CORNELL UNIVERSITY LAW LIBRARY

The Moak Collection

PURCHASED FOR

The School of Law of Cornell University

And Presented February 14, 1893

IN MEMORY OF

JUDGE DOUGLASS BOARDMAN

FIRST DEAN OF THE SCHOOL

By his Wife and Daughter

A. M. BOARDMAN and ELLEN D. WILLIAMS

Cornell University Library
KF 9240.D31
v.5
Defences to crime.The adjudged cases in

3 1924 020 155 994
law

Cornell University Library

The original of this book is in
the Cornell University Library.

There are no known copyright restrictions in
the United States on the use of the text.

http://www.archive.org/details/cu31924020155994

# DEFENCES TO CRIME.

## THE ADJUDGED CASES

IN THE

# AMERICAN AND ENGLISH REPORTS

WHEREIN THE DIFFERENT

## DEFENCES TO CRIME ARE CONTAINED.

WITH NOTES.

IN FIVE VOLUMES.

VOL. I. — SELF-DEFENCE.

VOL. II. — INSANITY AND DRUNKENNESS.

VOL. III. — DISABILITIES OF PARTIES, AGENCY; DURESS; ACCIDENT, IGNORANCE AND MISTAKE; CONSENT; OMISSIONS AND ATTEMPTS.

VOL. IV. — SPECIAL DEFENCES TO CRIMES AGAINST THE PUBLIC.

VOL. V. — SPECIAL DEFENCES TO CRIMES AGAINST PERSONS AND PROPERTY.

---

SAN FRANCISCO:
SUMNER WHITNEY & CO.,
LAW PUBLISHERS AND LAW BOOKSELLERS.
1886.

M10975

COPYRIGHT,
1886,
BY JOHN D. LAWSON.

# THE ADJUDGED CASES

ON

# DEFENCES TO CRIME.

## VOL. V.

INCLUDING

# SPECIAL DEFENCES

TO CRIMES AGAINST THE PROPERTY AND PERSONS OF INDIVIDUALS, VIZ:

FORGERY; FRAUD AND FALSE PRETENSES; LARCENY; RECEIVING STOLEN PROPERTY; ROBBERY; ABDUCTION; SEDUCTION; ASSAULT; ASSAULT AND BATTERY; ASSAULT WITH INTENT; FALSE IMPRISONMENT; RAPE AND HOMICIDE.

## WITH NOTES.

---

BY

JOHN D. LAWSON.

---

SAN FRANCISCO:
SUMNER WHITNEY & CO.,
LAW PUBLISHERS AND LAW BOOKSELLERS.
1886.

Entered according to Act of Congress in the year 1886, by
JOHN D. LAWSON,
In the office of the Librarian of Congress, at Washington.

# PREFACE.

---

This volume completing the remaining Offenses against the Property of Individuals, embraces the crimes of Forgery, Fraud, False Pretenses, Larceny, Receiving Stolen Goods and Robbery. It also includes all Offenses Against the Persons of Individuals, not embraced within the volume treating of Offenses against the Public alone. (Vol. IV.) The topics in this volume are Abduction, Seduction, Assault, Assault and Battery, Assault with Intent, False Imprisonment and Rape, and also Homicide. Under the latter head will be found all the adjudged defences to a charge of murder or manslaughter, not already embraced in Vols. I. and II., where the Defences of Self-Defence, Insanity and Drunkenness are particularly treated.

J. D. L.

APRIL, 1886.

---

This — the preface to the last volume of the series — is a proper place to review the *object*, *arrangement*, and *contents* of this undertaking.

OBJECT.

The object which has been in the mind of both compiler and publisher is to bring together in as few volumes as possible all the reported cases in which a particular defence has been set up on a trial or in an appellate court. In England the reports of Criminal Cases are for the most part contained in some thirty-five volumes devoted to Criminal Cases alone, the remainder being scattered here and there throughout the several hundred volumes

of the decisions of the Courts of Common Law. A complete set of these special volumes is, however, not easy to obtain; some of the volumes are very costly, and few practitioners in the United States have gone to the expense of collecting them. Then as to the Criminal Cases not included in them, only one who was able to consult whenever he might desire it, all the English Common Law Reports from Espinasse to the last volume of the English Law Reports, could bring them within his reach. The American cases on criminal law are — unlike the English cases — nearly all contained in the general reports. We have few special criminal reports. Anything like a complete collection of American criminal case law was therefore out of the question, except to one who was fortunate enough to to be able to consult a *complete* collection of the American Reports, State and Federal, To bring, therefore, all the criminal cases relevant to the prosecution or defence of a criminal accusation into a few volumes within the means of any practitioner, has been the object of this publication.

ARRANGEMENT.

In the arrangement of the reported cases on Defences to Crime those Defences which were of a general nature first claimed attention.

One of the most important of these was that of Self-Defence — the right to defend one's person or property, or the person or property of another by force and to take and destroy life or property in so doing. Through a business arrangement with the original publisher, the publishers of this series were enabled to obtain the admirable collection of these cases already made by Messrs. Horrigan and Thompson and this volume became therefore Vol. I. of the series

In a similar manner Mr. Lawson's collection of cases on Insanity and Drunkenness became Vol. II. — insanity and drunkenness being also general defences under certain circumstances to all manner of crimes.

In Vol. II. the remaining general defences to all crimes are taken up, viz.: 1. That the defendant is under some disability preventing him from being convicted and punished, *e.g.*, that he was at the time a corporation or an infant or a married woman or the principal of a guilty agent or only the agent of a guilty principal. 2. That the act was committed with the Consent of the person injured, that it was an Accident, or was done through Ignorance or Mistake of the Law or of the Facts; that it was committed under Duress; that it was merely an unexecuted Attempt; that it was an act of Omission and not of Commission.

All the general defences to crime having been thus shown, in the first three volumes, the remaining two contain special defences to particular crimes, arranged according to the nature of the crime. In volume IV. the following crimes (and such defences as may be raised to them, and which are not in the nature of defences to crime in general discussed in Vols. I., II. and III.) are treated of viz: —

Abortion,
Adultery,
Affray,
Barratry,
Bawdy Houses,
Bigamy,
Blasphemy,
Breaking Jail,
Bribery,
Carrying Concealed Weapons,
Compounding Felony,
Concealing Birth,
Conspiracy,
Counterfeiting,
Cruelty to Animals,
Desertion,
Disorderly Houses,
Disturbing Worship,
Disturbing the Peace,
Drunkenness,
Election Offenses,
Escape,
Extortion,
Forcible Entry,
Fornication,
Gaming,
Incest,
Indecent Exposure,
Lewdness,
Liquor Selling,
Malicious Mischief,
Miscegenation,
Misfeasance in Office,
Neglect of Children,
Nuisance,
Obscene Language,
Obscene Literature,
Obstructing Officers,

Obstructing Trains,
Obstructing Streets,
Obstructing the Mail,
Official Misconduct,
Pension Frauds,
Perjury,
Piracy,
Profanity,
Post-Office Frauds,
Prostitution,
Resisting Officers,
Revenue Frauds,
Riot,
Sabbath Breaking,
Slander and Libel,
Smuggling,
Sodomy,
Subornation,
Treason,
Trespass,
Vagrancy,

All these crimes fall under the definition of offenses against the Public alone. In addition to these this volume contains the following offenses against the Property of Individuals, viz.: Arson, Blackmailing, Burglary, Embezzlement, Threatening.

In volume V. are treated first, the remaining offenses against the Property of Individuals, viz.: Forgery, Fraud, False Pretenses, Larceny, Receiving Stolen Property, Robbery:

And all the offenses against the Persons of Individuals, viz.: Abduction, Assault, Assault and Battery, Assault with Intent, Rape, Seduction, Homicide.

CONTENTS.

The extent of the ground covered in the series, and the enormous amount of matter contained in these five volumes will be readily seen, and it is hoped will be appreciated by the profession. It may safely be said that these five volumes contain as much matter as *twelve volumes* of the ordinary law reports. The page is larger than usual, the type small and compact, yet clear; and in number of pages each volume is double the size of the usual law book. In this way only have the compiler and publisher been able to place this enormous amount of case law within the limits of five books. The large amount of matter

in these volumes may be seen by a glance at the sub-joined table: —

| | *Pages.* | *No. of Cases in Full.* | *No. of Cases Digested and Cited.* | *Whole No. of Cases.* |
|---|---|---|---|---|
| VOL. I................... | 1006 | 173 | 283 | 456 |
| VOL. II................... | 1002 | 339 | 281 | 620 |
| VOL. III................ | 934 | 496 | 622 | 1118 |
| VOL. IV................ | 1076 | 582 | 1024 | 1606 |
| VOL. V................... | 1316 | 385 | 1653 | 2038 |
| TOTAL IN FIVE VOLUMES. | 5334 | 1975 | 3863 | 5838 |

In no other branch of the law has so complete a collection of cases been made, in so convenient and so inexpensive a form. As already said in another place, this series is not intended to take the place of the treatises; it rather supplements them, by presenting the authorities which are cited in the treatises, as they are reported in the original sources.

The series will be of peculiar value not alone to the defence lawyer, but to the PROSECUTING ATTORNEY as well, in enabling him to anticipate all adjudicated defences on the part of his opponent. And Volumes I. and II. contain not only all the cases of successful defences but, also, all the cases in which a defence of the kind has been either sustained or overruled.

# CONTENTS.

## CHAPTER VII.

### CRIMES AGAINST THE PROPERTY OF INDIVIDUALS (CONTINUED).

PAGE.

PART I. FORGERY . . . . . . . . . 1–99

PART II. FRAUD AND FALSE PRETENSES . . . . . 100–392

PART III. LARCENY . . . . . . . . 393–638

PART IV. RECEIVING STOLEN PROPERTY . . . . 639–683

PART V. ROBBERY . . . . . . . . 684–722

## CHAPTER VIII.

### CRIMES AGAINST THE PERSONS OF INDIVIDUALS.

PART I. ABDUCTION — SEDUCTION . . . . . 723–782

PART II. ASSAULT AND BATTERY . . . . . . 783–879

PART III. RAPE . . . . . . . . . 880–910

PART IV. HOMICIDE . . . . . . . . 911–1199

# TABLE OF CASES.

[The page on which the case is reported in full is indicated by **black figures.** Thus: R. *v.* Adams, 1 R. & R. 224, is reported in full on page, **547.**]

——, R. *v.* 2 C. & P. 459. p. 582.
Abbott, R. *v.* 1 Den. 273. pp. 135, 136, 139, 141, 148, 289, 290, 380.
Abraham, State *v.* 10 Ala. 928. p. 835.
Abram, State *v.* 10 Ala. 929. p. 871.
Abrams *v.* People, 6 Hun, 491. pp. 450, 557.
Adams, R. *v.* 1 R. & R. 224. p. **547.**
Adams, R. *v.* 3 C. & P. 600. pp. 527, 582.
Adams, R. *v.* 1 Den. 38. p. **547.**
Adams, Commonwealth *v.* 114 Mass. 323; 19 Am. Dec. pp. **808,** 871.
Addis, R. *v.* 1 Cox, 78. p. 551.
Ah Ki, People *v.* 20 Cal. 178. p. 529.
Ah Kung, State *v.* 17 Nev. 361. p. 873.
Airey, K. *v.* 2 East, 30. p. 262.
Aldrich *v.* People, 101 Ill. 16. p. **635.**
Alger, People *v.* 1 Park. 1333. p. **777.**
Allen *v.* State, 15 Tex. (App.) 150. p. **285.**
Allen *v.* State, 12 Tex. (App.) 190. pp. **534,** 539, 583.
Allen *v.* State, 16 Tex. (App.) 150. pp. 375, 376.
Alexander, State *v.* 66 Mo. 148. pp. 1027, 1076.
Allred, State *v.* 84 N. C. 749. p. 386.
Ames' Case, 2 Greenl. 365. p. 73.
Amherst *v.* Skinner, 12 East, 270. p. 178.
Anable's Case, 24 Gratt. 563. pp. 252, 541.
Anderson's Case, 1 City H. Rec. 163. p. 710.
Anderson, R. *v.* 2 East's P. C. 772. pp. 504, 510.
Anderson *v.* State, 6 Baxt. 608. p. **871.**
Anderson, State *v.* 47 Iowa. 142. p. **254.**
Anderson, People *v.* 14 Johns. 294; 7 Am. Dec. 462. pp. **445,** 450, 539, 561, 563.
Andre *v.* State, 5 Iowa, 389. pp. 729, 743, 775.
Andrews, Commonwealth *v.* 2 Mass. 14. pp. 505, 509, 510.
Ann *v.* State, 11 Humph. 159. p. **968.**
Anonymous Case, 3 Cox, 137. p. **878.**
Archer, R. *v.* Dears. C. C. 449. pp. 281, 345.
Archer, R. *v.* 6 Cox, 518. p. 342.

Ardaga, People *v.* 51 Cal. 371. p. **899.**
Armory *v.* Delamerie, 1 Str. 504; 1 Smith's Ld. Cas. 256 (4th ed.). pp. 402, 440.
Armstrong *v.* People, 70 N. Y. 44. pp. 755, 756.
Arnold, State *v.* 55 Mo. 90. p. **780.**
Arnold *v.* Steeves, 10 Wend. 514. p. 811.
Aro, People *v.* 6 Cal. 208. pp. **917,** 1139.
Arundel's Case, 1 Lew. 115. pp. 663, 664.
Arscott, R. *v.* 6 C. & P. 408. pp. 54, 83.
Askins, United States *v.* 4 Cranch, 98. p. 871.
Aslett, R. *v.* 2 Leach, 954. p. 402.
Astley, R. *v.* 2 East's P. C. 329. p. 705.
Atkinson's Case, 2 Russ. 117. p. 548.
Austin, People *v.* 1 Park. C. C. 154. p. **1192.**

Babcock, People *v.* 7 Johns. 201; 5 Am. Dec. 256. pp. **304,** 307, 357, 385.
Bailey *v.* State, 58 Ala. 415. p. 557.
Bailey *v.* State, 52 Ind. 462. p. 559.
Bainham, R. *v.* 1 Salk. 379. p. **359.**
Baker, People *v.* 8 Phila. 613. p. **358.**
Baker, R. *v.* 1 Moody, 231. p. 97.
Baker, People *v.* 96 N. Y. 340. p. 371.
Baker *v.* State, 14 Tex. (App.) 332. p. 389.
Baker *v.* State, 34 Ohio St. 310. p. 388.
Baker *v.* State, 11 Tex. (App.) 262. p. 583.
Baldwin, Commonwealth *v.* 11 Gray, 197. pp. **40,** 54, 81.
Ball, R. *v.* Car. & M. 249. pp. 136, 141.
Ballard, United States *v.* 13 Int. R. R. 195. pp. 123, 128.
Bangs, Commonwealth *v.* 9 Mass. 387. p. 983.
Bank, R. *v.* R. & R. 421. p. **557.**
Barcus *v.* State, 49 Miss. 17. p. **875.**
Barfield *v.* State, 29 Ga. 127. p. 51.
Barker *v.* State, 48 Ind. 163. p. 819.
Barnard, R. *v.* 7 C. & P. 784. p. 381.
Barnes, R. *v.* 10 Cox, 255. pp. **491,** 578.
Barnes, R. *v.* 2 Den. 59; 20 L. J. M. C. 34. p. 497.
Barnes, R. *v.* 5 Cox, 113. p. 545.
Barnes, R. *v.* 1 Den. & P. 65. p. 545.
Barnes *v.* State, 9 Tex. (App.) 128. p. 722.
Barnes *v.* State, 49 Miss. 17. p. 835.
Barnett, R. *v.* 2 Russ. Cr. (7th Am. ed.) 117. p. 502.
Barnum *v.* State, 15 Ohio, 717. pp. 49, 75.
Bartlett, State *v.* 11 Vt. 650. pp. 506, 512, 515.
Barton, R. *v.* 1 Moody, 141. p. 98.
Bates, R. *v.* 3 Cox, 201. p. 346.
Batting, People *v.* 49 How. Pr. 392. p. 1156.
Bayard *v.* Malcom, 2 East, 33. p. 178.
Beall *v.* State, 15 Ind. 378. p. 515.
Bealoba, People *v.* 17 Cal. 395. p. 1047.
Beaman, R. *v.* R. & M. 433. p. 417.
Beasley *v.* State, 18 Ala. 534. pp. 834, 835.
Beatty *v.* State, 61 Miss. 18. p. 557.

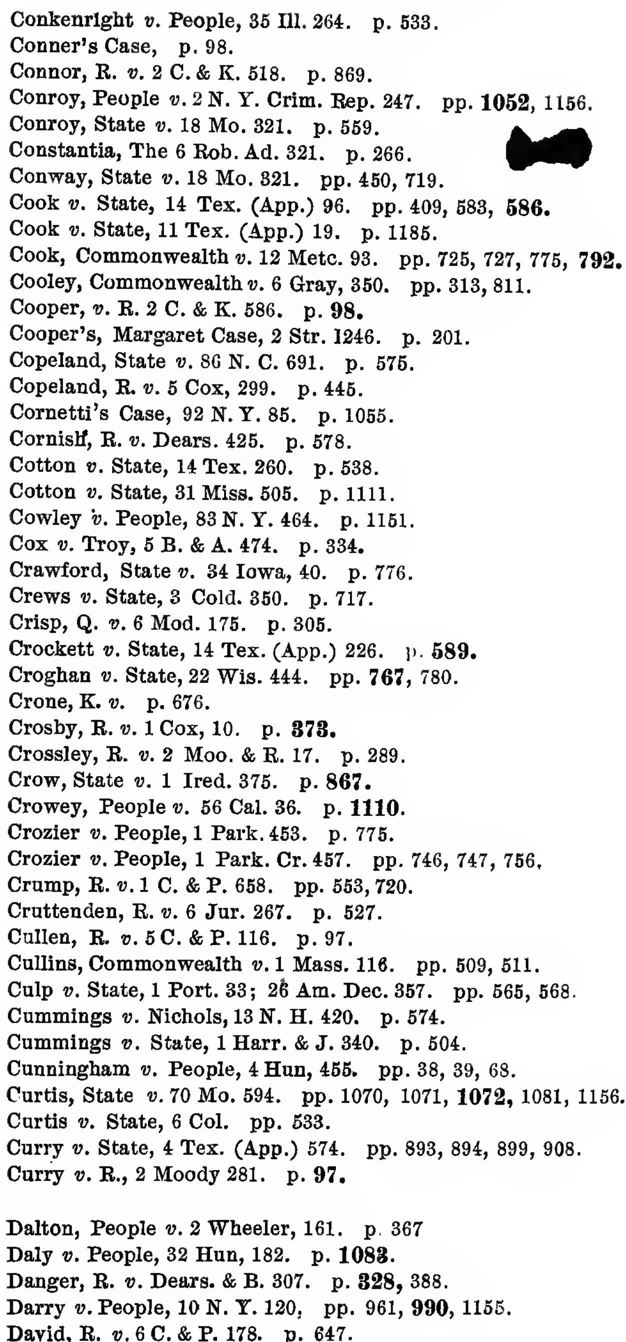
Bell *v.* State, 7 Tex. (App.) 25. pp. **480**, 574.
Bell *v.* State, 25 Tex. 574. p. 538.
Bell *v.* State, 4 Baxt. 429. p. **570.**
Bembridge, R. *v.* 6 East, 136. p. 177.
Benevides *v.* State, 14 Tex. (App.) 378. p. **1169.**
Bennett, People *v.* 49 N. Y. 144. pp. 966, 968.
Bennett, State *v.* 3 Brev. 514. p. 527.
Bennett, State *v.* 14 Iowa, 479. p. 512.
Benson, People *v.* 6 Cal. 225. pp. 899, 901, 902.
Berg *v.* State, 2 Tex. (App.) 148. p. **551.**
Bertles, R. *v.* 13 U. C. C. P. 607. p. 375.
Bettiline, United States *v.* 1 Woods, 654. pp. 123, **124.**
Betts, R. *v.* Bell, 90. p. **578.**
Beville *v.* State, 16 Tex. (App.) 70. pp. **863,** 879.
Bierce, State *v.* 27 Conn. 320. p. 767.
Biggs *v.* People, 8 Barb. 547. p. 129.
Biggs *v.* State, 29 Ga. 723. p. 1098.
Billard *v.* State, 30 Tex. 369. p. 559.
Bingley, R. *v.* 5 C. & P. 602. p. 338.
Bird, R. *v.* 12 Cox, 257. p. **543.**
Bird *v.* State, 16 Tex. (App.) 528. pp. **536,** 583.
Birdseye, R. *v.* 41 C. & P. 388. p. **548.**
Birket, R. *v.* 4 C. & P. 216. p. 572.
Bishop *v.* Small, 63 Me. 12. p. 117.
Bittick *v.* State, 40 Tex. 117. p. 1185.
Black *v.* State, 8 Tex. (App.) 329. p. 873.
Blackburn *v.* State, 44 Tex. 475. p. 642.
Blackwell, State *v.* 9 Ala. 79. p. 865.
Blades *v.* Higgs, 7 L. T. (N. S.) 798; 11 H. L. Cas. 621. pp. 459, 460, 461, 465.
Blake *v.* Allen, Moore, 619. p. 5.
Blanchard *v.* Fisk, 2 N. H. 398. p. 574.
Blanchard, People *v.* 90 N. Y. 314. pp. 286, **339,** 377.
Blandford *v.* State, 10 Tex. (App.) 627. p. 672.
Bloedow, State *v.* 45 Wis. 279. p. **826.**
Blunt *v.* Commonwealth, 4 Leigh, 689; 26 Am. Dec. 341. p. **548.**
Boak *v.* State, 32 Iowa, 430. p. 729.
Boaz *v.* Tate, 43 Ind. 60. p. 821.
Boghtlink *v.* Inglis, 3 East, 396. p. 268.
Bond *v.* Padelford, 13 Mass. 394. p. 418
Bonsall *v.* State, 35 Ind. 460. p. 710.
Boutien, R. *v.* R. & R. 259. pp. **85,** 89.
Boston & Lowell R. Co., Commonwealth *v.* 126 Mass. 61. p. 1130.
Boston & Maine R. Co., Commonwealth *v.* 133 Mass. 383. p. **1229.**
Boston & Maine R. Co. Commonwealth *v.* 129 Mass. 500. p. 1199.
Boston & Worcester R. Co., Commonwealth *v.* 11 Cush. 512. p. 1130.
Bostwick *v.* State, 11 Tex. (App.) 126. 1185.
Boutt, R. *v.* 2 C. & R. 604. p. 15.
Boulton, R. *v.* 1 Den. 508. p. 337.
Bowden *v.* State, 2 Tex. (App.) 56. p. 850
Bowder *v.* State, 41 Miss. 570. p. **374.**
Bowen, United States *v.* 2 Cranch, 143. p. 565.

Bower, R. *v.* 1 Cowp. 323. p. **356.**
Boxley *v.* Commonwealth, 24 Gratt. 655. p. **902.**
Boyce *v.* People, 55 N. Y. 644. p. 756.
Boyd, State *v.* 3 City H. Rec. 57. pp. 676, 678.
Bryd, R. *v.* 5 Cox, 502. p. 119.
Boynton, Commonwealth *v.* 2 Mass. 78. p. 68.
Brackett, R. *v.* 4 Cox, 274. p. 545.
Brackett, R. *v.* 1 M. & R. 526. p. 697.
Bradford, R. *v.* 2 L. Raym. 366. p. 359.
Bradley *v.* Banks, Yelv. 205*a*. p. 1072.
Bradley *v.* State, 31 Ind. 492. p. 798.
Brady, R. *v.* 26 U. C. Q. B. 13. p. 388.
Brady, State *v.* 27 Ia. 126. p. 527.
Bramley, R. *v.* 1 R. & R. 478. p. 482.
Bramley, R. *v.* 8 Cox, 468. p. 544.
Bratton *v.* State, 10 Humph. 103. pp. 842, **1012.**
Brennon *v.* State, 25 Ind. 403. pp. 694, 710.
Briggs, State *v.* 34 Vt. 501. p. 75.
Briley, State *v.* 8 Port. 473. p. 871.
Brill *v.* State, 1 Tex. (App.) 572. p. 539.
Bristow *v.* Wright, 2 Doug. 665. pp. 270, 1137.
Britt *v.* State, 7 Humph. 45. p. **712.**
Brockman, State *v.* 46 Mo. 566. p. 954.
Bromage *v.* Prosser, 4 B. & C. 255. p. 994.
Brooks, R. *v.* 8 C. & P. 295. pp. 452, 545.
Brooks, R. *v.* 1 F. & F. 502. p. **374.**
Brooks *v.* State, 35 Ohio St. 46. p. 559.
Brown, State *v.* 12 Minn. 538. p. 1156.
Brown, State *v.* 1 Hayw. 100. pp. 504, 515.
Brown *v.* State, 38 Tex. 482. pp. 937, **1085.**
Brown *v.* People, 16 Hun, 535. p. 371.
Brown *v.* People, 86 Ill. 239. pp. **31**, 68.
Brown, R. *v.* 3 Salk. 189. p. 359.
Brown, Commonwealth *v.* 10 Phila. 184. p. 95.
Brown's Case, 3 Chitty, 701. p. 177.
Brown's Case. p. 1140.
Brownell *v.* Manchester, 1 Pick. 232. p. 418.
Brownlow, R. *v.* 14 Cox, 216. p. 568.
Bryan, R. *v.* 7 Cox, 312. pp. 360, 361, 362.
Bryan, R. *v.* Dears. & B. 265. pp. **134,** 359.
Bryan, R. *v.* 2 F. & F. 567. p. **378.**
Bryan, R. *v.* 2 Str. 866. p. **355.**
Bryson, State *v.* 82 N. C. 576. p. 896.
Bull, R. *v.* 2 Ir. L. T. Rep. 18. p. 1141.
Bulmer, R. *v.* L. & C. 477. p. 374.
Buntain *v.* State, 15 Tex. (App.) 490. p. 583.
Burdett, Case of 4 Barn. & Ald. 164. pp. 948, 1141.
Burdick, Commonwealth *v.* 2 Barr, 163. p. 284.
Burgess, R. *v.* p. 380.
Burgon, R. *v.* Dears. & B. 11. pp. 289, 290.
Burke, R. *v.* R. & R. 495. p. 98.

Burke, R. *v.* 1 R. & R. 496. p. 73.
Burke *v.* People, 11 N. Y. 481. p. 871.
Burridge's Case, 3 P. Wms. 484. p. 201.
Burrow *v.* State, 12 Ark. 65. pp. 158, 293, 294, 375, 385.
Burrows, R. *v.* 11 Cox, 258. pp. **245**, 366.
Burrows, State *v.* 11 Ired. 477. p. 388.
Burt, State *v.* 64 N. C. 619. p. **569.**
Bush, People *v.* 3 Park. 552. pp. 805, 806.
Butler, State *v.* 65 N. C. 309. p. 542.
Butler, R. *v.* 2 C. & K. 340. p. **578.**
Butler, People *v.* 3 Park. Cr. R. 377. p. 1033.
Butler's Case. p. 446.

Cabbage, R. *v.* R. & R. 292. pp. 479, 573, 721.
Cady, People *v.* 6 Hill, 490. pp. 46, 95.
Calvin, State *v.* 22 N. J. (L.) 207. pp. **674,** 678.
Campbell, R. *v.* Moo. 179. p. 548.
Campbell, R. *v.* 2 Leach, 642. p. 580.
Camplin *v.* State, 1 Tex. (App.) 108. p. 615.
Canter *v.* State, 7 Lea, 350. p. 375.
Canwood, State *v.* 2 Stew. 360. p. 839.
Carberry *v.* State, 11 Ohio St. 410. **96.**
Cargill *v.* State, 8 Tex. (App.) 431. p. 879.
Carlos *v.* Fancourt, 5 T. R. 482. p. 71.
Carney *v.* Hopple's Heirs, 17 Ohio, 30. p. 70.
Carney's Case, Moo. 351. p. 97.
Carnot, United States *v.* 2 Cranch, 469. p. 565.
Carpenter *v.* People, 8 Barb. 603. pp. 725, 728, 729, **735,** 746, 772, 775, 776.
Carpenter, R. *v.* 11 Cox. 600. p. 378.
Carpenter, State *v.* 74 N. C. 232. p. 541.
Carroll *v.* State, 23 Ala. 28. p. 839.
Carter, State *v.* 72 N. C. 444. p. 582.
Cartwright, R. *v.* R. & R. 107. p. 588.
Cartwright *v.* Green, 8 Ves. 405. p. 562.
Carver *v.* Jackson, 4 Pet. 80. p. 259.
Carey, Commonwealth *v.* 12 Cush. 246. p. 1197.
Cary *v.* Hotailing, 1 Hill, 311. p. 413.
Caryl, People *v.* 3 Park. C. C. 326. pp. 313, 869.
Casas *v.* State, 12 Tex. (App.) 59. p. **583.**
Cassels *v.* State, Yerg. 149. p. 672.
Castetlow *v.* State, 15 Tex. (App.) 551. p. 583.
Cato *v.* State, 9 Fla. 163. p. 899.
Cavanagh, People *v.* 62 How. Pr. 187. p. 878.
Cayle's Case, 8 Co. 33; Yelv. 68. p. 675.
Chadwick, R. *v.* 2 Mood. & R. 545. p. 92.
Chamberlain *v.* State, 8 Wright, 431. p. 490.
Chambers, People *v.* 18 Cal. 382. p. 529.
Chandler, Commonwealth *v.* Thatch. 187. p. **78.**
Channel, R. *v.* 2 Str. 793. p. **357.**
Chapman, Q. *v.* p. 496.
Chapman *v.* State, 2 Head, 56. p. 358.

Chapman *v.* Lathrop, 6 Cow. 114. pp. 268, 269.
Charles *v.* State, 6 Eng. (Ark.) 389. pp. 881, 882.
Charles *v.* State, 11 Ark. 390. p. 904.
Chase, Commonwealth *v.* 9 Pick. 15. p. **571**.
Chathams, Commonwealth *v.* 14 Wright, 181. p. 490.
Cheek *v.* State, 35 Ind. [illegible] 1098.
Cheek *v.* State, 1 Coldw. 172. p. 386.
Cheeseman, R. *v.* 3 Cush. 181. p. 1141.
Cherry's Case, 2 East's P. C. 556. p. 542.
Childers *v.* State, 16 Tex. (App.) 525. p. 389.
Chovin, State *v.* 7 Iowa, 204. p. 869.
Christian *v.* Commonwealth, 23 Gratt. 954. p. **900**.
Christopher, R. *v.* Bell, 27. pp. **432**, 559.
Chunn, State *v.* 19 Mo. 233. p. 364.
Churchill *v.* Wilkins, 1 T. R. 447. p. 1137.
Chute *v.* State, 19 Minn. 271. p. 359.
Clark, R. *v.* R. & R. 181. p. 338.
Clark, People *v.* 7 N. Y. 385. p. 1092.
Clark *v.* People, 1 Park. C. C. 356. p. 1156.
Clark, People *v.* 33 Mich. 112. p. **776**.
Clark *v.* State, 7 Tex. 57. p. 621.
Clark, State *v.* 12 Mo. (App.) 593. p. 717.
Clarke *v.* State, 8 Ohio St. 630. p. **75**.
Clayton *v.* State, 15 Tex. (App.) 221. p. 583.
Clifford, Commonwealth *v.* 8 Cush. 215. pp. **698**, 718.
Clifford, State *v.* 14 Nev. 72. p. 559.
Clinch, R. *v.* 2 Leach, 614. p. 96.
Cline *v.* State, 43 Tex. 494. p. 389.
Clinton, R. *v.* Ir. Rep. 4 C. L. 6. p. 570.
Closs, R. *v.* D. & B. 460. pp. **12**, 19, 20, 67.
Clough, People *v.* 17 Wend. 351; 31 Am. Dec. 303. pp. **276**, 374.
Cocheco *v.* Strafford, 51 N. H. 481. p. 574.
Codrington, R. *v.* 1 C. & P. 661. pp. 289, **364**, 368.
Coffman *v.* Commonwealth, 10 Bush, 495. p. **1140**.
Cogan, R. *v.* 2 Leach, 503. p. 324.
Cogdell, People *v.* 1 Hill, 94. pp. 449, **560**.
Coggins, R. *v.* 12 Cox, 517. p. 678.
Cole *v.* Goodwin, 19 Wend. 254. p. 815.
Cole *v.* State, 40 Tex. 147. p. 776.
Cole, R. *v.* 2 Cox, 341. p. 557
Coleman, State *v.* 6 Rich. 185 pp. **987**, 1155.
Collicott, R. *v.* R. &. R. 212; 4 Taunt. 300. p. 21.
Collins, Commonwealth *v.* 1 Mass. 116. pp. 505, 512.
Collins, R. *v.* 2 M. & R. 461. p. 92.
Colby *v.* State, 55 Ala. 84. p. 375.
Colquitt *v.* State, 34 Tex. 550. p. 877.
Colvin *v.* State, 11 Ired. 361. p. **75**.
Combrun, R. *v.* pp. 101, 104.
Cornbrune, R. *v.* 1 Wils. 301. p. **356**.
Conant, United States *v.* p. 129.
Conger, People *v.* 1 Wheeler, 448. p. 367.



Conkenright *v.* People, 35 Ill. 264. p. 533.
Conner's Case, p. 98.
Connor, R. *v.* 2 C. & K. 518. p. 869.
Conroy, People *v.* 2 N. Y. Crim. Rep. 247. pp. **1052**, 1156.
Conroy, State *v.* 18 Mo. 321. p. 559.
Constantia, The 6 Rob. Ad. 321. p. 266.
Conway, State *v.* 18 Mo. 321. pp. 450, 719.
Cook *v.* State, 14 Tex. (App.) 96. pp. 409, 583, **586.**
Cook *v.* State, 11 Tex. (App.) 19. p. 1185.
Cook, Commonwealth *v.* 12 Metc. 93. pp. 725, 727, 775, **792.**
Cooley, Commonwealth *v.* 6 Gray, 350. pp. 313, 811.
Cooper, *v.* R. 2 C. & K. 586. p. **98.**
Cooper's, Margaret Case, 2 Str. 1246. p. 201.
Copeland, State *v.* 86 N. C. 691. p. 575.
Copeland, R. *v.* 5 Cox, 299. p. 445.
Cornetti's Case, 92 N. Y. 85. p. 1055.
Cornish, R. *v.* Dears. 425. p. 578.
Cotton *v.* State, 14 Tex. 260. p. 538.
Cotton *v.* State, 31 Miss. 505. p. 1111.
Cowley *v.* People, 83 N. Y. 464. p. 1151.
Cox *v.* Troy, 5 B. & A. 474. p. 334.
Crawford, State *v.* 34 Iowa, 40. p. 776.
Crews *v.* State, 3 Cold. 350. p. 717.
Crisp, Q. *v.* 6 Mod. 175. p. 305.
Crockett *v.* State, 14 Tex. (App.) 226. p. **589.**
Croghan *v.* State, 22 Wis. 444. pp. **767**, 780.
Crone, K. *v.* p. 676.
Crosby, R. *v.* 1 Cox, 10. p. **373.**
Crossley, R. *v.* 2 Moo. & R. 17. p. 289.
Crow, State *v.* 1 Ired. 375. p. **867.**
Crowey, People *v.* 56 Cal. 36. p. **1110.**
Crozier *v.* People, 1 Park. 453. p. 775.
Crozier *v.* People, 1 Park. Cr. 457. pp. 746, 747, 756.
Crump, R. *v.* 1 C. & P. 658. pp. 553, 720.
Cruttenden, R. *v.* 6 Jur. 267. p. 527.
Cullen, R. *v.* 5 C. & P. 116. p. 97.
Cullins, Commonwealth *v.* 1 Mass. 116. pp. 509, 511.
Culp *v.* State, 1 Port. 33; 26 Am. Dec. 357. pp. 565, 568.
Cummings *v.* Nichols, 13 N. H. 420. p. 574.
Cummings *v.* State, 1 Harr. & J. 340. p. 504.
Cunningham *v.* People, 4 Hun, 455. pp. 38, 39, 68.
Curtis, State *v.* 70 Mo. 594. pp. 1070, 1071, **1072,** 1081, 1156.
Curtis *v.* State, 6 Col. pp. 533.
Curry *v.* State, 4 Tex. (App.) 574. pp. 893, 894, 899, 908.
Curry *v.* R., 2 Moody 281. p. **97.**

Dalton, People *v.* 2 Wheeler, 161. p. 367
Daly *v.* People, 32 Hun, 182. p. **1083.**
Danger, R. *v.* Dears. & B. 307. p. **328,** 388.
Darry *v.* People, 10 N. Y. 120, pp. 961, **990**, 1155.
David, R. *v.* 6 C. & P. 178. p. 647.

Davidson, Commonwealth *v.* 1 Cush. 33. p. 371.
Davis' Case, 2 East's P. C. 706. p. 689.
Davis *v.* Spencer, 24 N. Y. 390. p. 1094.
Davis *v.* State, 42 Tex. 226. p. **897.**
Davis *v.* State, 8 Tex. (App.) 510. p. 1188.
Davis & Purdue *v.* State, 1 Hill, 96. pp. 795, 796, 868.
Davis, State *v.* 53 Iowa, 252. p. 93.
Davis, State *v.* 1 Ired. 125. pp. 843, 868.
Davis, R. *v.* 6 C. & P. 178. p. 650.
Davis, R. *v.* 7 C. & P. 789. p. 811.
Davis, United States *v.* 5 Mass. 356. p. 568.
Davies, R. *v.* Dears. 640. p. 559.
Dawes *v.* Peck, 8 T. R. 336. p. 266.
Dawkins *v.* State, 58 Ala. 376; 29 Am. Rep. 754. pp. **885**, 904.
Dawson, R. *v.* 1 Strange. p. 199.
Deal, State *v.* 64 N. C. 270. p. 583.
Dean, State *v.* 44 Iowa, 73. p. 559.
Dean, State *v.* 49 Iowa, 73; 31 Am. Rep. 143. p. **448.**
Deane *v.* Clayton, 7 Taunt. 518. p. 838.
Deaves, R. *v.* 11 Cox, 327. p. **559.**
De Bare, United States *v.* 6 Biss. 358. p. **662.**
Deering *v.* State, 14 Tex. (App.) 599. pp. 583, **590.**
Deering, R. *v.* 11 Cox, 298. pp. **413,** 548.
De Hart, State *v.* 6 Baxt. 222. p. 385.
Delyon, State *v.* 1 Bay, 353. pp. 364.
Dempsey *v.* State, 3 Tex. (App.) 429. p. 1105.
Denny, R. *v.* 1 Cox, 178. p. 97.
Devine *v.* People, 20 Hun, 98. p. 553.
Dickinson, R. *v.* R. & R. 419. p. **554.**
Dignowitty *v.* State, 17 Tex. 551. p. 642.
Dillingham *v.* State, 5 Ohio St. 260. pp. 158, 375.
Dinsmore, State *v.* 12 Allen, 235. p. 1074.
Dixon *v.* Baldwin, 5 East, 175. p. 268.
Dixon *v.* State, 15 Tex. (App.) 480. p. 583.
Dixon, R. *v.* Dears, 580. pp. 434, 559.
Dixon's Case, 3 M. & S. 11. p. 176.
Doepke, State *v.* 68 Mo. 208. p. **474.**
Doering *v.* State, 49 Ind. 60. pp. **818**, 870, 877.
Dolan, R. *v.* 6 Cox, 449; 1 Dears. 436. pp. 655, 656, 659, 665, 677, **658.**
Donahoe *v.* State, 12 Tex. (App.) 297. p. 1185.
Donally's Case. p. 705.
Dord *v.* People, 6 Barb. 671. p. 373.
Dougherty, Commonweaith *v.* 107 Mass. 245. pp. 870, 1016.
Dovalina *v.* State, 14 Tex. (App.) 311. p. **99.**
Dowlen *v.* State, 14 Tex. (App.) 61. **822,** 870.
Downe *v.* Richardson, 5 B. & A. 674. p. 335.
Dobson, State, *v.* 3 Harr. 573. p. 572.
Doe, State 79 Ind. 9; 41 Am. Rep. 599. p. 592.
Donnally's Case, 1 Leach, 229. pp. 694, 699, 718.
Dow, State *v.* 12 Tex. (App.) 344. p. **558.**
Drake *v.* State, 19 Ohio St. 211. p. **68.**

Dresch *v.* State, 14 Tex. (App.) 175. pp. 583, 594, 621.
Drew, Commonwealth *v.* 19 Pick. 179. pp. 158, 251, 298, 326, 327, **366.**
Drew, Commonwealth *v.* 4 Mass. 391. p. 839.
Driffield, R. *v.* p. 101.
Dudley's Case, 2 Sid. 91. p. 72.
Duff, R. *v.* 2 Leach, 915. p. 581.
Driffield, R. *v.* Say, 146. p. 356.
Dundas, R. *v.* 6 Cox, 380. pp. 136, 141.
Dunham *v.* State, 3 Tex. (App.) 465. p. 615.
Dunnage, R. *v.* 2 Burr. 1130. p. 356.
Durkie, United States *v.* 1 McAll. 176. p. **719.**
Dutton *v.* Solomonson, 3 B. & P. 584. p. 268.

Eagleton, R. *v.* Dears. 575. p. 289.
Earle, Commonwealth *v.* 1 Whart. 525. p. 1023.
East Boston Ferry Co., Commonwealth *v.* 13 Allen, 589. p. 1131.
Eckert, People *v.* 2 N. Y. Cr. Rep. 470. pp. **748,** 781.
Edge, State *v.* 1 Strobh 91. p. **868.**
Edmonds *v.* State, 70 Ala. 8. pp. **398,** 542.
Edwards, State *v.* 70 Mo 480. pp. 1072, 1075, 1076.
Edwards, R. *v.* 5 C. & P. 518. p. 713.
Edwards, R. *v.* 6 C. & P. 521. pp. 334, 717, 722.
Egan, R. *v.* 1 Cox, 29. p. 96.
Egginton, R. *v.* 2 Bos. & P. 508. p. 660.
Eichar, Commonwealth *v.* 4 Clark, 326. p. 780.
Elizabeth *v.* State, 27 Tex. 329. pp. 1185, 1186.
Ellins, R. *v.* R. & R. 188. p. 261.
Elliott, R. *v.* 1 Leach, 175. p. 21.
Ellis, R. *v.* 4 Cox, 258. p. 97.
Ellis, State *v.* 3 Conn. 185. pp. 504, 512.
Ellor, R. *v.* 1 Leach, 363. p. 97.
Emmerich, State *v.* 1 West. Rep. 760. p. **1113.**
Emmerich, State *v.* 13 Mo. App. 492. p. 1114.
England, State *v.* 8 Jones (L.), 399. p. 575.
Engleman *v.* State 2 Ind. 91. p. 527.
Ennis *v.* State, 3 G. Greene, 67. pp. 413, 545.
Enoch, People *v.* 13 Wend. 159. pp. 993, 1008.
Enoch, R. *v.* 5 C. & P. 539. pp. 914, 1139.
Erickson, State *v.* 45 Wis. 86. p. 1042.
Erring *v.* State, 4 Tex. (App.) 417. p. 873.
Erskine *v.* State, 1 Tex. (App.) 405. pp. 640, 642.
Erwin *v.* State, 29 Ohio St. 186. p. 1111.
Essex, R. *v.* 7 Cox, 384. p. 545.
Evans *v.* Kymer, 1 B. & Ad. 528. pp. 332, 337.
Evans *v.* Stevens, 4 T. R. 225. pp. 996.
Evans *v.* People, 49 N. Y. 86. p. 1114.
Evans, R. *v.* 9 Cox, 233. pp. **314,** 387.
Evans, R. *v.* L. & C. 256. p. **387.**
Evans, R. *v.* C. & M. 612. p. 557.
Evans, State *v.* 5 C. & P. 555. p. 387.

Evans *v.* State, 1 Humph. 394. p. 843.
Evans *v.* State, 15 Tex. (App.) 31. p. 583.
Evers, State *v.* 49 Mo. 542. pp. 158, 375.
Ewington, R. *v.* 41 Eng. C. L. 178. p. 119.
Eyre, Commonwealth *v.* 1 S. & R. 347. pp. **800**, 867.

Fadner *v.* People, 2 N. Y. Crim. Rep. 553. pp. **34**, 68.
Fahnstock *v.* State, 23 Ind. 231. p. 1156.
Fairchild, People *v.* 48 Mich. 31. p. 886.
Fallows, R. *v.* 5 C. & P. 508. p. **717**.
Fann, State *v.* 65 N. C. 317. p. 575.
Fanning *v.* State, 66 Ga. 167. **708**.
Farina *v.* Home, 16 M. & W. 119. p. 645.
Fay *v.* Commonwealth, 28 Gratt. 912. pp. **248**, 366, 371, 391.
Fearnly, K. *v.* 1 T. R. 320. p. 227.
Feastor, State *v.* 25 Mo. 324. p. 1116.
Felton *v.* State, 9 Yerg. 397. pp. 545, 547.
Ferrell *v.* Commonwealth, 1 Duv. 153. p. 512.
Fields, Commonwealth *v.* 4 Leigh, 648. pp. 881, **904**.
Fields *v.* State, 52 Ala. 348. p. 1155.
Filkins *v.* People, 69 N. Y. 101. p. 878.
Findlay *v.* Bean, 8 S. & R. 571. p. 458.
Finn *v.* Commonwealth, 6 Pa. St. 460. p. 871.
Fisher, R. *v.* 8 C. & P. 183. pp. 227, **1191**.
Fitch, People *v.* 1 Wend. 198; 19 Am. Dec. 477. pp. **29**, 38, 46, 47, 68, 73.
Fitchburg R. Co., Commonwealth *v.* 10 Allen, 189. p. 1130.
Fitchburg R. Co., Commonwealth *v.* 120 Mass. 373. pp. **1117**, 1130.
Fitchburg R. Co., Commonwealth *v.* 126 Mass. 472. pp. **1126**, 1131.
Flanagan, R. *v.* R. & R. 186. p. 580.
Flanders, State *v.* 38 N. H. 324. p. **91**.
Fletcher, State *v.* 1 Cush. 27. p. 878.
Fletcher, R. *v.* 4 C. & P. 545. p. 578.
Fletcher *v.* State, 16 Tex. (App.) 635. p. 583.
Fondren *v.* State, 16 Tex. (App.) 48. pp. **852**, 877.
Forde *v.* Skinner, 4 C. & P. 494. p. 817.
Foren, People *v.* 25 Cal. 361. pp. 1046, 1047, 1048, 1156.
Foster, Commonwealth *v.* 114 Mass. 311. p. 55.
Foster, State *v.* 61 Mo. 549. p. 1156.
Foster *v.* People, 50 N. Y. 598. p. 1040.
Foster *v.* State, 4 Tex. (App.) 246. p. 642.
Foster *v.* State, 11 Tex. (App.) 105. p. 938.
Foulkes *v.* Commonwealth, 2 Rob. (Va.) 836. p. 67.
Foy, State *v.* 82 N. C. 679. p. 569.
Fowley, State *v.* 18 Mo. 445. p. 46.
Fox, Commonwealth *v.* 7 Gray, 585. pp. 933, 961.
Frampton, R. *v.* 2 C. & K. 48. p. **543**.
Frantz, Commonwealth *v.* 8 Phila. 612. p. 575.
Freel, People *v.* 48 Cal. 436. pp. **1082**, 1112, 1189
Freels, State *v.* 3 Humph. 228. pp. 843, 868.
Freeth, R. *v.* R. & R. 127. p. 368.

French, R. *v.* 11 Cox, 472. pp. 96, 98.
Fritchler, State *v.* 54 Mo. 424. p. **554.**
Fryson *v.* Chambers, 9 M. & W. 467. p. 646.

Gablick *v.* People, 40 Mich. 292. pp. **531,** 582.
Gallagher, Commonwealth *v.* 6 Metc. 565. p. **695.**
Galloway, People *v.* 17 Wend. 540. pp. 71, **322,** 388.
Galloway *v.* State, 41 Tex. 289. pp. **530,** 582.
Gammon, R. *v.* 5 C. & P. 321. p. 897.
Garcia *v.* State, 26 Tex. 209. pp. 608, 642.
Gardner, R. *v.* Dears. & B. 40. pp. 287, 378, 379, 380.
Gardner, R. *v.* L. & C. 243. pp. **401,** 541.
Gardner, R. *v.* 36 Eng. L. & Eq. R. p. 296.
Gardner, People, *v.* 2 Johns. 477. pp. 504, 515.
Garrett, R. *v.* Dears. 232. p. **347.**
Garrett, R. *v.* 8 Cox, 386. p. 545.
Gascoigne's Case, Leach, 313. pp. 686, 706.
Gates, People *v.* 13 Wend. 311. pp. 167, 387.
Gates, State *v.* 27 Minn. 52. p. 776.
Gavin, Commonwealth *v.* 121 Mass. 55. p. 1137.
Gaylor, R. *v.* 7 Cox, 253. p. 1113.
Gaze, R. *v.* R. & R. 388. p. 675.
Gemmell, R. *v.* 26 U. C. Q. B. 312. p. 375.
Genung, People *v.* 11 Wend. 18. p. 323.
George *v.* State, 11 Tex. (App.) 95. pp. 877, 1185.
German, State *v.* 54 Mo. 526; 14 Am. Rep. 481. pp. **953,** 1141, 1143.
Gerrisch, R. *v.* 2 M. & R. 219. p. 648.
Getchell, People *v.* 6 Mich. 496. pp. 299, **371.**
Gherkin, State *v.* 7 Ired. 206. p. 75.
Gibbs, R. *v.* Dears. 448. p. 578.
Gibson, K. *v.* p. 240.
Gilbert, R. *v.* Moo. 155. p. 548.
Gilbert, United States *v.* 2 Sumn. 27. p. 949.
Gill, People *v.* 6 Cal. 637. pp. **920,** 1139.
Givens, State *v.* 5 Ala. 747. p. 75.
Glass, R. *v.* 1 Den. 216; 2 C. & K. 375. p. **578.**
Glyde, R. *v.* 11 Cox, 103. pp. 443, 444.
Gnosil's Case, 1 C. & P. 304. pp. 690, **710.**
Godfrey *v.* People, 63 N. Y. 207. pp. **856,** 871.
Godfrey, R. *v.* 8 C. & P. 563. pp. **572,** 720.
Goggin, United States *v.* 9 Biss. 769. p. **120.**
Goins *v.* State, 41 Tex. 334. p. 1185.
Good, R. *v.* C. & M. 582. p. 417.
Goode, R. *v.* C. & M. 582. p. 493.
Gooden, R. *v.* 11 Cox. 672. pp. 96, 98.
Goodenough, R. *v.* 6 Cox, 209. p. 545.
Goodrich, State *v.* 46 N. H. 186. p. 574.
Goodwin's Case, 6 City H. Rec. 9. p. 866.
Goodhall, R. *v.* R. & R. 461. pp. 126, 281, 346, 356, 368, **376,** 385.
Goold, State *v.* 53 Me. 279. p. 869.
Gordon's Case, Dears. 586. pp. 112, 114.

Goss, R. *v.* 8 Cox, 262. p. 364.
Grady, Commonwealth *v.* 13 Bush, 285. pp. **300,** 385.
Graham *v.* Cammann, 2 Cai. 168. p. 259.
Graham, People *v.* 6 Park. Cr. 135. p. 51.
Graham, State *v.* 74 N. C. 646. p. 1186.
Grant *v.* State, 2 Tex. (App.) 163. p. 539.
Graves, State *v.* 72 N. C. 482. pp. **523,** 582.
Graves, People *v.* 5 Park. 134. pp. 805, 806.
Gray, R. *v.* Dears. & B. 303. p. **858,** 877.
Gray, State *v.* 8 Jones, 170. p. 898.
Green, Commonwealth *v.* 1 Ashm. 289. pp. 933, 1047.
Green, Q. *v.* Jebb's Cr. Cas. 281. p. 6.
Green, R. *v.* Dears. 323. pp. **494,** 578.
Green, R. *v.* 3 F. & F. 274. p. **770.**
Green, State *v.* 66 Mo. 651. pp. 1029, 1033.
Green *v.* State, 12 Tex. (App.) 51. pp. 583. 597.
Green, State *v.* 7 Wis. 676. p. 158.
Greene, Commonwealth *v.* 111 Mass. 392. pp. **418,** 554.
Greenhalgh, R. *v.* Dears. 267. pp. 337, 338.
Griffin *v.* State, 4 Tex. (App.) 411. pp. 672, 673.
Griffith, R. *v.* 8 C. & P. 248. p. 1075.
Grosse *v.* State, 11 Tex. (App.) 364. p. 1185.
Guernsey, R. *v.* 1 F. & F. 394. p. **555.**
Guffee *v.* State, 8 Tex. (App.) 187. p. **1196.**
Guiterman et al. *v.* Liverpool, etc., Steamship Co., 83 N. Y. 359. p. 1151.
Guy, R. *v.* 1 Leach, 277. p. 568.

Haak *v.* Linderman, 64 Pa. St. 499; 3 Am. Rep. 612. p. 490.
Hadley's Case, 5 City H. Rec. 8. p. **553.**
Haines, People *v.* 14 Wend. 546. p. 374.
Hairston *v.* State, 54 Miss. 689. pp. **828,** 873.
Hale, R. *v.* 2 C. & K. 327. p. 877.
Hale, State *v.* 7 West Coast Rep. 141. p. **532.**
Hale, People *v.* 1 N. Y. Crim. Rep. 533. pp. **804,** 869.
Hall, R. *v.* 3 C. & P. 409. pp. 699, 718.
Hall, People *v.* 6 Park. 644. pp. 710, 711.
Hall, R. *v.* 1 Den. 381. p. 394.
Hall *v.* State, 16 Tex. (App.) 6. pp. **846,** 877.
Hall, State *v.* 5 Harr. 492. p. 869.
Hall's Case, 1 Hume Cr. L. 173. p. 261.
Halloway, R. *v.* 5 C. & P. 524. p. 557
Halloway's Case. p. 1003.
Hamilton, People *v.* 46 Cal. 540. pp. 899, **901.**
Hamilton *v.* State, 60 Ind. 193. p. 568.
Hamilton *v.* State, 11 Ohio, 435. pp. 504, 512.
Hammel *v.* State, 14 Tex. (App.) 326. pp. 483, **600,** 1179.
Hammond, State *v.* 35 Wis. 315. pp. 1040, 1041, 1042.
Hammond *v.* State, 3 Cold. 129. p. 722.
Hancock, R. *v.* 14 Cox, 119. p. **677.**
Hand, United States *v.* 2 Wash. C. C. 435. pp. **788,** 870.
Hannah *v.* State, 1 Tex. (App.) 578. p. 608.

Hanson, State *v.* 2 C. & K. 913. p. **869.**
Hardeman *v.* State, 16 Tex. (App.) 1. pp. **104,** 858.
Hardeman *v.* State, 12 Tex. (App.) 207. pp. **542,** 583, 602, 619.
Hardy, State *v.* Duval, 236. p. 541.
Hargrave, R. *v.* 5 C. & P. 178. p. 1198.
Hargrave's Case, 5 C. & P. 110. p. 961.
Harkins, Commonwealth *v.* 128 Mass. 79. p. 256.
Harmon, State *v.* 78 N. C. 578. p. 1191.
Harman, Commonwealth *v.* 4 Barr, 269. p. 947.
Harper, R. *v.* 14 Cox, 574. pp. **23,** 68.
Harrington, Commonwealth *v.* 3 Pick. 26. p. 774.
Harris, R. *v.* 7 C. & P. 446. pp. 696, 860, 877.
Harris *v.* State, 13 Tex. (App.) 309. p. 583.
Harris *v.* State, 15 Tex. (App.) 411. p. 583.
Harrison, People *v.* 8 Barb. 560. pp. 26, 38, 39, 68.
Harrison *v.* State, 6 Tex. (App.) 42. p. 917.
Harrison *v.* State, 16 Tex. (App.) 326. pp. 583, 604.
Harrison *v.* State, 24 Ala. 21. p. 839.
Hart *v.* State, 14 Tex. (App.) 657. p. 583.
Hart *v.* State, 38 Tex. 382. p. 538.
Hart *v.* State, 57 Ind. 102. pp. 501, 557, 694.
Hart, R. *v.* 6 C. & P. 106 pp. 468, 566.
Hartman *v.* Commonwealth, 5 Barr, 60. p. 356.
Hartshorn, R. *v.* 6 Cox, 395. p. **93.**
Hartwell, Commonwealth *v.* 128 Mass. 415; 35 Am. Rep. 391. p. **1133.**
Harvey, R. *v.* 2 Leach, 523. p. **946.**
Harvey's Case, 2 East's P. C. 856. p. 83.
Harvey's Case, 1 Alison, 364 p. 262.
Hassall, R. *v.* L. & C. 58. p. 577.
Hatchett, Commonwealth *v.* 2 Allen, 136. p. 933.
Haughey, Commonwealth *v.* 3 Metc. 223. pp. 301, 385.
Harvey, R. *v.* R. & R. 227. p. 98.
Hawes, State *v.* 43 Iowa, 181. p. **781.**
Hawkes, R. *v.* 2 Moody, 60. p. 98.
Hawkins, Commonwealth *v.* 128 Mass. 79. p. 374.
Hawkins, State *v.* 8 Port. 461; 33 Am. Dec. 294. pp. 574, 720.
Hayden, R. *v.* 7 C. & P. 445. p. 579.
Haynes, People *v.* 11 Wend. 557. pp. 251, 256, 311.
Haynes, People *v.* 28 Am. Dec. 530; 14 Wend. 546. pp. 157, **258.**
Haynes, R. *v.* 4 M. & S. 214. p. **357.**
Hays *v.* People, 1 Hill, 351. p. 806.
Hayward, Commonwealth *v.* 10 Mass. 34. p. 93.
Healey's Case, 4 City H. Rec. 36. p. 568.
Hearsey, Commonwealth *v.* 1 Mass. 137. p. 357.
Heath, R. *v.* p. 101.
Hector, State *v.* 2 Mo. 166. p. 954.
Hedley, United States *v.* p. 129.
Heilbonn's Case, 1 Park. Cr. 429. p. 54.
Helm, State *v.* 6 Mo. 243. p. 1116.
Hench's Case, 2 Russ. 120. p. 548.
Henderson *v.* State, 14 Tex. 503. p. 68.

Henning, R. *v.* 4 F. & F. 50. p. **722.**
Henning, United States *v.* 4 Cranch, 608. p. **129.**
Henry, Commonwealth *v.* 22 Pa. St. 253. pp. 299, 384.
Henry *v.* State, 39 Fla. 679. p. 589.
Henshall, 2 Lew. 135. p. 877.
Henshaw, R. *v.* L. & C. 445. pp. **279**, 341, 375.
Herrick, People *v.* 13 Wend. 87. pp. 156, 311.
Hawes, Commonwealth *v.* 1 Brewst. 348. p. 811.
Hewitt *v.* State, 10 Tex. (App.) 501. p. 1185.
Hay, R. *v.* 2 C. &. K. 982. p. 575.
Heywood, R. *v.* 2 C. & K. 352. p. **85.**
Hickey, Commonwealth *v.* 2 Pars. 317. p. 355.
Hickey, People *v.* 11 Hun, 631. p. 878.
Higdon, State *v.* 32 Iowa, 262. p. 734.
Hill, State *v.* 1 Houst. 420. p. 565.
Hill *v.* State, 57 Wis. 377. p. **450.**
Hill *v.* State, 1 Yerg. 76; 24 Am. Dec. 1441. p. **56.**
Hill, R. *v.* 1 Den. 453. pp. 645, 646.
Hill, R. *v.* R. & R. 190. p. 341.
Hill's Case, R. & R. 390. pp. 261, 341.
Hill's Case, 2 Gratt. 595. pp. 1066, 1069.
Hilton, R. *v.* 2 Lew. 214. p. **1139.**
Hindmarsh's Case. pp. 950, 951, 953.
Hines *v.* State, 3 Tex. (App.) 483. p. 1105.
Hirsch *v.* State, 1 Tex. (App.) 373. p. 366.
Hobbs *v.* Branscomb, 3 Camp. 420. p. 820.
Hodges, R. *v.* M. & M. 341. p. 580.
Hodgins, R. *v.* D. & B. 3. p. 67.
Hodgson *v.* Loy, 7 T. R. 445. p. 268.
Hodgson, R. *v.* Dears. & B. 3. pp. **7**, 20, 64.
Holcombe *v.* State, 69 Ala. 218. p. 574.
Holden, R. *v.* 2 Taunt. 333. p. 4.
Holden, State *v.* 81 N. C. 527. p. 572.
Holder, Commonwealth *v.* 9 Gray, 7. p. 507.
Holland, R. *v.* 2 M. & R. 351. p. 933.
Holland, R. *v.* 5 T. R. 623. p. 129.
Hollingberry, R. *v.* 4 Barn. & Cress. 329. p. 261.
Hollister *v.* Nowlen, 9 Wend. 537. p. 815.
Holloway, R. *v.* 5 C. & P. 524. p. 120.
Holloway, R. *v.* 1 Den. 370; 2 C. & K. 943. pp. 393, 394, **395**, 420.
Holly, State *v.* 10 Humph. 141. pp. 961, **1180.**
Holmes, State *v.* 54 Miss. 153. p. 1098.
Holmes, State *v.* 82 N. C. 607. p. **364.**
Honig, State *v.* 8 Mo. (App.) 298. p. 678.
Hooghkerk, People *v.* 96 N. Y. 159; 2 N. Y. Crim. Rep. 204. p. 756.
Hopkins, R. *v.* 8 C. & P. 591. p. 945.
Horbach *v.* State, 43 Tex. 254. pp. 1104, 1105.
Hore, R. *v.* 3 F. & F. 315. p. 556.
Horne, R. *v.* Cowp. 682. p. 178.
Horner *v.* Perkins, 124 Mass. 431. p. 326.
Horner's Case, 2 East's P. C. 703. p. 689.

Hornbeck *v.* State, 10 Tex. (App.) 408. p. 539.
Horton *v.* State, 53 Ala. 487. p. 96.
House *v.* State, 9 Tex. (App.) 53. p. **907.**
Hovey, State *v.* 50 N. H. 510. p. 533.
Hovey's Case, 29 Hun, 332. p. 1055.
Howard, United States *v.* 3 Sumn. 12. p. 1137.
Howe, Commonwealth *v.* 132 Mass. 250. p. 388.
Howell *v.* State, 37 Tex. 591. p. **69.**
Howell's Case, 26 Gratt. 995. p. 1066.
Howie, R. *v.* 11 Cox, 32. pp. 97, 98.
Huber *v.* State, 57 Ind. 341. p. 694.
Hudson *v.* State, 10 Tex. (App.) 215. 559.
Hudson *v.* State, 6 Tex. (App.) 565. pp. **1100,** 1196.
Hughes, Commonwealth *v.* 5 Allen, 499. p. 1137.
Hull, State *v.* 34 Conn. 132. p. 817.
Humphrey *v.* State, 63 Ind. 223. p. **550.**
Humphreys, State *v.* 10 Humph. 442. p. 68.
Humphries, Commonwealth *v.* 7 Mass. 242. p. 700.
Hunt *v.* State, 7 Tex. (App.) 212. p. 917.
Hunt *v.* State, 55 Ala. 138. p. 571.
Hunt, K. *v.* 2 Camp. 584. p. 261.
Hunt *v.* Commonwealth, 13 Gratt. 957. p. 559.
Hunter *v.* State, 13 Tex. (App.) 16. p. 583.
Hurst, State *v.* 11 W. Va. 54. p. **383.**
Hussey *v.* Thornton, 4 Mass. 405. p. 269.
Hutchinson, R. *v.* 1 Lewin, 195. p. 559.

Ilott *v.* Wilkes, 3 B. & A. 304. pp. 838, 839.
Ingham, R. *v.* Bell C. C. 181. p. **111.**
Ingle *v.* State, 1 Tex. (App.) 1307. p. 583.
Inhabitants R. *v.* 2 Hawk. P. C. p. 178.
Inhabitants, R. *v.* 3 Mau. & S. 537. p. 89.
Ireland *v.* Higgins, Cro. Eliz. 125. p. 455.
Irvine *v.* State, 13 Tex. (App.) 409. p. 583.
Irving *v.* State, 9 Tex. (App.) 66. p. 899.
Irving *v.* People, 95 N. Y. 541; 2 N. Y. Crim. R. 171. p. 756.
Ives, State *v.* 13 Ired. 338. p. 664.

Jackson *v.* Cairns, 20 Johns. 301. p. 323.
Jackson *v.* Stevens, 16 Johns. 110. p. 322.
Jackson *v.* State, 7 Tex. (App.) 363. pp. 640, 642.
Jackson, Commonwealth *v.* 15 Gray, 187. p. 1113.
Jackson, R. *v.* 3 Camp. 370. pp. 368, 382.
Jackson, R. *v.* 9 Cox, 505. p. **557.**
Jackson, R. *v.* 1 Moo. 119. p. 545.
Jacobs, R. *v.* 12 Cox, 151. p. 545
Jacobson's Case, 2 City Hall Rec. 131. p. 947.
Jacobs, People *v.* 35 Mich. 36. pp. **115,** 359.
James, State *v.* 58 N. H. 67. p. **573.**
Jamison *v.* State, 37 Ark. 445. p. **373.**
Jarnigan *v.* State, 3 Tex. (App.) 462. p. 867.

Jarrott, State *v.* 1 Ired. 76. p. 961.
Jeffries, Commonwealth *v.* 7 Allen, 548. pp. 298, 1137.
Jeff's Case, 39 Miss. 321. p. 830.
Jenks *v.* Coleman, 2 Sumn. 22. p. 814.
Jennison, R. *v.* 9 Cox, 158. p. 346.
Jennings, R. *v.* 2 Lew. 130. p. 877.
Jennings, State *v.* 18 Mo. 435. pp. 1029, 1033, 1034, 1035, 1036.
Jersey, People *v.* 18 Cal. 337. p. 557.
Jilson, People *v.* 3 Park. 234. p. 869.
Joe *v.* State, 6 Fla. 571; 65 Am. Dec. 579. pp. **974,** 1155.
John *v.* State, 23 Wis. 504. p. 68.
John, State *v.* 5 Johns. (L.) 163; 69 Am. Dec. 777. pp. **687,** 710.
Johns, United States *v.* 1 Wash. C. C. 363. p. 947.
Johnson *v.* Commonwealth, 24 Gratt. 555. p. 254.
Johnson *v.* Commonwealth, 24 Pa. St. 387. p. **1022.**
Johnson *v.* Patterson, 14 Conn. 1. p. 839.
Johnson, R. *v.* 3 Camp. 370. p. 263.
Johnson, R. *v.* 1 Lew. 164. p. **1139.**
Johnson, R. *v.* 2 Moody, 325. p. **377.**
Johnson *v.* State, 41 Tex. 65. pp. 286, 375.
Johnson *v.* State, 36 Ark. 242. p. 294.
Johnson *v.* State, 12 Tex. (App.) 385. p. **606.**
Johnson *v.* State, 16 Tex. (App.) 402. p. **608.**
Johnson, State *v.* Phill. L. 140. p. 722.
Johnson *v.* State, 43 Tex. 576. p. 866.
Johnson *v.* State, 35 Ala. 363. pp. 842, 865.
Johnson *v.* State, 36 Tex. 375. pp. **519,** 551.
Johnson *v.* State, 11 Ohio St. 324. p. 568.
Johnson *v.* State, 12 Tex. (App.) 350. p. 583.
Johnson *v.* State, 13 Tex. (App.) 379. p. 583.
Johnson *v.* State, 1 Tex. (App.) 118. pp. 559, 633.
Johnson, State *v.* 2 Ore. 115. p. 512.
Johnson, People *v.* 1 Park. Cr. Rep. 219. pp. 1091, 1093.
Johnson, People *v.* 12 Johns. 262. pp. 263, 273.
Johnson *v.* Windle, 3 Bing. (N. C.) 225. p. 332.
Joice *v.* State, 53 Ga. 50. p. 895
Jones *v.* People, 12 Ill. 259. p. 527.
Jones *v.* State, 8 Tex. (App.) 648. p. 559.
Jones *v.* State, 13 Tex. (App.) 1. p. 873, 894.
Jones *v.* State, 11 S. & M. 315. pp. 835, 842.
Jones *v.* State, 50 Ind. 473. pp. 167, 366.
Jones *v.* State, 59 Ind. 229. p. 501.
Jones, K. *v.* 24 Eng. C. L. 156. p. 119
Jones, K. *v.* 1 Leach, 161. p. 305.
Jones, R. *v.* 3 Cox, 441. p. 877.
Jones, R. *v.* 2 C. & P. 629. p. 966.
Jones, R. *v.* 1 Den. 188. p. 352.
Jones, R. *v.* 2 East's P. C. 883. p. 85.
Jones, R. *v.* C. & M. 612. p. **557.**
Jones, R. *v.* 1 Salk. 379; 6 Mod. 105. pp. 103, **356.**
Jones, State *v.* 65 N. C. 395. pp. 400, 542.

Jones, State *v.* 3 Dev. & B. 122. p. 527.
Jones & Palmer's Case, 1 Leach, 405. p. 74.
Jones' Case, 1 Leach, 208. p. 177.
Jones' Case, 1 Leigh, 598. pp. 1066, 1068.
Jordan *v.* Commonwealth, 25 Gratt. 943. p. 717.
Jordan *v.* State, 10 Tex. 479. p. 1159.
Justice, State *v.* 2 Dev. 200. p. 386.

Keefer, People *v.* 18 Cal. 637. pp. **831**, 873.
Keenan *v.* Commonwealth, 44 Pa. St. 55. pp. 1074, 1155.
Keeper of Prison, Commonwealth *v.* 2 Ashm. 227. p. 1113.
Kelham, People *v.* 11 Cox, 561. p. 371.
Kemp *v.* State, 38 Tex. 110. p. 1185.
Keller *v.* State, 51 Ind. 111. pp. **162**, 359, 365, 375.
Kelley *v.* State, 14 Ind. 36. p. 501.
Kellogg *v.* State, 26 Ohio St. 15. p. **411**, 547,
Kelly *v.* Commonwealth, 1 Grant's Cases, 487. p. 1032.
Kelly *v.* People, 6 Hun, 509. p. 545.
Kelly, R. *v.* Moo. C. C. 113. p. 961.
Kendall *v.* State, 8 Tex. (App.) 569. p. 938.
Kendrick, R. *v.* 5 Q. B. 49. pp. 141, 142, 289, 290.
Kennedy, R. *v.* 2 Leach, 914. p. 581.
Kennedy *v.* State, 34 Ohio St. 310. p. 388.
Kenyon *v.* People, 26 N. Y. 203. p. 729, 756.
Kenyon, People *v.* 5 Park. 254. p. 775.
Kenyon, Ex parte 5 Dill. 389. p. 575.
Kimble *v.* State, 12 Tex. (App.) 420. p. **701**, 714.
King *v.* State, 54 Ga. 184. p. **520.**
King *v.* State, 13 Tex. (App.) 277. p. 938.
King's Case, 2 Va. Cas. 84. p. 1066.
Kirby's Case, 1 Hume, 174. p. 262.
Kirkham, R. *v.* 8 C & P. 115. pp. 1003, 1189.
Kirksey *v.* Fike, 29 Ala. 206. p. 482.
Kirkland *v.* State, 43 Ind. 146; 13 Am. Rep. 387. p. **792.**
Kneeland, R. *v.* 2 Leach, 833. pp. 706, **713.**
Knight, R. *v.* Salk. 375. pp. 30, 189.
Knight, R. *v.* 12 Cox, 162. pp. **441**, 559.
Knutson *v.* State, 14 Tex. (App.) 570. pp. 583, **612.**
Krause *v.* Commonwealth, 93 Pa. St. 418; 39 Am. Rep. 762. p. **488.**
Krider, State *v.* 78 N. C. 481. p. 572.

Lacefield *v.* State, 34 Ark. 275. p. 872.
Ladd, State *v.* 32 N. H. 110. p. 574.
Lamb, State *v.* 65 N. C. 419. p. 96.
Lancaster, Commonwealth *v.* Thatch. 429. p. 373.
Landin *v.* State, 10 Tex. (App.) 63. pp. 583, 621.
Lando, R. *v.* 33 Eng. L. & Eq. 636. p. 119.
Lane *v.* Commonwealth, 59 Pa. St. 371. p. **1017**
Lane *v.* People, 10 Ill. 305. p. 559.
Langley's Case, 4 City H. Rec. 159. p. 556.
Lansing *v.* McKillup, 3 Caines, 287. p. 71.

Lapier's Case, 2 East's P. C. 703. p. 689.
Lara, R. *v.* pp. 305, 307, 352, **356.**
Larner, R. *v.* 14 Cox, 498. p. **379.**
Lathin, R. *v.* p. 433.
Larender's Case, 2 East's P. C., ch. 16, sec. 15. p. 493.
Lawson *v.* State, 30 Ala. 14. pp. 843, 866.
Leach, Commonwealth *v.* 1 Mass. 59. p. 480.
Leal *v.* State, 12 Tex. (App.) 279. pp. **671,** 679.
Lear's Case, 1 Hale 506. p. 562.
LeBlanch, State *v.* 2 Vroom, 82. p. 515.
Leddington, R. *v.* 9 C. & P. 79. p. 1197.
Lee *v.* Resdow, 7 Taunt. 191. pp. 459, 460, 462.
Lee, R. *v.* L. & C. 309. pp. 158, 375.
Lee, R. *v.* 8 Cox, 233. pp. **360,** 362.
Lee, R. *v.* 1 Leach, 61. p. 871.
Leigh, R. *v.* 2 East's P. C. 694. p. 439.
Leighton, People *v.* pp. 1051, 1055.
Lennox & Pyboss' Case, 2 Lew. Cr. C. 268. p. 700.
Lenton, Commonwealth *v.* 2 Va. Cas. 476. p. 73.
Leobald *v.* State, 33 Ind. 484. p. 385.
Leppard, R. *v.* 4 F. & F. 51. p. 556.
LeRoy *v.* Deakins, 1 Sid. 142. p. 73.
Lesser *v.* People, 73 N. Y. 78. p. 346.
Lester, Commonwealth *v.* 129 Mass. 101. p. 579.
Levine, R. *v.* 10 Cox, 374. p. **361.**
Levy, R. *v.* 4 C. & P. 241. p. 546.
Lewer *v.* Commonwealth, 15 S. & R. 93. p. 545.
Lewis' Case, Fost. Cr. L. 116. p. 79.
Lewis *v.* State, 30 Ala. 54. pp. 880, 881.
Lewis, State *v.* 48 Iowa, 578. p. **780.**
Lewis, Re, 6 U. C. Pr. Rep. 237. p. 868.
Lies *v.* De Diabler, 12 Cal. 330. p. 70.
Lightner *v.* Steinagee, 33 Ill. 510. p. 487.
Lill *v.* Queen, Dears. 132; 1 El. & Bl. pp. 329, 331.
Lilley, People *v.* 43 Mich. 521. pp. 865, 876, **783.**
Littlejohn *v.* State, 59 Miss. 273. p. 530.
Livingstone's Case, 14 Gratt. 592. pp. 933, 1140.
Lloyd, R. *v.* 7 C. & P. 318. pp. 895, 899, 910.
Locke, State *v.* 35 Ind. 419. p. 167.
Locke *v.* State, 32 N. H. 106. p. 574.
Loomis *v.* Edgarton, 19 Wend. 420. p. 480.
Loomis, People *v.* 4 Denlo, 380. p. 572.
Long *v.* Worceman, 38 Me. 49. p. 117.
Long *v.* State, 12 Ga. 293. p. 694.
Long *v.* State, 27 Ala. 32. p. 482.
Long, People *v.* 39 Cal. 694. p. **1046.**
Lonsdale *v.* Rigg, 26 L. J. 196. p. 460.
Loose, R. *v.* Bell, 259. p. **577.**
Lovelady *v.* State, 4 Tex. (App.) 545. pp. **1142,** 1180.
Lowick's Case, 13 How. St. Tr. 277. p. 261.
Lunsford *v.* State, 1 Tex. (App.) 449. p. 572.

Lunsford, State *v.* 81 N. C. 528. p. **861.**
Lupin *v.* Marie, 7 Wend. 77. p. 269.
Lurch, State *v.* 6 West C. R. 110. p. **159.**
Lutton *v.* State, 14 Tex. (App.) 518. p. 389.
Lymus, State *v.* 26 Ohio St. 400. pp. **456,** 572
Lynch, R. *v.* 5 C. & P. 325. p. 1189.
Lynch's Case. p. 263.
Lyon *v.* State, 61 Ala. 224. p. 557.
Lyon, R. *v.* 1 F. & F. 54. p. **542.**
Lyon, R. *v.* 2 Leach, 681. p. 98.
Lyons *v.* Merrick, 105 Mass. 71. p. 1137.
Lyons *v.* State, 52 Ind. 426. pp. **729,** 775.
Lyons, R. *v.* C. & M. 217. pp. 655, 658, 659, 665.
Lyons, Q. *v.* p. 665.
Lytle, State *v.* 64 N. C. 255. p. 68.

Maccarty, Q. *v.* 6 Mod. 301. pp. 103, 305.
Macdaniel, Commonwealth *v.* 1 Leach, 52. p. 1138.
Mackinley, People, *v.* 9 Cal. 250. p. 574.
Maddox *v.* State, 41 Tex. 206. pp. 553, 559.
Madge, R. *v.* 9 C. & P. 29. pp. 504, 513.
Madison *v.* State, 16 Tex. (App.) 435. pp. 583, **616.**
Madox, R. *v.* Russ. & Ry. 92. pp. 576, 578.
Magee, State *v.* 11 Ind. 154. pp. 158, 375.
Magowan, Commonwealth *v.* 1 Metc. 368. p. 167.
Maher *v.* People, 10 Mich. 220. p. 789.
Maher *v.* State, 10 Mich. 212. p. 1098.
Mahly, State *v.* 68 Mo. 315. p. **1025.**
Mahoney *v.* People, 3 Hun, 202. p. 712.
Majone's Case, 91 N. Y. 211. pp. 1055, 1063.
Major, R. *v.* 2 Leach, 894. p. 568.
Mann, People *v.* 75 N. Y. 484; 31 Am. Rep. 482. pp. **50,** 55, 81.
Mapes *v.* State, 14 Tex. (App.) 129. pp. 583, 621.
Maranda *v.* State, 44 Tex. 442. p. 366.
Marcus, R. *v.* 2 C. & K. 356. p. **75.**
Marentelle *v.* Oliver, 2 N. J. (L.) 379. p. 795.
Marion, People *v.* 29 Mich. 31. p. 61.
Marner, R. *v.* C. & M. 628. p. 113.
Marsh, R. *v.* 3 F. & F. 523. p. 536.
Marshall *v.* State, 31 Tex. 471. p. 553.
Marshall *v.* State, 33 Tex. 664. p. 1105.
Marshall, People *v.* 59 Cal. 386. p. 771.
Martin, R. *v.* F. & F. 501. p. **373.**
Martin, R. *v.* 14 Cox, 375. p. **92.**
Martin, R. *v.* L. R. 1 C. C. R. 56; 10 Cox, 383. p. 380.
Martin, R. *v.* 8 Ad. & E. 481. p. 331.
Martin, Commonwealth *v.* 17 Mass. 363. pp. 696, 700.
Martin's Case, 3 Chit. C. L. 707. p. 177.
Martin's Case. p. 620.
Martinez *v.* State, 41 Tex. 126. p. **517,** 580.
Martinez *v.* State, 16 Tex. (App.) 122. p. **621.**

Marvin's Case, Sir John. p. 57.
Mason, R. *v.* 1 Leach, 487. p. 341.
Mason's Case, 2 R. & R. 419. pp. 690, 691.
Massey, State *v.* 86 N. C. 659; 41 Am. Rep. 478. p. **895.**
Massey, State *v.* p. 909.
Massey *v.* State, 10 Tex. (App.) 645. p. 1188.
Masterson, R. *v.* 2 Cox, 100. p. **380.**
Mattheson, R. *v.* 5 Cox, 276. p. **575.**
Matthews *v.* State, 10 Tex. (App.) 279. p. 286.
Matthews *v.* State, 55 Ala. 187. p. 1142.
Matthews *v.* State, 33 Tex. 102. p. 388.
Matthews, R. *v.* 12 Cox, 489. p. **560.**
Matthias *v.* Matthias, 3 Jones, 132. p. 896.
Maxwell, People *v.* 24 Cal. 15. p. 581.
Mead *v.* Young, 4 T. R. 28. pp. 32, 83.
Meadows, R. *v.* 1 C. & K. 398. p. **771.**
Mercer, R. *v.* 6 Jur. 243. p. 817.
Meredith, K. *v.* 2 Campb. 639. p. 268.
Meredith *v.* State, in manuscript. pp. 834, 838.
Merrell, Commonwealth *v.* 14 Gray, 515. p. 904.
Merriman *v.* The Hundred of Chippenham, 2 East, P. C. 709. p. 705.
Merrill, Commonwealth *v.* 14 Gray, 415. pp. **887**, 896.
Merritt *v.* State, 2 Tex. (App.) 177. p. 583.
Merry *v.* Green, 7 M. & W. 623. pp. 430, 438, 565.
Mershon *v.* State, 51 Ind. 14. p. 62.
Metcalfe, R. *v.* R. & M. 433. p. 493.
Meyerfield's Case, Phil. N. C. 108. p. 830.
Middleton *v.* State, Dudl. 275. p. 386.
Middleton *v.* State, 53 Ga. 248. pp. **519**, 580.
Milburne, R. *v.* Lewin, 251. p. 559.
Millard, Commonwealth *v.* 1 Mass. 6. p. 527.
Miller *v.* Race, 1 Burr. 457. p. 675.
Miller *v.* State, 61 Ind. 405. pp. **62**, 99.
Miller, Commonwealth *v.* Lewis Cr. L. 398. p. 1023.
Miller *v.* Commonwealth, 78 Ky. 15. p. 545.
Miller, People *v.* 2 Park. Cr. R. 197. pp. 156, 167.
Miller, People *v.* 14 Johns. 371. pp. 358, 375.
Miller, R. *v.* 13 Cox. 179. p. **769.**
Mills, State *v.* 17 Me. 211. p. 341.
Mills, United States *v.* 7 Pet. 140. pp. 125, 127.
Milsaps, State *v.* 82 N. C. 649. p. 866.
Minister of St. Botolph's Case, 1 W. Bl. 443. p. 179.
Minter Hart, R. *v.* 6 C. & P. 106. pp. 333, 334, 335.
Mitchell's Case, 2 East's P. C. 839. p. 497.
Mitchell, United States *v.* 1 Bald. 366. p. 6.
Mackridge, State *v.* 11 Vt. 654. p. 504.
Moffatt, R. *v.* 2 Leach, 486. pp. 68, 77, 323.
Moffatt, K. *v.* 1 Leach, 431. p. 71.
Moffatt's Case, 2 East, 954. p. 73.
Mole, R. *v.* 1 Car. & K. 417. pp. 433, 559.
Montague, State *v.* 2 McCord, 287. p. 185.

Mongano, People *v.* 1 N.Y. Crim. Rep. 411. pp. **1048**, 1156
Monneir, State *v.* 8 Minn. 212. p. 93.
Montgomery *v.* State, 12 Tex. (App.) 323. p. **64**.
Moutgomery *v.* State, 13 Tex. (App.) 75. p. 99.
Montgomery, Commonwealth *v.* 11 Metc. 534. p. 527.
Montgomery, United States *v.* 3 Sawy. 344. p. **678**.
Mooney *v.* Miller, 102 Mass. 217. p. 117.
Mooney, State *v.* Phill. 434. p. **865**.
Moore *v.* State, 18 Ala. 533. p. 835.
Moore *v.* State, 8 Tex. (App.) 496. p. 539.
Moore *v.* State, 7 Tex. (App.) 14. p. 1185.
Moore, Commonwealth *v.* 99 Pa. St. 570. pp. **283**, 286, 375.
Moore, R. *v.* 8 Cox. 416. p. 443.
Moore, State *v.* 69 N. C. 207. pp. **1107**, 1189.
Moore, State *v.* 25 Iowa, 128. p. 1113.
Moore, State *v.* 15 Iowa, 413. p. 388.
Moore, State *v.* 31 Conn. 479. pp. 839, 843.
Moore's Case, 1 Leach, 335. p. 689.
Mopsey, R. *v.* 11 Cox, 143. p. 96.
Morfit, R. *v.* 1 R. & R. 307. p. 721.
Morgan *v.* State, 42 Ark. 131; 48 Am. Rep. 55. pp. **291**, 378.
Morgan *v.* State, 16 Tex. (App.) 593. pp. **926**, 1141.
Morgan *v.* State, 13 S. & M. 242. p. 842.
Morgan *v.* State, 33 Ala. 413. pp. 835, 836, 837, 873.
Morgan, State *v.* 3 Ired. 187. p. 839.
Morgan, United States *v.* 1 Cranch, 278. p. 568.
Morgan's Case, 3 Ired. 186. p. 830.
Morphy, State *v.* 33 Iowa, 270. pp. 933.
Morris, R. *v.* 2 East, 748. pp. 675, 676.
Morris, R. *v.* 2 Leach, 527. p. 568.
Morris, R. *v.* 2 Leach, 915 p. 581.
Morris, State *v.* 1 Hayw. 429. p. **1189**.
Morrison & Gray *v.* Buchanan, 6 C. P. &18. p. 332.
Morse *v.* Shaw, 124 Mass. 59. p. 326.
Morton, R. *v.* 12 Cox, 456; L. R. 1 C. C. R. 22. p. 96.
Mott, R. *v.* 2 C. & P. 521. p. **98**.
Moye *v.* State, 9 Tex. (App.) 88. p. 358.
Mucklow, R. *v.* 1 Moo. 160. pp. 439, 557.
Mulholland, Commonwealth *v.* 5 W. N. C. 208. p. 75.
Mullins *v.* State, 37 Tex. 337. pp. 621, 633.
Murphy, People *v.* 47 Cal. 103. p. 541.
Murray, R. *v.* 5 C. & P. 145 note *a*. p. 498.
Murphy's Case, 23 Gratt. 972. p. 1069.
Murphy's Case, 6 C. & P. 103. p. 961.
Murrow, R. *v.* 2 Lew. 136. p. 877.
Musgrave, R. *v.* 1 Lewin, 138. p. 67.
Mycall, Commonwealth *v.* 2 Mass. 136. pp. 47, 200.
Mycock, R. *v.* 12 Cox, 28. p. 770.
McAfee *v.* State, 14 Tex. (App.) 668. p. **403**, 545.
McAllister, People *v.* 49 Mich. 12. **369**.
McAtee, Commonwealth *v.* 8 Dana, 29. p. 129.

McCall v. Taylor, 34 L. J. 365, C. P. p. 24.
McCall v. State, 67 Ala. 227. pp. 570, 574.
McCann v. People, 6 Park. 629. pp. **1089,** 1189.
McCarty, Commonwealth v. 2 Pa. L. Jour. 136. p. 733.
McCloskey v. People, 5 Park. 279. pp. **684,** 710, 711.
McCord v. People, 46 N. Y. 470. p. **382.**
McCoy v. State, 44 Tex. 616. p. 608.
McDade v. People, 29 Mich. 50. p. 788.
McDaniel v. Commonwealth, 77 Va. 281. pp. **1065,** 1156.
McDaniel v. State, 8 S. & M. 401. p. 839.
McDaniel v. State, 33 Tex. 420. p. 530.
McDougal, State v. 20 Wis. 482. p. 557.
McDuffy, Commonwealth v. 125 Miss. 467. pp. 257, **296,** 383.
McGarren, People v. 17 Wend. 460. p. 561.
McGinty, People v. 24 Hun, 62. p. **710.**
McGregor v. State, 4 Tex. (App.) 599. pp. **844,** 877.
McHenry v. State, 40 Tex. 46. p. 521.
McIntosh's Case, 2 East, 942. p. 324.
McKenzie v. State, 6 Eng. 594. pp. 292, 293, 375.
McLaren, State v. 1 Ark. 311. p. 93.
McLaughlin, People v. 44 Cal. 435. p. 1074.
McLoughlin, R. v. 8 C. & P. 535. pp. 696, 697, 877.
McMahon v. State, 1 Tex. (App.) 102. p. 642.
McNab, State v. 20 N. H. 160. pp. 960, 1040.
McNair v. State, 14 Tex. (App.) 18. pp. **469,** 572, 583.
McNair v. State, 35 Ala. 453. pp. **880,** 897.
McNeil v. Collinson, 128 Mass. 313. p. 1137.
McPhail v. State, 10 Tex. (App.) 128. p. 583.
McPike, Commonwealth v. 3 Cush. 181. p. 1141.

N. & C. R. Co. v. Peacock, 25 Ala. 229. p. 839.
Neeley, State v. 74 N. C. 425; 21 Am. Rep. 496. pp. 896, **908.**
Neff, State v. 58 Ind. 516. pp. **816,** 870.
Nehuff, R. v. 1 Salk. 151. pp. 101, 359.
Nelson v. People, 5 Park. 39. pp. 805, 806.
Newman, State v. 9 Nev. 48. p. 548.
Newton, R. v. 2 Moody, 89. p. **96.**
Neyland v. State, 13 Tex. (App.) 536. p. 1164.
Nicholls, R. v. 2 Cox. 181. p. 910.
Nichol, People v. 34 Cal. 214. pp. 1046, 1048.
Nichol, R. v. Russ. & R. 130. p. 889.
Nicholson, R. v. 2 Leach, 698. pp. 104, 545, **356.**
Niven's Case, 5 City H. Rec. 79. p. 355.
Noakes v. People, 25 N. Y. 380, 384. p. 51.
Noble v. State, 22 Ohio St. 541. p. 898.
Noble, State v. 15 Me. 476. p. 1137.
Nolen v. State, 8 Tex. (App.) 585. p. 1185.
Nolen v. State, 14 Tex. (App.) 474. pp. 1180, **1181.**
Noregia, People v. 48 Cal. 123. pp. **529,** 582.
Norman v. State, 24 Miss. 54. p. 842.
Norris' Case, 6 City H. Rec. 86. p. 710.

North, R. *v.* 8 Cox. 436. p. 545.
Norton *v.* Ladd, 5 N. H. 203. p. 571.
Norton, State *v.* 76 Mo. 180. p. 371.
Nueslein, State *v.* 25 Mo. 111. pp. 1033, 1036.
Nugent *v.* State, 18 Ala. 521. p. 910.
Nye *v.* People, 35 Mich. 19. pp. 787, 1156.

Oates, R. *v.* 6 Cox, 540. p. 387.
O'Connor *v.* State, 30 Ala. 1. p. 371.
Ogletree *v.* State, 28 Ala. 693. pp. 835, 836, 837, 871.
O'Gorman, State *v.* 68 Mo. 179. p. 476.
Olifier, R. *v.* 10 Cox, 402. pp. 760, 770.
Oliver *v.* Commonwealth, 101 Pa. St. 215. p. **732.**
Oneby, R. *v.* 2 Ld. Raym. 1488. p. 993.
Ordway, Commonwealth *v.* 1 Cush. 270. p. 878.
Orrell, State *v.* 1 Dev. (L.) 139. p. 1139.
Ortega, United States *v.* 4 Wash. C. C. 531. pp. 795, 797.
Osborn *v.* State, 52 Ind. 526. pp. **726,** 775.
Owen *v.* State, 44 Tex. 248. p. 538.
Owen, R. *v.* 2 Leach, 652. p. 580.

Painter, State *v.* 67 Mo. 84. p. 871.
Palmer *v.* People, 10 Wend. 165. p. 418.
Palmer, United States *v.* 3 Wheat. 610. p. 719.
Palmore *v.* State, 29 Ark. 248. p. 1156.
Parchman *v.* State, 2 Tex. (App.) 228. p. 673.
Parfait, R. *v.* 1 Leach, 23. p. **714.**
Parfait, R. *v.* 1 East's P. C. 416. p. 704.
Parker & Brown's Case, 2 East's P. C. 963. p. 89.
Parker, R. *v.* 2 Cox, 274. pp. 96, 98.
Parker, R. *v.* 3 Q. B. Rep. 392. p. 331.

Parker, Commonwealth *v.* 9 Metc. 263. pp. 982, 983, 984.
Parker, Commonwealth *v.* 2 Pick. 548. p. 1139.
Parkes & Brow, R. *v.* 2 Leach, C. C. 785. pp. 20, 80.
Parkes, R. *v.* 2 Leach, 703. p. 545.
Parkes, R. *v.* 2 East's P. C. 963. p. 51.
Parmenter, Commonwealth *v.* 121 Mass. 354. p. 327.
Parr, Commonwealth *v.* 5 W. & S. 345. p. 767.
Parshall, People *v.* 6 Park. 132. p. 771.
Parsons *v.* State, 21 Ala. 300. pp. **922,** 933, 1141.
Partridge, R. *v.* 6 Cox, 183. p. **381.**
Partridge, R. *v.* 7 C. & P. 551. p. 527.
Pasley *v.* Freeman, 3 T. R. 51. p. 310.
Pateman, R. *v.* R. & R. 454. pp. 68, 324.
Pauli *v.* Commonwealth, 89 Pa. St. 432. pp. 75, 491.
Payne *v.* People, 6 Johns. 103. p. 572.
Peacock, People *v.* 6 Cow. 72. p. 51.
Pear's Case, East's P. C. pp. 546, 719.
Pearce *v.* Lea, 68 N. C. 90. p. 526.
Pefferling *v.* State, 40 Tex. 486. pp. 893, 904.

Penley, State *v.* 27 Conn. 587. p. 116.
Pennsylvania *v.* Lewis, Add. 279. p. 1047.
Perdue *v.* Aldridge, 19 Ind. 290. p. 70.
Perle's Case. p. 422.
Perry *v.* State, 41 Tex. 483. p. 608.
Perry, Commonwealth *v.* 8 Phila. 616. p. 575.
Perry, R. *v.* 1 Den. 69. p. 338.
Perrott, R. *v.* 2 Mau. & Sel. 379. pp. 181, 270.
Petch, R. *v.* 14 Cox, 116. pp. **463**, 571.
Peterson *v.* State, 21 Tex. (App.) 650. pp. **874**, 937.
Peterson *v.* State, 14 Tex. (App.) 162. p. 904.
Pettigrew *v.* State, 12 Tex. (App.) 225. pp. 583, **625.**
Phelp's Case, 2 Moo. p. 876.
Phifer, State *v.* 65 N. C. 325. p. 359.
Phillips, R. *v.* 2 East's P. C., ch. 16, sec. 98. pp. 397, 398.
Phillips, R. *v.* 3 Camp. 74. p. 1114.
Phineas Adams' Case. p. 422.
Phipoe, R. *v.* 2 Leach, 673. p. 467.
Phipoes, Mrs., Case. pp. 334, 718.
Pickett *v.* State, 12 Tex. (App.) 86. p. **1156.**
Pierce *v.* People, 81 Ill. 98. p. **318.**
Pierson *v.* People, 79 N. Y. 436. p. 967.
Pierson *v.* People, 18 Hun, 253. p. 967.
Pilling, R. *v.* 1 F. & F. 325. p. 99.
Pinkney, R. *v.* pp. 104, **355.**
Pitts *v.* State, 5 Tex. (App.) 541. p. **388.**
Plato's Case, 2 City H. Rec. 7. p. 710.
Pleasant *v.* State, 13 Ark. 360. pp. 882. 904.
Plestow, R. *v.* 1 Camp. 494. p. 1137.
Pliemling *v.* State, 46 Wis. 516. pp. **1037**, 1156.
Plummer, R. *v.* Kel. 117. p. 982.
Plunket's Case. pp. 690, 691.
Pogue *v.* State, 12 Tex. (App.) 283. p. 1151.
Pollhill *v.* Walter, 1 Wm. IV. p. 85.
Pollock *v.* Pollock, 71 N. Y. 137. p. 967.
Pool, People *v.* 27 Cal. 573. p. 811.
Poole, R. *v.* Dears. & B. 345. p. **393.**
Poole *v.* People, 80 N. Y. 645. p. 968.
Pooley, R. *v.* Russ. & R. 12. p. 338.
Popinaux *v.* State, 12 Tex. (App.) 140. p. **389.**
Porter *v.* State, 1 Mart. & Yerg. 226. p. 539.
orter, United State *v.* 2 Cranch, C. C. 60. p. 228.
Porter, United States *v.* 3 Day, 283. p. 1137.
Potter *v.* People, 5 Mich. 7. p. 786.
Poulton, R. *v.* 5 C. & P. 329. p. 1139.
Powell *v.* State, 13 Tex. (App.) 244. p. 933.
Powell *v.* State, 15 Tex. (App.) 411. p. 583.
Powell, Commonwealth *v.* 7 Metc. 601. p. 814.
Powell, R. *v.* 2 Wm. Bl. 787. p. 4.
Powell's Case, 1 Dallas, 47. p. 176.
Pratley, R. *v.* 5 C. & P. 533. p. 422, 578.

Prator *v.* State, 15 Tex. (App.) 363. p. 583.
Pratt, R. *v.* Moo. 250. p. 548.
Pratt, R. *v.* 8 Cox, 334. p. **364.**
Pratt, R. *v.* Dears. 360. pp. **482**, 575.
Pratt, State *v.* 7 Houst. 249. p. 1097.
Pray, Commonwealth *v.* 13 Pick. 359. p. 1137.
Prescott, United States *v.* 2 Biss. 325. p. **118**.
Preston, R. *v.* 1 Den. & P. 351. pp. **436**, 559.
Preston, R. *v.* 2 Den. 353. pp. 433, 434, 435.
Preston R. *v.* 21 U. C. Q. B. 86. p. 93.
Preston's Case. p. 1186.
Preston *v.* State, 8 Tex. (App.) 30. p. 1185.
Price *v.* State, 18 Tex. (App.) 474; 51 Am. Rep. 322. pp. **1095,** 1191.
Price *v.* State. p. 527.
Priestly, State *v.* 74 Mo. 24. p. 904.
Privett, R. *v.* 1 Den. 193. p. 396.
Prowes, R. *v.* 1 Moo. 349. pp. 504, 514.
Pryor's Case, 21 Gratt. 1010. p. 1066.
Pugh *v.* Robinson, 1 T. R. 116. p. 228.
Putnam *v.* Sullivan, 4 Mass. 45; 3 Am. Dec. 206. p. 90.
Pywell, R. *v.* 1 Stark. 402. pp. 141, 142, 364.

Rafferty *v.* People, 69 Ill. 111. p. 1197.
Ragg, R. *v.* 8 Cox, 262. p. 364.
Rainbolt *v.* State, 34 Tex. 287. p. 866.
Randall, Commonwealth *v.* 4 Gray, 36. p. 1137.
Ranney *v.* People, 22 N. Y. 414. pp. **306,** 346, 375.
Ransom *v.* State, 22 Conn. 153. p. 559.
Ravenscroft, R. *v.* R. & R. 160. p. 97.
Ray, Commonwealth *v.* 3 Gray, 441. p. 26.
Read, R. *v.* 14 Cox, 17; L. R. 3 Q. B. Div. 131. p. 464.
Reason, R. *v.* 1 Str. 500. p. 1005.
Rector, People *v.* 19 Wend. 569. pp. 996, 1007, 1008, 1010, 1011, 1033.
Redstrake, State *v.* 39 N. J. (L.) 365. pp. **1**, 64.
Reed *v.* State, 8 Tex. (App.) 40. pp. 559, 615.
Reed, R. *v.* 7 C. & P. 848. pp. 356, 359.
Reid R. *v.* 1 Dears. 257. p. 485.
Reid's Case, Burn. 173. p. 262.
Renshaw, R. *v.* 2 Cox, 285. p. 869.
Reopelle, R. *v.* 20 U. C. Q. B. 260. p. 97.
Respublica *v.* De Longschamps, 1 Dall. 111. pp. 795, 797.
Reynolds *v.* State, 14 Tex. (App.) 427. p. **1161.**
Reynolds R. *v.* 2 Cox, 170. p. 545.
Rhodes *v.* Commonwealth, 12 Wright, 396. p. 1020.
Rhodes *v.* State, 11 Tex. (App.) 563. pp. 1185, 1186, 1189.
Rhodes *v.* State, 1 Cold. 351. p. 904.
Rice *v.* Commonwealth, 100 Pa. St. 28. pp. **759,** 776.
Rice *v.* Commonwealth, 102 Pa. St. 408. p. **764**, 776.
Rice, State *v.* 83 N. C. 661. p. 583.
Rice, United States *v.* 1 Hughes, 560. pp. 1189, 1197.
Richards, R. *v.* 1 Mich 216. p. 377.

Richards, R. *v.* R. & R. 192. pp. 97, 324.
Richardson *v.* State, 34 Tex. 142. p. 1097.
Richardson, R. *v.* 6 C. & P. 336. pp. 647, 650.
Richardson, R. *v.* 1 F. & F. 488. p. 387.
Richels *v.* State, Sneed, 606. p. **866.**
Riddle, United States *v.* 4 Wash. 644. p. 872.
Ridgeway, R. *v.* 3 F. & F. 858. p. 362.
Riebe, State *v.* 27 Minn. 315. pp. 75, 95.
Rielly, R. *v.* Jebb, 51. p. **575.**
Riley, R. *v.* 1 Cox, 98. p. **546.**
Ritson, Queen *v.* L. R. 1 C. C. 200. p. 51.
Roberson, R. *v.* Bell, 34, p. 572.
Roberts *v.* State, 2 Head, 501. p. 386.
Roberts, R. *v.* C. & M. 652. p. 97.
Robertson *v.* State, 10 Tex. (App.) 642. p. 876.
Robertson *v.* State, 3 Tex. (App. 503. p. **109.**
Robertson, State *v.* 30 La. Ann. 340. p. 1104.
Bobertson, United States *v.* 5 Cranch, 38. p. 548.
Robins, R. *v.* Dears. 418. p. 498.
Robinson *v.* Kruse, 29 Ark. 575. p. 482.
Robinson *v.* State, 16 Tex. (App.) 347. p. **1174.**
Robinson *v.* State, 11 Tex. (App.) 403. p. 624.
Robinson *v.* State, 6 Wis. 585. p. 96.
Robinson *v.* State, 12 Mo. 592. p. 957.
Robinson, R. *v.* Bell, 34. p. **454.**
Robinson, R. *v.* Cox, 115. p. 388.
Robinson, State *v.* 73 Mo. 306. pp. **1070**, 1156.
Robinson, State *v.* 12 Mo. 592. p. 954.
Robinson's Case, 3 Chit. 666. p. 177.
Roderigas, People *v.* 49 Cal. 9. pp. **729,** 775.
Roebuck, R. *v.* Dears. & B. 24. pp. 135, 137, 138, 139, 141, 142, 148, 289, 290.
Roebuck, R. *v.* 7 Cox, 126. p. 360.
Rogan, K. *v.* Jebb's Cr. Cas. 62. pp. 699, 718.
Rogers *v.* People, 15 How. Pr. 558. p. 1091.
Rogers *v.* State, 8 Tex. (App.) 401. p. **58.**
Rogers, R. *v.* 8 C. & P. 629. p. 43.
Rogers, R. *v.* 2 Moo. C. C. 85. p. 648.
Roodle *v.* State, 5 Neb. 475. p. **69.**
Roper, State *v.* 2 Dev. (L.) 473; 24 Am. Dec. 268. p. **561.**
Ross, State *v.* 1 Gall. 624. p. 983.
Ross, State *v.* 25 Mo. 426. p. 1116.
Ross *v.* People, 5 Hill, 294. pp. 389, 545.
Rounals, State *v.* 14 La. Ann. 278. p. 515.
Rouse, R. *v.* 4 Cox, 7. p. 97.
Roy *v.* Ferrers, 1 Sid. 278. pp. 72, 73.
Royal, People *v.* 53 Cal. 63. pp. **882,** 897.
Rucker *v.* State, 7 Tex. (App.) 549. p. 1178.
Rudick, R. *v.* 8 C. & P. 237. p. 717.
Ruhl, State *v.* 8 Iowa, 447. pp 728, 772, 775.
Ruhuke, State *v.* 27 Minn. 310. p. 358.
Ruloff *v.* People, 18 N. Y. 179. pp. **939,** 1141.

Rushworth, R. *v.* 1 Stark. 397. p. **97.**
Russell, R. *v.* 1 Leach, 10. p. 98.
Rutherford *v.* Commonwealth, 2 Va. Cas. 141. p. 678.
Rutherford *v.* State, 13 Tex. (App.) 92. p. 869.
Ryan *v.* State, 45 Ga. 128. p. 375.
Rye *v.* State, 8 Tex. (App.) 163. p. 538.

Saddler *v.* State, 12 Tex. (App.) 194. p. **905.**
Safford *v.* People, 1 Park. Cr. 474. pp. 746, 775.
Sainsbury, K. *v.* 7 T. R. 451. p. 809.
Saltillo *v.* State, 16 Tex. (App.) 249. p. **625.**
Samuel *v.* Paine, 1 Doug. 359. p. 820.
Sanchez, People *v.* 24 Cal. 17. pp. **1042,** 1046, 1048, 1156.
Sandys, R. *v.* 1 Cox, 8. p. **876.**
Sanford *v.* State, 12 Tex. (App.) 196. pp. 899, **906.**
Sankey, Commonwealth *v.* 22 Pa. St. 390. p. **90.**
Santello *v.* State, 16 Tex. (App.) 249. p. 583.
Sargent *v.* Courier, 66 Ill. 245. p. 482.
Sargent, R. *v.* 10 Cox, 611. p. **93.**
Satchell *v.* State, 1 Tex. (App.) 438. pp. 110, 358.
Saunders, Queen *v.* Plowd. 473. p. 1005.
Saunders, R. *v.* 2 Strange, 865. p. 227.
Savage, R. *v.* 5 C. & P. 143. p. **546.**
Savage's Case, Styles' Rep. 12. pp. 72, 73.
Saward, R. *v.* 5 Cox, 295. p. **575.**
Scates, State *v.* 6 Jones (N. C.), 420. p. **924.**
Schenault *v.* State, 10 Tex. (App.) 410. pp. 849, 877.
Schenck, People *v.* 2 Johns. 479. pp. 504, 515.
Schindler *v.* State, 15 Tex. (App.) 394. p. 583.
Schlesinger *v.* State, 11 Ohio St. 669. p. 388.
Schmidt, R. *v.* 10 Cox, 172. pp. **653,** 664, 677.
Schoenwald, State *v.* 31 Mo. 152. p. 1027.
Schultz *v.* Hoagland, 85 N. Y. 464. p. 967.
Scircle *v.* Neeves, 47 Ind. 289. p. 864.
Scitz *v.* State, 23 Ala. 42. p. 837.
Scott *v.* People, 62 Barb. 63. pp. **241,** 365.
Scott, People *v.* 6 Mich. 296. p. 786.
Scott, State *v.* 39 Mo. 429. p. 954.
Scott, State *v.* 34 Mo. 424. p. 957.
Scott, State *v.* 12 La. Ann. 274. p. 933.
Scott's Case, 1 Alison Cr. L. 365. p. 261.
Scribble, R. *v.* 1 Leach, 275. p. **581.**
Scully, R. *v.* 1 Cox, 189. p. 559.
Seagler, State *v.* 1 Rich. 30. pp. 399, **542.**
Searle, Commonwealth *v.* 2 Binn, 332. p. 6.
Searing, R. *v.* R. & R. 850. p. 571.
Self, State *v.* 1 Bay, 242. p. 550.
Sellis, R. *v.* 7 C. & P. 850. p. 1139.
Semple's Case, 2 East's P. C. 691. pp. 452, 546.
Seward, State *v.* 42 Mo. 206. p. 1116.
Seymore *v.* State, 12 Tex. (App.) 391. pp. 583, **627.**

Shadbolt, R. *v.* 5 C. & P. 504. p. 697.
Shadle *v.* State, 34 Tex. 572. p. 877.
Shaffer *v.* State, 82 Ind. 223. p. 387.
Shall, People *v.* 9 Cow. 778. pp. 26, 28, 38, 39, **71.**
Sharman, R. *v.* Dears. C. C. 285. pp. 9, 15, 21.
Sharp *v.* State, 6 Tex. (App.) 650. p. 929.
Sharp, State *v.* 71 Mo. 218. p. 1156.
Sharpe, United States *v.* 1 Pet. 131. p. 185.
Shaw, R. *v.* 1 W. Bl. 790. p. 261.
Shea, R. *v.* 7 Cox, 148. p. 559.
Shean, State *v.* 32 Iowa, 88. p. 729.
Shelton *v.* State, 12 Tex. (App.) 513. pp. 583, 621, **628.**
Shepardson, People *v.* 48 Cal. 189. p. 718.
Sheriff, Commonwealth *v.* 3 Brewst. 342. p. **677.**
Shermer, State *v.* 55 Mo. 613. p. 557.
Sherwood, R. *v.* 1 C. & K. 556. p. 1189.
Sherwood, R. *v.* 7 Cox, 270. p. 340.
Sherwood, R. *v.* Dears. & B. 251. pp. 135, 136, 137, 146.
Shinn *v.* State, 64 Ind. 13. pp. **692,** 710, 717.
Shoaf, State *v.* 68 N. C. 378. p. 677.
Shock, State *v.* 68 Mo. 555. pp. **1028,** 1155.
Shovlin *v.* Commonwealth, 106 Pa. St. 369. pp. **809,** 870.
Shurtleff, State *v.* 18 Me. 371. p. 91.
Simmons *v.* Commonwealth, 5 Binn. 617. pp. 504, 515.
Simmons, United States *v.* 96 U. S. 366. pp. 122, 123.
Simonds, Commonwealth *v.* 2 Mass. 163. p. 185.
Simon's Case, 2 East's P. C. 731. p. 704.
Simpson *v.* State, 59 Ala. 1; 31 Am. Rep. 1. pp. **833,** 876.
Simpson *v.* State, 4 Humph. 456. pp. 504, 515.
Simpson, State *v.* 3 Hawks. 620. p. 358.
Sindram's Case, 88 N. Y. 196. p. 1055.
Six Carpenters' Case, 8 Coke, 290. p. 422.
Skeehan, People *v.* 49 Barb. 217. p. 1033.
Skiff *v.* People, 2 Park. Cr. 139. p. 256.
Sloan, State *v.* 47 Mo. 604. p. 1033.
Sloanaker, State *v.* 1 Houst. 62. p. **872.**
Smith *v.* Hunt, 13 Ohio, 260. p. 70.
Smith *v.* McClure, 5 East, 475. p. 332.
Smith *v.* State, 2 Tex. (App.) 477. p. 583.
Smith *v.* State, 35 Tex. 738. p. 559.
Smith *v.* State, 52 Ga. 88. p. 873.
Smith *v.* State, 33 Me. 48; 54 Am. Dec. pp. **981,** 1155.
Smith *v.* State, 18 Ohio St. 420. 98.
Smith *v.* State, 39 Miss. 54. pp. 830, 867.
Smith, Commonwealth *v.* 1 Brewst. 347. p. 358.
Smith, People *v.* 5 Cow. 258. p. 480.
Smith, People *v.* 16 Cal. 280. p. 557.
Smith, State *v.* 32 Me. 369. p. 960.
Smith, State *v.* 43 Me. 369. p. 1039.
Smith, State *v.* 8 Yerg. 150. p. **76.**
Smith, John R. *v.* 2 Den. 449. pp. 333, 337.

Smith, R. *v.* 1 Cox, 10. p. 574.
Smith, R. *v.* 1 Den. & P. 447. p. **466.**
Smith, R. *v.* 1 Den. & P. 44. p. 572.
Smith, R. *v.* 8 C. & P. 173. pp. 696, 860.
Smith, R. *v.* 1 Moo. 473. p. 545.
Smith, R. *v.* 1 Lewin, 301. p. 717.
Smith, R. *v.* Dears. & B. 566. pp. **17,** 67.
Smith, United States *v.* 1 Cranch, 475, 569.
Smith's Case, 2 East's P. C. 783. pp. 699, 718.
Snapp *v.* State, 3 Tex. (App.) 138. p. 937.
Snyder *v.* Commonwealth, 85 Pa. St. 519. p. 734.
Snyder, Re 17 Kas. 542. pp. **149,** 365.
Spears *v.* State, 2 Tex. (App.) 244. p. 866.
Spencer, R. *v.* 3 C. & P. 420. p. 386.
Spicer *v.* People, 11 Bradw. 295. p. 870.
Spinks *v.* State, 8 Tex. (App.) 125. p. 539.
Spirey *v.* State, 26 Ala. 90. pp. 482, 556.
Somers *v.* Pumphrey, 24 Ind. 231. p. 798.
Somerville, Commonwealth *v.* 1 Va. Cas. 163; 5 Am. Dec. 574. p. 871.
Soper, State *v.* 16 Me. 293. p. 726.
South, State *v.* 28 N. J. (L.) 28. p. 550.
Stanfield *v.* State, 43 Tex. 167. p. 826.
Stanley *v.* State, 24 Ohio St. 166. p. **508.**
Starck *v.* State, 63 Ind. 285. pp. 501, **558.**
Starr, State *v.* 38 Mo. 269. p. 1027.
Stearns, People *v.* 21 Wend. 409. pp. 28, 38, 46, 51.
Stephens, K. *v.* 5 East, 257. p. 178.
Sterling, K. *v.* 1 Leach, 117. p. 323.
Stetson, People *v.* 4 Barb. 151. pp. 383, **386.**
Stevens *v.* State, 1 Tex. (App.) 591. p. 1104.
Stevens, R. *v.* 5 East, 244. p. 342.
Stevens, R. *v.* 1 Moo. 409. p. 860.
Stevenson, Commonwealth *v.* 127 Mass. 446. p. 377.
Stewart, State *v.* 29 Mo. 419. p. 838.
Stinson *v.* People, 43 Ill. 397. p. 545.
Stocker, R. *v.* 5 Mod. 137. p. 72.
Stoessiger *v.* R. Co., 3 El. & B. 549. pp. 25, 335.
Stokes, People *v.* 2 N. Y. Crim. Rep. 382. pp. **962,** 1155.
Stone, People *v.* 9 Wend. 182. p. 270.
Stone, People *v.* 16 Cal. 369. p. 557.
Stone, R. *v.* 1 F. & F. 311. p. **375.**
Stone, R. *v.* 1 Leach, 376. p. 580.
Stone, State *v.* 68 Mo. 101. pp. 556, **558.**
Stoyell, State *v.* 54 Me. 24. pp. **723,** 728, 772, 775.
Story, R. *v.* R. & R. 81. pp. 368, 381.
Stuart *v.* People, 73 Ill. 20. p. 530.
Stuyvesant's Case, 4 City Hall Rec. 156. pp. 368, 374, 375.
Snell *v.* State, 50 Ga. 220. p. 557.
Sullivan *v.* People, 1 Park. C. C. 347. p. 1156
Sullivan *v.* State, 44 Wis. 595. p. 828.
Sullivan, State *v.* 85 N. C. 506. p. 769.

Sully, People *v.* 5 Park. Cr. R. 142. p. 156.
Summer, R. *v.* 3 Salk. 194; 2 E. P. C. 668; 15 Serg. & R. 93. p. 413.
Summer, State *v.* 10 Vt. 587; 33 Am. Dec. 219. pp. **309**, 388.
Supt. Phila. Prison, Commonwealth *v.* 9 Phila. 551. p. 577.
Sutton *v.* Madre, 2 Jones, 320. p. 896.
Swain *v.* Cheney, 41 N. H. 235. p. 574
Swans, The Case of, 7 Rep. 15. pp. 455, 456.
Swauner *v.* Swauner, 50 Ala. 66. p. 482.
Sydserff *v.* Queen, 11 Q. B. 245. p. 362.

Tanner *v.* Commonwealth, 14 Gratt. 635. p. 559.
Taplin's Case, 2 East's P. C. 712. p. 704.
Tarpley *v.* People, 42 Ill. 340. p. 877.
Tarrant's Case, 4 Burr. 2106. p. 177.
Tawell's Case, Will's Cr. Ev. 181. p. 946.
Taylor, State *v.* 25 Iowa, 273. p. 527.
Taylor *v.* State, 12 Tex. (App.) 489. pp. 583, 621, **632.**
Taylor *v.* State, 14 Tex. (App.) 340. p. 1178.
Taylor *v.* State, 15 Tex. (App.) 357. p. 583.
Taylor *v.* State, 5 Tex. (App.) 569. p. 643.
Taylor, People *v.* 3 Denio, 91. p. 129.
Taylor's Case. p. 1091.
Tefft *v.* Windsor, 17 Mich. 486; 3 Cr. L. Mag. 838. p. 286.
Terry *v.* Hutchinson, 18 L. T. Rep. (S. C.) 521. p. 770.
Therasson *v.* People, 82 N. Y. 238. pp. **311**, 366.
Titus, Commonwealth *v.* 116 Mass. 42. p. 559.
Thomas *v.* People, 19 Wend, 480. p. 359.
Thomas *v.* People, 34 N. Y. 351. p. 156.
Thomas *v.* State, 40 Tex. 60. p. 625.
Thomas *v.* State, 16 Tex. (App.) 535. pp. **890,** 904.
Thomas, People *v.* 3 Hill, 169. pp. 257, 299, 383, 384.
Thompson *v.* State, 43 Tex. 260. pp. 608, **904,** 908.
Thompson, Commonwealth *v.* 2 Clark, 33. pp. 383.
Thompson, Commonwealth *v.* 108 Mass. 461. p. 1114.
Thompson, People *v.* 2 Johns. Cas. 342. p. 97.
Thompson, R. *v.* 1 Moody, 78. p. **580.**
Thompson, R. *v.* L. & C. 233. pp. **497,** 578.
Thorn, People *v.* 6 L. R. 54. p. 949.
Thorn, R. *v.* C. & M. 206. p. 99.
Thornburg, State *v.* 6 Ired. (L.) 67. p. **80.**
Thornton, R. *v.* p. 556.
Threstle, R. *v.* 2 C. & K. 842. p. 557.
Thurborn, R. *v.* 1 Denison, 387; Temp. & M. 67. pp. **424,** 433, 434, 435, 438, 440, 441, 443, 559, 560.
Thurtell, R. *v.* p. 948.
Tobin, Commonwealth *v.* 2 Brewst. 570. p. 574.
Tomlinson, People *v.* 35 Cal. 503. p. 75.
Tompkins, People *v.* 1 Park. 238. pp. 316, 366.
Toohey, State *v.* MSS. p. 988.
Topolauck *v.* State, 40 Tex. 160. p 899.
Toshack, R. *v.* 1 Den. C. C. 492. pp. 8, 9, 15, 19, 21.

Townley, R. *v.* 12 Cox, 59. p. **458**, 571.
Townley, R. *v.* L. R. 1 C. C. R. 315. pp. 464, 465, 466.
Townsend, State *v.* 5 Har. (Del.) 487. p. 811.
Trafton *v.* State, 5 Tex. (App.) 480 p. 642.
Treadwell *v.* State, 16 Tex. (App.) 560. p. 1180.
Trexler, State *v.* 2 Car. L. Repos. 7 Am. Dec. 90. p. 691.
Triloe, R. *v.* 1 C. & M. 650. p. 914.
Tucker *v.* State, 16 Tex. (App.) 471. pp. **582**, 583.
Turner *v.* State, 16 Tex. (App.) 433. p. 1180.
Turner, R. *v.* 6 C. &. P. 407. p. 580.
Turner, State *v.* 1 Wright, 20. p. 949.
Turner's Case, 1 Raym, 144. p. 961.
Turpin, R. *v.* 2 C. & K. 820. p. 67.
Tyler *v.* People, Breese, 293. p. **560.**
Tyler *v.* State, 2 Humph. 298. p. 365.

Umphrey *v.* State, 63 Ind. 223. pp. 501, 557.
Underwood, State *v.* 49 Me. 181. pp. 512, 515.
Underwood *v.* State, 25 Ala. 70. p. **878.**
Uprichard, Commonwealth *v.* 3 Gray, 484. pp. **501,** 509, 511, 515.

Vale's Case, 2 East C. L. 953 p. 77.
Vance, People *v.* 21 Cal. 400. p. 1074.
Vance, State *v.* 17 Iowa. 138 p. 839.
Vandimark, State *v.* 35 Ark. 396. p. 294.
Vanness *v.* Parckard, 2 Pet. 144. p. 838.
Van Mugen, R. *v.* 1 R. & R. 118. p. **549**, 720.
Van Vechten, People *v.* 2 N. Y. Cr. Rep. 291. p. **870.**
Varner *v.* Spencer, 72 N. C. 381. p. 482.
Vermont & Mass. R. Co., Commonwealth *v.* 108 Mass. 7, p. 1130.
Vickery, State *v.* 19 Tex. 362. p. 375.
Viddetto, Case of, 3 Park. 609. p. 945.
Villareal *v.* State, 26 Tex. 107. p. 1088.
Vincent *v.* State, 10 Tex. (App.) 330. p. 673.
Voight *v.* State, 13 Tex. (App.) 21. p. 583.
Vyse, R. *v.* 1 Moo. 218. pp. 338, 676.

Wade, R. *v.* 1 C. & K. 939. p. 646.
Wade's Case, 2 City H. Rec. 46. p. 93.
Wadsworth, R. *v.* 10 Cox, 557. p. 543.
Wagner, United States *v.* 1 Cranch, 314. p. 569.
Waite *v.* State 13 Tex. (App.) 179. p. 1151.
Waite, Commonwealth *v.* 11 Allen, 204. p. 809.
Wakeling, R. *v.* R. & R. 504. p. 378.
Wakely *v.* Hart, 6 Binn. p. 316. 821.
Walford, R. *v.* Esp. 562. p. 572.
Walker *v.* People, 38 Mich. p. 532.
Walker & Morrod, R. *v.* Dears. 280. pp. **409,** 541.
Walker *v.* State, 13 Tex. (App.) 609. p. 1180.
Walker *v.* State, 23 Ind. 61. p. 167.
Walker *v.* State, 7 Tex. (App.) 245. p. 1185, 1186.

Walker, State *v.* 41 Iowa, 217. pp. **526,** 582.
Wallace *v.* State, 7 Tex. (App.) 570. pp. **914,** 1139.
Wallace *v.* State, 11 Lea, 543. p. **359.**
Walls, R. *v.* 2 C. & K. 214. p. **710.**
Wall's Case, 2 East P. C. 953. pp. 73, 324.
Walne, R. *v.* 11 Cox, 647. p. **376.**
Walsh, R. *v.* 4 Taunt. 281. p. 422.
Walters, R. *v.* 2 Burn's Just. 180. p. 562.
Walton *v.* State, 6 Yerg. 377. p. 93.
Walton, Commonwealth *v.* 7 Brewst. 489. p. 761.
Walton, R. *v.* L. & C. 289. p. **703.**
Walworth, People *v.* 8 Alb. L. J. 19. p. 1156.
Wambough *v.* Shank, Pen. 229. p. 797.
Wammack, State *v.* p. 1082.
Ward *v.* State, 48 Ala. 161. p. 572.
Ward, People *v.* 15 Wend. 231. p. 954.
Ward, R. *v.* 2 Ld. Raym. 1461. pp. 9, 10, 71, 72, 78.
Ward, R. *v.* 2 Str. 747. p. 3.
Ward, State *v.* 7 Baxt. 76. p. 75.
Warner *v.* Commonwealth, 1 Pa. St. 154; 44 Am. Dec. 114. p.p. 565.
Warren *v.* State, 1 G. Greene, 106. p. 527.
Warren, Commonwealth *v.* 6 Mass. 72. p. **357.**
Waterman *v.* People, 67 Ill. 91. p. **78.**
Watkins *v.* State, 60 Miss. 323. p. 550.
Watkins, United States *v.* 3 Cranch, 441. pp. 121, **168.**
Watkin's Case, 2 Moo. p.876.
Watson *v.* State, 36 Miss. 593. p. 512.
Watson, R. *v.* Dears. & B. 348. pp. **302.** 387
Watson, R. *v.* 20 L. J. 18. p. 363.
Watts, R. *v.* R. & R. 436. p. **93.**
Watts, R. *v.* Dears. 327. p. 565.
Wavell, R. *v.* 1 Moo. 224. pp. 351, 353, 373.
Webb *v.* State, 5 Tex. (App.) 596. p. 625.
Webb, R. *v.* Moo. 431. pp. 394, 396, 398, **545.**
Webb, R. *v.* R. & R. 405. pp. 85, **88.**
Webster, Commonwealth *v.* 5 Cush. 310; 52 Am. Dec. 711. pp. 949, 961, 1138, 1189.
Weekes, R. *v.* 10 Cox, 225. p. 541.
Weirerback *v.* Trone, 2 W. & S. 408. p. 358.
Welch *v.* People, 17 Ill. 399. p. 413.
Wellar *v.* People, 30 Mich. 276. pp. **958,** 1155.
Wellington, Commonwealth *v.* 7 Allen, 299. p. 1137.
Wells *v.* State, 4 Tex. (App.) 20. p. 538.
Wells, State *v.* 48 Iowa, 671. p. 734.
Welsh *v.* People, 17 Ill. 339. p. 545.
Welsh *v.* State, 3 Tex. (App.) 422. p. 642.
Wentworth *v.* Portsmouth R. Co., 55 N. H. 540. p. 482.
West *v.* State, 1 Wis. 209. pp. 733, 734.
West, State *v.* 69 Mo. 401. p. 1076.
West, R. *v.* 2 C. & K. 496. pp. 95, 96, 98.
West's Case, 1 D. & B. 575. p. 346.

Weston *v.* United States, 5 Cranch, 492. p. **421.**
Wheatly, R. *v.* 2 Burr. 1125; 1 W. Bl. 273. pp. **100,** 305, 307, 355, 357.
Wheeler, R. *v.* 1 Cox, 106. p. 877.
Wheeler, State *v.* 19 Minn. 98. pp. **25,** 68, 95.
Whitaker *v.* State, 12 Tex. (App.) 436. p. **1157.**
White *v.* Commonwealth, 6 Binn. 183. p. 1019.
White *v.* State, 11 Tex. 769. pp. 375, 389, 559, 620.
White *v.* State, 20 Wis. 236. p. 545.
White, People *v.* 24 Wend. 520. pp. 996, 1007, 1008.
White, R. *v.* 2 C. & K. 404. pp. 54, **81.**
White, R. *v.* 1 Den. 208. p. 42.
Whiteford *v.* Commonwealth, 6 Rand. 721. pp. 1066, 1155.
Whitney *v.* State, 10 Ind. 404. p. 167.
Whyte, R. *v.* 5 Cox, 290. p. 89.
Wieners, State *v.* 66 Mo. 11. pp. 1071, 1074, 1075, 1081.
Wilcox, R. *v.* R. & R. 50. p. 26.
Wilders, R. *v.* pp. 102, 103.
Wiley, R. *v.* 1 Den. & P. 43. pp. **643,** 677.
Wilkerson, R. *v.* 1 R. & R. 470. pp. 482, 544.
Wilkerson, State *v.* 72 N. C. 378. pp. 584, 620.
Willets *v.* Buffalo, etc., R. Co., 14 Barb. 585. p. 814.
Williams *v.* Dawson. p. 820.
Williams *v.* State, 2 Tex. (App.) 171. p. 933.
Williams *v.* State, 7 Tex. (App.) 163. p. 625.
Williams *v.* State, 15 Tex. (App.) 622. p. 1196.
Williams *v.* State, 12 Tex. (App.) 240. p. **714.**
Williams *v.* State, 51 Ga. 535. p. 68.
Williams, People *v.* 4 Hill, 9. pp. 383, **385.**
Williams, R. *v.* 32 Eng. C. L. R. 524. p. 881.
Williams, R. *v.* 1 Leach, 134. p. 97.
Williams, R. *v.* 7 Cox, 355. p. 545.
Williams, R. *v.* 7 C. & P. 354. pp. 257, 299, **383.**
Williamson, R. *v.* 11 Cox, 328. p. **363.**
Willis *v.* People, 19 Hun. 84. p. 375.
Willis *v.* People, 1 Scam. 401. p. 916.
Willis *v.* State. 15 Tex. (App.) 118. p. 583.
Willson, State *v.* 28 Minn. 52. pp. **52,** 81.
Wilner, State *v.* 66 Mo. 11. p. 1031.
Wilson *v.* People, 24 Mich. 410. p. 786.
Wilson *v.* People, 1 Cow. Cr. Rep. 149. p. 557.
Wilson *v.* People, 39 N. Y. 459. pp. 450, 556.
Wilson *v.* Sproul, 3 P. & W. 49. p. 734.
Wilson *v.* State, 1 Port. 126. pp. 389, 413, 545.
Wilson *v.* State, 45 Tex. 76. p. 642.
Wilson *v.* State, 3 Tex. (App.) 64. pp. 710, 715.
Wilson *v.* State, 12 Tex. (App.) 48. pp. 596, **639,** 677.
Wilson, Commonwealth *v.* 1 Phila. 80. p. 550.
Wilson, R. *v.* 8 C. & P. 111. p. 545.
Wilson, State *v.* 2 Const. 135. p. 358.
Wilson, Case of, 3 Park. 207. p. 945.
Wingo, State *v.* 89 Ind. 204. p. **499.**
Winthrop, State *v.* 43 Iowa, 519. pp. **911,** 1139.

Wisdom's Case, 8 Port. 507. p. 400.
Wiserman *v.* Vandepertt, 2 Vern. 203. p. 268.
Witchell's Case, 2 East's P. C. 830. p. 262.
Witt *v.* State, 9 Mo. 761. p. 548.
Wittkomksy *v.* Watson, 71 N. C. 451. p. 896.
Wolf *v.* State, 19 Ohio St. 248. p. 811.
Wolf *v.* State, 41 Ala. 412. pp. 399, **542**.
Wolf *v.* State, 14 Tex. (App.) 210. pp. 588, **632**.
Womack *v.* State, 16 Tex. (App.) 179. p. **633**.
Wong Ah You, People *v.* 6 West Coast Rep. 438. p. **522**.
Wood *v.* State, 48 Ga. 192. p. **777**.
Wood, R. *v.* 4 C. & P. 381. pp. 696, 877.
Wood, R. *v.* 1 Moo. 578. p. 877.
Wood, R. *v.* 8 Cox, 453. pp. 424, 443.
Wood, R. *v.* 1 F. & F. 497. p. **677**.
Wood, State *v.* 46 Iowa, 116. p. 450.
Woodbury *v.* State, 69 Ala. 515. p. 370.
Woodfall, R. *v.* 5 Burr. 2666. p. 190.
Woodman, R. *v.* 14 Cox, 179. p. **380**.
Woodrun, Commonwealth *v.* 4 Clarke, 362. p. 355.
Woodward, People *v.* 31 Hun, 57. pp. **478**, 574.
Woodword's Case, Leach, Cr. L. 783. p. 57.
Woolaver, State *v.* 77 Mo. 103. p. 780.
Woolroth *v.* Meadows, 5 East, 463. p. 178.
Worcester, Commonwealth *v.* 3 Pick. 462. p. 809.
Worrell's Case, Trem. P. C. 106. p. 15.
Wright *v.* People, 33 Mich. 301. p. 788.
Wright *v.* Lawes, 4 Esp. 82. p. 268.
Wright *v.* Rainscot, 1 Wm. Saund. 83. p. 455.
Wright *v.* State, 4 Humph. 194. p. 767.
Wright *v.* State, 5 Yerg. 154. pp. 450, 672.
Wright, R. *v.* 4 F. & F. 967. p. 720, 899.
Wright's Case, 75 Va. 914. p. 1066.
Wrigley, People *v.* 1 Lew. 171. p. **1140**.
Wyat *v.* Aland, 1 Salk. 325. p. 178.
Wycherley, R. *v.* 8 C. & P. 263. p. 1114.
Wynn's Case, 1 Leach, 413. p. 440.

Yarrington, R. *v.* 1 Salk. 406. p. 72.
Yates *v.* State, 37 Tex. 202. pp. **527**, 582.
Yates, R. *v.* 1 Moody, 170. p. 388.
York, R. *v.* 2 C. & K. 841; 1 Den. 343. p. **564**.
York, R. *v.* 1 Den. 335; 3 Cox Cr. 181. p. 402.
York, State *v.* 5 Harr. 473, p. 553.
York's Case, 9 Metc. 93. pp. 993, 994.
Young *v.* K., 3 T. R. 106. pp. 158, 185, 194, 271, 273, 308, 367, 368, 422.
Young, R. *v.* 10 Cox, 371. p. **1197**.
Young, State *v.* 46 N. H. 266. pp. **43**, 54, 81.
Young, State *v.* 76 N. C. 258. p. 359.

Zink *v.* People, 77 N. Y. 114. p. 548.
Zsehocke *v.* People, 62 Ill. 127. pp. **486**, 575.

# TABLE OF CONTENTS.

---

## CHAPTER VII.

### Crimes against the Property of Individuals (Continued).

---

### PART I.

#### Forgery.

PAGE

Forgery — Intent to Defraud Essential. *State* v. *Redstrake*, 39 N. J. (L.) 365 . . . . . 1
Forgery — Intent to Defraud some One Essential — College Diploma. *R.* v. *Hodgson*, D. & B. 3 . . . . . 7
Forgery — Must be of some Document or Writing — Artist's Name on Painting. *R.* v. *Closs*, D. & B. 460 . . . . . 12
Forgery — Counterfeiting Printed Wrappers. *R.* v. *Smith*, D. & B. 566 . 17
Forgery — Bill of Exchange — Inchoate Instrument. *R.* v. *Harper*, 14 Cox, 574 . . . . . 23
Forgery — Instrument Must be Valid — What is an "Accountable Receipt." *State* v. *Wheeler*, 19 Minn. 98 . . . . . 25
Forgery — Paper whose Purpose has been Satisfied. *People* v. *Fitch*, 1 Wend. 198 . . . . . 29
Forgery — Fictitious Decree of Court. *Brown* v. *People*, 86 Ill. 239 . . 31
Forgery — Seal of Court — Instrument Forged Must be Apparently Valid. *Fadner* v. *People*, 2 N. Y. Cr. Rep. 553 . . . . . 34
Forgery — Must Purport to be Act of Another — Fictitious Name. *Commonwealth* v. *Baldwin*, 11 Gray, 197 . . . . . 40
Forgery — Instrument Must Purport to be Act of Another. *State* v. *Young*, 46 N. H. 266 . . . . . 43
Forgery — Unauthorized County Bonds. *People* v. *Mann*, 75 N. Y. 484 . 50
Forgery — False Assumption of Authority. *State* v. *Wilson*, 28 Minn. 52 . 52
Forgery — Inducing Person to Sign Paper by Fraud. *Hill* v. *State*, 1 Yerg. 76 . . . . . 56
Forgery — Public Writings. *Rogers* v. *State*, 8 Tex. (App.) 401 . . . . 58
Forgery — No Presumption of Guilt from Uttering. *Miller* v. *State*, 51 Ind. 405 . . . . . 62

#### NOTES.

Section 405. Forgery — Intent to Defraud Essential . . . . . 64
406. —— Must be of some "Document" . . . . . 67
407. —— Incomplete Instrument . . . . . 67

PAGE

SECTION 408. —— Instrument Must be Valid on its Face . . . . . 68
408a. —— Instrument Void on its Face — Deed of Married Woman without Acknowledgment . . . . . . . . . 69
409. —— Instrument Void on its Face — Promise to Pay sum in Labor . . . . . . . . . . . . 71
410. —— Some one Must be Injured . . . . . . . 75
411. —— Letter of Introduction . . . . . . . . 78
412. —— False Certificate of Character . . . . . . 78
413. —— False "Making" Necessary . . . . . . . 80
414. —— Instrument Must Purport to be act of Another . . 81
415. —— False Assumption of Authority . . . . . . 81
416. —— "Uttering" . . . . . . . . . . 85
417. —— Fictitious Name . . . . . . . . . 85
418. —— Inducing one to Sign Note for Larger Sum . . . 90
419. —— Inducing one to Assent to Alteration . . . . . 91
420. —— Drawing Check on Bank — No Money There . . . 92
421. —— Passing Counterfeit Money . . . . . . . 92
422. —— Falsely attesting Voting Papers . . . . . . 92
423. —— Cutting Pieces out of Bank-Notes . . . . . . 93
424. —— What is not Forgery — Other Illustrations . . 93
425. —— Partnership . . . . . . . . . . . 95
426. —— Injury Must not be too Remote . . . . . 95
427. —— "Accountable Receipt" . . . . . . . . . 95
428. —— "Acquaintance" . . . . . . . . . . 96
429. —— "Bank Bills" . . . . . . . . . . . 96
430. —— "Bill of Exchange" . . . . . . . . . 96
431. —— "Deed" . . . . . . . . . . . . 96
432. —— "Order for the Delivery of Goods . . . . . . 96
433. —— "Order for the Payment of Money" . . . . . 97
434. —— "Promissory Note" . . . . . . . . . 98
435. —— "Receipt for Money" — "Receipt" . . . . . 98
436. —— "Record" . . . . . . . . . . . 98
437. —— "Shares" . . . . . . . . . . . 98
438. —— "Undertaking" — "Warrant" . . . . . . 99
439. —— No Presumption of Guilt from Uttering . . . . 99
440. —— Evidence held Insufficient . . . . . . . 99

---

## PART II.

### FRAUD AND FALSE PRETENSES.

Fraud — Private Injury — Injury to be Indictable at Common Law Must be Public. *R.* v. *Wheatly*, 2 Burr. 1125 . . . . . . . . 100
Fraudulent Disposition of Mortgaged Property. *Hardeman* v. *State*, 16 Tex. (App.) 1 . . . . . . . . . . . . . . . 104
Fraudulent Disposition of Mortgaged Property. *Robertson* v. *State*, 3 Tex. (App.) 502 . . . . . . . . . . . . . . . 109

PAGE

Fraud — Bankrupt Act — Intent to Defraud Creditors by Making False Entries — Intent to Defraud Essential. *R.* v. *Ingham*, Bell, C. C. 181. 111

False Pretenses — Matters of Opinion. *People* v. *Jacobs*, 35 Mich. 36 . 115

Fraud — Obtaining Goods with Intent to Defraud — Bankrupt Act. *United States* v. *Prescott*, 2 Biss. 325 . . . . . . . . . . . 118

Fraud — Means of Effecting Fraud must be Shown. *United States* v. *Goggin*, 9 Biss. 769. . . . . . . . . . . . . . . . . 120

Fraud — Charge that Act was done "by Fraudulent Means" Insufficient. *United States* v. *Bettilini*, 1 Woods, 64 . . . . . . . . 124

False Pretenses — Attempt to Defraud not Indictable. *United States* v. *Henning* . . . . . . . . . . . . . . . . 129

False Pretenses — Matter of Opinion — Untrue Puffing of Quality of Goods. *R.* v. *Bryan*, D. & B. 265 . . . . . . . . . . . 134

False Pretenses — Delusive Promise — False Pretense Turning out True — Promise as to Future Event. *Re Snyder*, 17 Kas. 542 . . . . 149

False Pretenses — Truth of Pretense. *State* v. *Lurch*, 6 W. C. Rep. 110 . 159

False Pretenses — Requisites of Indictment — No Injury Done — Future Event. *Keller* v. *State*, 51 Ind. 111 . . . . . . . . 162

False Pretenses — Requisites of Indictment — Public and Private Frauds — Deceits — Injury — Indictment — Limitations — Demurrer — Leave to Withdraw. *United States* v. *Watkins*, 3 Cranch, C. C. 441 . . 168

False Pretenses — Agent and Principal Colluding as to Price of Lands — Motive. *Scott* v. *People*, 62 Barb. 63 . . . . . . . . 241

False Pretenses — Prisoner must know that Pretense is False. *R.* v. *Burrows*, 11 Cox, 258. . . . . . . . . . . . . . . 245

False Pretenses — Intent to Defraud Essential — Prosecutor must Rely on Representations. *Fay* v. *Commonwealth*, 28 Gratt. 912. . . . . 248

False Pretenses — Crime not Committed where no Property Obtained. *State* v. *Anderson*, 47 Iowa, 142. . . . . . . . . . . 254

False Pretenses — Money must be Obtained — Obtaining Consent to Judgment. *Commonwealth* v. *Harkins*, 128 Mass. 79. . . . . . . 256

False Pretenses — False Representation Must be made before Delivery of Goods. *People* v. *Haynes*, 14 Wend. 546. . . . . . . . . 258

False Pretenses — Obtaining Charitable Donation. *People* v. *Clough*, 17 Wend. 351. . . . . . . . . . . . . . . . . 276

False Pretenses — Must be of Existing Fact. *R.* v. *Henshaw*, L. & C. 444. 279

False Pretenses — Procuring Note by Fraud — Future Fact. *Commonwealth* v. *Moore*, 99 Pa. St. 570. . . . . . . . . . . . 283

Swindling — Representation Must not be as to Future Events. *Allen* v. *State*, 16 Tex. (App.) 150. . . . . . . . . . . . 285

False Pretenses — Remoteness of Pretense. *R.* v. *Gardner*, D. & B. 40. . 287

False Pretenses — Property Must be Obtained — Remote Cause. *Morgan* v. *State*, 42 Ark. 131. . . . . . . . . . . . . . 291

False Pretenses — Obtaining Money Rightfully Due. *Commonwealth* v. *McDuffy*, 126 Mass. 467. . . . . . . . . . . . . 296

False Pretenses — Ordinary Pretense Required of Prosecutor. *Commonwealth* v. *Grady*, 13 Bush, 255. . . . . . . . . . . 300

False Pretenses — Money Must be Parted with — Partnership. *R.* v. *Watson*, D. & B. 348. . . . . . . . . . . . . . . 302

Indictable Frauds at Common Law. *People* v. *Babcock*, 7 Johns. 201. . 304

PAGE

Indictable Frauds — New York Statute — False Pretenses. *Ranney* v. *People*, 22 N. Y. 414. . . . . . 306

False Pretenses — Not Indictable as "other Fraudulent, Swindling or Deceitful Practices." *State* v. *Sumner*, 10 Vt. 587. . . . . 309

False Pretenses — Prosecutor must be Influenced by Representations — No Inference of this from other Facts. *Therasson* v. *People*, 82 N. Y. 238. . . . . . 311

False Pretenses — Money Obtained by Partner from Firm. *R.* v. *Evans*, 9 Cox, 238. . . . . . 314

False Pretenses — Obtaining Money — False or Bogus Checks — Confidence Game. *Pierce* v. *People*, 81 Ill. 98. . . . . . 318

False Pretenses — Act Must Work Prejudice to Some One. *People* v. *Galloway*, 17 Wend. 540. . . . . . 322

False Pretenses — Indictment — Existing and Future Fact. *Commonwealth* v. *Stevenson*, 127 Mass. 446. . . . . . 324

False Pretenses — Valuable Security — Property in Chattel. *R.* v. *Danger*, D. & B. 307. . . . . . 328

False Pretenses — False Statement as to Intention — Future Fact. *People* v. *Blanchard*, 90 N. Y. 314. . . . . . 339

False Pretenses — Prisoner must be Benefited by Act. *R.* v. *Garrett*, Dears. 232. . . . . . 347

NOTES.

SECTION 441. Fraud to be Indictable at Common Law Must Injure Public . 355
442. Fraud — Selling Mortgaged Property . . . . . 358
443. —— Removing Goods With Intent to Defraud . . . 358
343*a*. —— Fraudulent Intent . . . . . 358
443*b*. —— Persons with Debts not due not "Creditors" . . 358
443*c*. —— Removing Property with Intent to Prevent a Levy . 358
444. —— Removing Nuisance . . . . . 359
445. False Pretenses — Breach of Contract not Indictable . . 359
446. —— Puffing Goods — Opinion . . . . . 359
447. —— Value of Business . . . . . 363
448. —— False Warranty Not . . . . . 364
449. —— Pretense Must be False . . . . . 365
450. —— False Pretense turning out True . . . . . 365
451. —— Prisoner Must Know Pretense is False . . . . 366
452. —— Representations Must be Relied on . . . . . 366
453. —— Intent Must be to Deprive Owner of Property . . 371
454. —— Money or Property Must be Obtained . . . . 373
455. —— Obtaining Satisfaction of Debt . . . . . 373
456. —— Representations Made Subsequently . . . . 374
457. —— Obtaining Charitable Donation . . . . . 374
458. —— Property Must be Obtained by Means of Pretense . . 374
459. —— Pretense Must be Made with Design of Obtaining Property . . . . . 374
460. —— Owner Must Intend to Part with Property . . . 375
461. —— Prisoner Must have Received Property . . . . 375
462. —— Object of Pretense Must be as Charged . . . . 375

PAGE

SECTION 463. —— Pretense Must be of Existing Fact . . . . . 375
464. —— Assertion of Existing Intention Insufficient . . . 377
465. —— Remoteness of Pretense . . . . . . . . . 378
466. —— Direct Promise Must be Proved . . . . . . 380
467. —— Inference of Pretense from Conduct . . . . . 381
467*a*. —— Protection Afforded only to Honesty . . . . . 382
468. —— Merely Obtaining One's Own Not . . . . . . 383
469. —— Person Deceived Must have Used Ordinary Prudence . 385
470. —— Passing Counterfeit Money . . . . . . . . 386
471. —— Passing Bank-Note of Bankrupt Bank . . . . . 386
472. —— What not False Pretenses — Illustrations . . . 386
473. —— Partnership Affairs . . . . . . . . . . 387
474. —— "False Token or Writing" . . . . . . . . 387
475. —— "False Writing" . . . . . . . . . . . 387
476. —— "Fraudulent, Swindling or Deceitful Practices" . . 387
477. —— "Money" . . . . . . . . . . . . . 388
478. —— "Money, Goods or Other Property" . . . . . 388
479. —— "Valuable Security" . . . . . . . . . . 388
480. —— "Written Instrument" . . . . . . . . . 388
481. —— Swindling and Theft under Texas Code . . . . 388
482. —— Swindling under Texas Code . . . . . . . 389

---

## PART III.

### LARCENY.

Larceny — Taking of Property Essential. *R.* v. *Poole*, Dears. & B. 345 . . . . . . . . . . . . . . . . . . 393
Larceny — Taking — Deprivation of Property Must be Permanent, not Temporary. *R.* v. *Holloway*, 2 C. & K. 943 . . . . . . . . 395
Larceny — Caption and Asportation Necessary. *Edmonds* v. *State*, 70 Ala. 8 . . . . . . . . . . . . . . . . . . 398
Larceny — Insufficient Taking. *R.* v. *Gardner*, L. & C. 243 . . . . 401
Larceny — Taking Essential. *McAfee* v. *State*, 14 Tex. (App.) 668 . . 403
Larceny — Evidence of Taking Essential. *R* v. *Walker*, Dears. 280 . . 409
Larceny — Owner Intending to Part with Property by Fraud. *Kellogg* v. *State*, 26 Ohio St. 15 . . . . . . . . . . . . . . 411
Larceny — Intent to Steal Must be Found by Jury. *R.* v. *Deering*, 11 Cox, 289 . . . . . . . . . . . . . . . . . . 415
Larceny — Intent to Steal Essential — Taking Goods From Officer. *Commonwealth* v. *Green*, 111 Mass. 392 . . . . . . . . . . 418
Larceny — Felonious Intent Necessary. *Johnson* v. *State*, 36 Tex. 375. . 419
Larceny — *Animus Furandi* Must be Proved. *Weston* v. *United States* 5 Cranch, C. C. 492 . . . . . . . . . . . . . . . 421
Larceny — Finder of Goods on Highway — Lost Bank-Note. *R.* v. *Thurborn*, 1 Den. 387 . . . . . . . . . . . . . . . 424
Larceny — Felonious Intent at the Time of Finding. *R.* v. *Christopher*, Bell, C. C. 27 . . . . . . . . . . . . . . . . 432

PAGE

Larceny — Finder — Intent Formed Subsequently. *R.* v. *Preston*, 1 Den. & P. 351 . . . . . . . . . . . . . . . . 436

Larceny — Lost Bank-Note — Finder. *R.* v. *Knight*, 12 Cox, 162 . . . . 441

Larceny — Finder — Subsequent Intent. *People* v. *Anderson*, 14 Johns. 294. 445

Larceny — Finder. *State* v. *Dean*, 49 Iowa, 73 . . . . . . . . 448

Larceny — Subsequent Conversion of Hired Property. *Hill* v. *State*, 57 Wis. 377 . . . . . . . . . . . . . . . . 450

Larceny—Dogs not Subject of — Nor are They "Chattels." *R.* v. *Robinson*, Bell, 34 . . . . . . . . . . . . . . . . 454

Larceny — Dogs not Subject of Larceny. *State* v. *Lymus*, 26 Ohio St. 400 . 456

Larceny — Animals. *R.* v. *Townley*, 12 Cox, 59 . . . . . . . . 458

Larceny — Wild Animals — Possession. *R.* v. *Petch*, 14 Cox, 116 . . . . 463

Larceny — Prosecutor Must Have Possession of and Property in Goods. *R.* v. *Smith*, 1 Den. & P. 447 . . . . . . . . . . . 466

Larceny — Prosecutor Must Have Property in Goods. *McNair* v. *State*, 14 Tex. (App.) 18 . . . . . . . . . . . . . . 469

Larceny — Stealing Coffins — Criterion of Value. *State* v. *Doepke*, 68 Mo. 208 . . . . . . . . . . . . . . . . 474

Larceny — *Lucri Causa* Essential. *People* v. *Woodward*, 31 Hun, 57 . . 478

Larceny — Joint Ownership of Property. *Bell* v. *State*, 7 Tex. (App.) 25 . 480

Larceny — One in Unlawful Possession of Goods. *R.* v. *Pratt*, Dears. 360 . 482

Larceny — Constable Converting Proceeds of Sale — Bailee. *Zschocke* v. *State*, 62 Ill. 127 . . . . . . . . . . . . . . 486

Larceny by Bailee. *Krause* v. *Commonwealth*, 93 Pa. St. 418 . . . . 488

Larceny — Master and Servant. *R.* v. *Barnes*, 10 Cox, 255 . . . . . 491

Larceny — Money Obtained by Fraud — Altering Books. *R.* v. *Green*, Dears. 323 . . . . . . . . . . . . . . . . 494

Larceny — False Representation by Servant to Obtain Property. *R.* v. *Thompson*, L. & C. 233 . . . . . . . . . . . . . 497

Larceny — Farm Hand — Servant. *State* v. *Wingo*, 89 Ind. 204 . . . 499

Larceny — Property Stolen in Foreign Country and Brought into State. *Commonwealth* v. *Uprichard*, 3 Gray, 434 . . . . . . . . 501

Larceny — Bringing into State Property Stolen in Foreign Country. *Stanley* v. *State*, 24 Ohio St. 166 . . . . . . . . . . . 508

Larceny from House — Property Outside of Store. *Martinez* v. *State*, 41 Tex. 126 . . . . . . . . . . . . . . . . 517

Larceny from House — Property Outside of Warehouse. *Middleton* v. *State*, 53 Ga. 248 . . . . . . . . . . . . . . . . 195

Larceny from the Person — Simple Larceny. *King* v. *State*, 54 Ga. 184 . 520

Grand Larceny — Insufficiency of Evidence. *People* v. *Wong Ah You*, 6 West Coast Rep. 438 . . . . . . . . . . . . . 522

Larceny — Possession of Stolen Property. *State* v. *Graves*, 72 N. C. 182 . 523

Larceny — Effect of Recent Possession. *State* v. *Walker*, 41 Ia. 217 . . 426

Larceny — Effect of Recent Possession. *Yates* v. *State*, 37 Tex. 202 . . 527

Larceny — Effect of Recent Possession. *People* v. *Noregea*, 48 Cal. 123 . 529

Larceny — Possession of Stolen Property. *Galloway* v. *State*, 41 Tex. 289 . . . . . . . . . . . . . . . . . 530

Larceny — Possession of Stolen Property. *Gablick* v. *People*, 40 Mich. 292 . . . . . . . . . . . . . . . . . 531

PAGE

Larceny — Presumption from Posesssion of Recently Stolen Property. *State* *Hale*, 7 West Coast Rep. 141 . . . . . . . . . . . . 532

Larceny — Voluntary Return of Stolen Property. *Allen* v. *State*. 12 Tex. (App.) 190 . . . . . . . . . . . . . . . 534

Larceny — Voluntary Return of Property. *Bird* v. *State*, 16 Tex. (App.) 528 . . . . . . . . . . . . . . . . 536

NOTES.

SECTION 483. Larceny — Taking Necessary — Property Must be Removed . 541

484. —— Goods Must be Taken — Changing Piles of Ore or Manfactured Property . . . . . . . . . . . 544

485. —— Purchasing Property from Thief . . . . . . 544

486. —— Property Must be Converted by Prisoner . . . 543

487. —— Must be Against Will of Owner . . . . . 545

488. —— Property Parted with through Fraud . . . 547

489. —— Intent to Steal Essential . . . . . . . . 548

490. —— Goods Must be Taken with Intent to Appropriate Them to Prisoner's Own Use . . . . . . . . . . 549

491. —— Open Taking . . . . . . . . . . 550

492. —— Intent to Use and Return Property . . . . . 550

493. —— Taking Horse with Intent to Return It . . . . 550

494. —— Intent to Steal Essential — Other Motives — Alarm . 553

495. —— Aiding to Escape . . . . . . . . . . 553

496 —— Taking in a Joke . . . . . . . . . 553

497. —— To Induce Criminal Connection . . . . . 554

498. —— Taking Part of Goods Seized on Execution . . . 554

499. —— Servant Giving away Goods in Charity . . . . 554

500. —— Intent to Deprive Owner of Property Permanently Necessary . . . . . . . . . . . . . . 555

501. —— Intent Must Exist at Time of Taking . . . . . 556

502. —— Lost Goods — Finder not Guilty of Larceny . . . 559

503. —— Finder Keeping Goods till Reward Offered . . . 565

504. —— What not Subjects of Larceny — Choses in Action . 565

505. —— Bank-Notes . . . . . . . . . . . 565

506. —— Railroad Ticket . . . . . . . . . . . 565

507. —— Bills of Exchange . . . . . . . . . 565

508. —— Bills of Exchange — Order for Payment of Money — Property not in Prosecutor . . . . . . . . . 566

509. —— "Goods and Chattels" . . . . . . . . . 568

510. —— "Lawful Money of the United States" . . . . 568

511. —— "Money" . . . . . . . . . . . . 568

512. —— "Money, Goods, Wares or Merchandise" . . . . 568

513. —— "Order for the Payment of Money"— "Certificate for the Payment of Money"— "Public Security" . . . 568

514. —— "Personal Goods" . . . . . . . . . . 568

515. —— "Promissory Notes" . . . . . . . . . 568

516. —— "Direction in Writing" . . . . . . . . 568

517. —— Things attached to or Savoring of Realty . . . 569

PAGE

SECTION 518. —— Nuggets of Gold . . . . . . . . 569
519. —— "Sea Weed" . . . . . . . . . . . 570
520. —— "Personal Property," . . . . . . . . 570
521. —— Things Savoring of Realty — Severance and Asportation must be Different Acts . . . . . . . . . . 570
522. —— Animals not Subjects of Larceny — Ferrets . . . 571
523. —— "Cow, Sheep or Other Animal" . . . . . . 571
524. —— "Doves" . . . . . . . . . . . . 571
525. —— "Dogs" . . . . . . . . . . . . 572
526. —— "Personal Goods" . . . . . . . . . 572
527. —— "Horse" — "Filly" . . . . . . . . 572
528. —— Oysters . . . . . . . . . . . . 572
529. —— Other Fish . . . . . . . . . . . 572
530. —— Sheep . . . . . . . . . . . . 572
531. —— Prosecutor Must Have Property in Goods . . . 572
532. —— Thing Must have some Value . . . . . . 572
533. —— Opening Letter Addressed to Another . . . . 572
534. —— Writing Containing Evidence of any Existing Debt — Value of Newspaper List of Subscribers . . . . 573
535. —— *Lucri Causa* Essential . . . . . . . . 574
536. —— No Larceny of One's Own Property . . . . 574
537. —— Tenant in Common or Joint Owner . . . . 574
538. —— Person Having Lawful Possession of Property . . 575
539. —— Bailee . . . . . . . . . . . . 575
540. —— Bailee Failing to Account . . . . . . . 577
541. —— Meaning of Bailment . . . . . . . . 577
542. —— Common Carrier . . . . . . . . . 578
543. —— Carrier of Goods for Hire . . . . . . . 578
544. —— Servant . . . . . . . . . . . . 578
545. —— Stealing "In a Building" . . . . . . . 579
546. —— Stealing from "Dwelling-House" . . . . . . 580
547. —— "In a Dwelling-House" . . . . . . . . 580
548. —— "Dwelling-House" . . . . . . . . . 580
549. —— "Ground Adjoining a Dwelling-House" . . . 580
550. —— Larceny from a House . . . . . . . . 580
551. —— "Shop" . . . . . . . . . . . . 580
552. —— "Warehouse" — "Granary" . . . . . . 580
553. —— Stealing from the Person — Property Must be Completely Removed . . . . . . . . . . . . 580
554. —— Stealing "Privately from the Person" . . . . 581
555. —— Receiving Stolen Goods . . . . . . . . 581
556. —— Possession of Recently Stolen Property . . . . 581
557. —— Erroneous Charge . . . . . . . . . 582
558. —— "Voluntary Return of Stolen Property" . . . 583
559. —— Evidence Held Insufficient . . . . . . . 583
560. —— Casas *v.* State . . . . . . . . . . 583
561. —— Cook *v.* State . . . . . . . . . . 586
562. —— Crockett *v.* State . . . . . . . . . 589
563. —— Deering *v.* State . . . . . . . . . 590
564. —— Dresch *v.* State . . . . . . . . . 594

PAGE

565. —— Green *v.* State . . . . . . . . . . . . 597
566. —— Hammell *v.* State . . . . . . . . . . 600
567. —— Hardeman *v.* State . . . . . . . . . 602
568. —— Harrison *v.* State . . . . . . . . . . 604
569. —— Johnson *v.* State . . . . . . . . . . 606
570. —— Johnson *v.* State . . . . . . . . . . 608
571. —— Knutson *v.* State . . . . . . . . . . 612
572. —— Madison *v.* State . . . . . . . . . . 616
573. —— Martinez *v.* State . . . . . . . . . . 621
574. —— Pettigrew *v.* State . . . . . . . . . 625
575. —— Saltillo *v.* State . . . . . . . . . . 625
576. —— Seymore *v.* State . . . . . . . . . . 627
577. —— Shelton *v.* State . . . . . . . . . . 628
578. —— Taylor *v.* State . . . . . . . . . . 632
579. —— Wolf *v.* State. . . . . . . . . . . 633
580. —— Womack *v.* State . . . . . . . . . . 633

---

## PART IV.

### Receiving Stolen Property.

Receiving Stolen Property — Elements of the Crime. *Wilson* v. *State*, 12 Tex. (App.) 48 . . . . . . . . . . . . . . . 639
Receiving Stolen Property — Prisoner must Have Possession of the Property. *R.* v. *Wiley*, 1 D. & P. 43 . . . . . . . . . . . 643
Receiving Stolen Property — Stoppage *in Transitu* from Thief to Owner. *R.* v. *Schmidt*, 10 Cox, 172 . . . . . . . . . . . . 653
Receiving Stolen Property — Restoration to Owner Between Stealing and Receiving. *R.* v. *Dolan*, 6 Cox, 449 . . . . . . . . . 658
Receiving Stolen Property — Property Received must be Stolen. *United States* v. *DeBare*, 6 Biss. 358 . . . . . . . . . . . 662
Receiving Stolen Goods — Concealment — Intent — Proof Necessary. *Aldrich* v. *People*, 101 Ill. 16 . . . . . . . . . . . . 665
Receiving Embezzled Property. *Leal* v. *State*, 12 Tex. App. 279 . . . 671
Receiving Stolen Property — Bank-Notes not Goods and Chattels. *State* v. *Calvin*, 22 N. J. (L.) 207 . . . . . . . . . . . . 674

### NOTES.

Section 581. Receiving Stolen Property — Goods Must be Stolen . . 677
582. —— Receiving Embezzled Property . . . . . 677
583. —— Goods must be Actually in Prisoner's Possession . . 677
584. —— Stoppage *in Transitu* Before Receipt . . . . 677
585. —— Knowledge Essential . . . . . . . . 677
586. —— Stealer not Receiver . . . . . . . . . 678
587. —— Principal and Accessory . . . . . . . . 678
588. —— "Goods" Bank-Notes . . . . . . . . 678
588*a*. —— Property Stolen from Mails . . . . . . . 678

## PART V.

### ROBBERY.

PAGE

Robbery — Force and Violence Essential. *McCloskey* v. *People*, 5 Park. 299 684
Robbery — Use of Force Necessary — Or Terror. *State* v. *John*, 5 Jones (L.), 163 . . . . . 687
Robbery — Violence Essential — Snatching from Hand — Subsequent Violence. *Shinn* v. *State*, 64 Ind. 13 . . . . . 692
Robbery — With Intent to Maim or Kill with Dangerous Weapon. *Commonwealth* v. *Gallagher*, 6 Metc. 565 . . . . . 695
Robbery — Property must be Property of Other than Robber — Indictment. *Commonwealth* v. *Clifford*, 8 Cush. 215 . . . . . 698
Robbery — Constituents of, Under Texas Code. *Kimble* v. *State*, 12 Tex. (App.) 420 . . . . . 701
Robbery — Demanding Property with Menaces. *R.* v. *Walton*, L. & C. 289. 703
Robbery — Larceny from the Person. *Fanning* v. *State*, 66 Ga. 167 . . 708

### NOTES.

SECTION 589. Robbery — Force Must be Used . . . . . 710
590. —— Or Putting in Fear . . . . . 710
591. —— Force Must be Used to Overcome Resistance . . 710
592. —— Fear Must be of Personal Violence — Threats . . 712
593. —— Threats of Legal Imprisonment . . . . . 713
594. —— Demand Necessary . . . . . 714
595. —— Putting in Fear — Bodily Injury . . . 714
596. —— Intent to Steal at Time Necessary . . . 717
597. —— Subsequent Use of Violence . . . . 717
598. —— Taking Must be in Prosecutor's Presence . . . 717
599. —— Property Must be in Possession of Party Robbed . 717
599*a*. —— Receiver Not Guilty of Robbery . . . . . 718
600. —— Articles Taken Must be Property of Prosecutor . . 718
601. —— *Lucri Causa* Essential . . . . . 719
602. —— Getting One's Own by Violence . . . . 722
603. —— "Menaces" . . . . . 722
604. —— "Public Highway" . . . . . 722
605. —— Time of War . . . . 722

# CHAPTER VIII.

## Crimes Against the Persons of Individuals.

---

## PART I.

### Abduction and Seduction.

PAGE

Abduction for "Purpose of Prostitution." *State* v. *Stoyell*, 54 Me., 24 . 723

Abduction for Prostitution — Illicit Intercourse. *Osborn* v. *State*, 52 Ind. 526 . . . . . . . . . . . . . . . . . . 726

Abduction for Prostitution — Chaste Character. *Lyons* v. *State*, 52 Ind. . 426 . . . . . . . . . . . . . . . . . . 729

Abduction — Proof — Seduction. *People* v. *Roderigas*, 49 Cal. 9 . . 729

Seduction — Good Repute of Female Must be Proved. *Oliver* v. *Commonwealth*, 110 Pa. St. 215 . . . . . . . . . . . 732

Abduction — "Previous Chaste Character" — "Purpose of Prostitution." *Carpenter* v. *People*, 8 Barb. 603 . . . . . . . . . . 735

Seduction — Meaning of "Previously Chaste Character." *Andre* v. *State*, 5 Iowa, 389 . . . . . . . . . . . . . . 743

Seduction — Under Promise of Marriage — Proof Necessary. *People* v. *Eckert*, 2 N. Y. Crim. Rep. 470 . . . . . . . . . . 748

Seduction — Corroborative Evidence of Woman's Story — Insufficient Proof. *Rice* v. *Commonwealth* 100 Pa. St. 28 . . . . . . . . 759

Seduction — Under Promise of Marriage — Insufficient Proof. *Rice* v. *Commonwealth*, 102 Pa. St. 408 . . . . . . . . . . . 764

Seduction — Where Woman Does Not Consent not Seduction. *Croghan* v. *State*, 22 Wis. 444 . . . . . . . . . . . . . 767

### NOTES.

Section 606. Abduction not a Crime at Common Law . . . . . . 769

607. —— Man not Bound to Return Girl . . . . . . 769

608. —— Girl Must be in Charge of Parents . . . . . . 769

609. —— Taking out of Possession of Father . . . . 770

609*a*. —— Intent to Marry . . . . . . . . . 771

610. —— "Taking or Causing to be taken" — Fraudulent Decoying . . . . . . . . . . . . . . . 771

611. —— Taking for "Purpose of Prostitution or Concubinage" . 771

612. —— "Purpose of Prostitution" . . . . . . . . 772

613. —— "Previous Chaste Character" . . . . . 775

614. Seduction — "Previous Chaste Character" . . . . . 775

615. —— "Purpose of Prostitution . . . . . . . . 776

616. —— Woman Must be Chaste at Time . . . . . . 776

617. —— Promise of Marriage Necessary . . . . . . 776

618. —— Married Man . . . . . . . . . . . 777

PAGE

SECTION 619. —— No Seduction when Force is Used . . . . . . 780
620. —— Marriage of Parties . . . . . . . . . . . 780
621. —— Seduction by Guardian of Female — Who not a "Guardian" . . . . . . . . . . . . . . 780
622. —— Evidence held Insufficient to Convict . . . . . 781

---

# PART II.

## ASSAULT AND BATTERY.

Assault — Elements of the Crime. *People* v. *Lilley*, 43 Mich. 521 . . . . 783
Assault — Elements of Crime — Shooting at Window of Person's House — Law of Nations — House of Foreign Minister. *United States* v. *Hand*, 788
Assault — Assault Must be on Person of Prosecutor. *Kirland* v. *State*, 43 Ind. 146 . . . . . . . . . . . . . . . . 792
Assault — Action Explained by Words — Resisting Trespass. *Commonwealth* v. *Eyre*, 1 S. & R. 347 . . . . . . . . . . . 800
Assault — Taking hold of Person Without Intent to Injure. *People* v. *Hale*, 1 N. Y. Cr. Rep. 533 . . . . . . . . . . . 804
Assault — Negligent Driving in Violation of City Ordinance. *Commonwealth* v. *Adams*, 114 Mass. 323 . . . . . . . . . . 808
Assault — Arrest by Officer Without Warrant — When Notice not Necessary. *Shovlin* v. *Commonwealth*, 106 Pa. St. 369 . . . . . . . . 809
Assault — Common Carrier — Ejecting Passenger. *People* v. *Caryl*, 3 Park. 326 . . . . . . . . . . . . . . . . . 813
Assault — Superintendent of Poor House. *State* v. *Neff*, 58 Ind. 516 . . 816
Assault — Dangerous Weapon — Arrest. *Doering* v. *State*, 49 Ind. 60 . 818
Assault — Lawful Use of Violence — Schoolmaster. *Dowlen* v. *State*, 14 Tex. (App.) 61 . . . . . . . . . . . . . . . 822
Mayhem — Intent Must be found by Jury. *State* v. *Bloedow*, 45 Wis. 279 . 826
Assault With Intent to Murder. *Hairston* v. *State*, 54 Miss. 689 . . . . 828
Assault with Intent to Murder — Intent Essential. *People* v. *Keefer*, 18 Cal. 637 . . . . . . . . . . . . . . . . 831
Assault with Intent to Murder — Setting Spring Guns. *Simpson* v. *State*, 59 Ala. 1. . . . . . . . . . . . . . . . . 833
Aggravated Assault — Meaning of "Child." *McGregor* v. *State*, 4 Tex. (App.) 599 . . . . . . . . . . . . . . . . 844
Aggravated Assault — Made by Decrepit Person — Or in Private House. *Hall* v. *State*, 16 Tex. (App.) 6 . . . . . . . . . . . 846
Aggravated Assault — Intent and Act Necessary. *Fondren* v. *State*, 19 Tex. (App.) 48 . . . . . . . . . . . . . . . . 852
Mayhem — Premeditation Necessary. *Godfrey* v. *People*, 62 N. Y. 207 . . 856
Assault with Intent — Bodily Injury Dangerous to Life. *R.* v. *Gray*, D. & B. 303 . . . . . . . . . . . . . . . . . 858
False Imprisonment — Person Going Voluntarily — Fraud. *State* v. *Lunsford*, 81 N. C. 528 . . . . . . . . . . . . . . 861
False Imprisonment — Delay in Taking Bail. *Beville* v. *State*, 16 Tex. (App.) 70 . . . . . . . . . . . . . . . . 863

NOTES.

PAGE

SECTION 623. Assault — Must be Present Intention to Strike . . . . 865
624. —— Intent to Injure Essential — Coupled with Act . . 866
625. —— Threatening Gesture not — Pointing Cane . . . 866
626. —— Intent to Injure the Gist — Pointing Pistol . . . 866
627. —— Words not an Assault . . . . . . . 867
628. —— Not, When Words explain Act . . . . . . . 867
629. —— Assault Must be on Person . . . . . . . 868
630. —— Opening Railway Switch . . . . . . . . 868
631. —— Stopping Carriage . . . . . . . . . 868
632. —— Force Must be External . . . . . . . . 869
633. —— And Must do Injury . . . . . . . . . 869
634. —— Accident or Play . . . . . . . 869
635. —— Use of Lawful Force . . . . . . . 869
636. —— Preventing Breach of Peace . . . . 870
636*a*. —— Shooting at House Window . . . . . . . 870
636*b*. —— Negligent Driving . . . . . . . . . 871
637. —— Recaption . . . . . . . . . . . . 871
638. —— Force to Recover Property . . . . . 871
638*a*. —— Mayhem . . . . . . . . . . . 871
639. —— Mayhem — Other Essentials . . . 871
640. —— Maiming by Lying in Wait . . . . 871
641. —— Assault with Intent to Kill . . . . 871
642. —— Assault with Intent to Murder. . . . . 873
642*a*. —— Assault with Intent to Kill Not . . . . 874
643. —— Must be Intent to Kill Party Assaulted . . 875
644. —— Spring Guns . . . . . . . . . . . 876
645. —— Assault with Intent to Commit Manslaughter . . . 876
646. —— Assault with Intent to Rob — Subsequent Common Assault . . . . . . . . . . . . . 876
647. —— Aggravated Assault — "Child" — "Decrepit Person". 877
647*a*. —— Intent and Act Essential . . . . . . . . 877
648. —— "Beating" . . . . . . . . . . . 878
649. —— Bodily Injury Dangerous to Life . . . . . 877
650. —— "Grievous Bodily Harm" . . . . . . . 877
651. —— "Wounding" . . . . . . . . . . 877
652. —— "Deadly and Dangerous Weapon" . . . . . 877
653. —— "Offensive Weapon" . . . . . . . . 878
654. —— "Sharp Dangerous Weapon" . . . . . . 578
655. —— Assault with Violence — Snatching from Hand . . 878
656. —— Deterring Person from Giving Evidence . . 878
657. —— Bailing Person to Force Confession . . . . . 878
658. —— False Imprisonment — Restraint Must be Against Will. 879
659. —— Delay in Taking Bail . . . . . . . . . 879

## PART III.

### RAPE.

PAGE

Rape — Force and Violence Essential. *McNair* v. *State*, 53 Ala. 453. . 880
Rape — Acts and Devices not Enough. *People* v, *Royal*, 53 Cal. 63. . . 882
Rape — What is "Abuse" of Child. *Dawkins* v. *State*, 58 Ala. 376. . 885
Assault with Intent — Intent to Accomplish Rape Essential. *Commonwealth* v. *Merrill*, 14 Gray, 415. . . . . . . . . . . . 887
Assault not Intent — Intent to Rape Necessary. *Thomas* v. *State*, 16 Tex. (App.) 535. . . . . . . . . . . . . . . . . 890
Assault with Intent — No Presumption of Intent. *State* v. *Massey*, 86 N. C. 659. . . . . . . . . . . . . . . 895

### NOTES.

SECTION 660. Rape — Force and Violence Essential . . . . . . 897
661. —— Penetration must be Proved . . . . . . . 897
662. —— Proof of Emission . . . . . . . . 898
663. —— Not Rape if Woman Consent . . . . . . . 899
664. —— Intent must be to Effect Purpose at all Hazards . . 899
665. —— Evidence Held Insufficient . . . . . . . 899
666. —— People *v.* Andega . . . . . . . . 899
667. —— Christian *v.* Commonwealth . . . . . . . 900
668. —— People *v.* Hamilton . . . . . . 901
669. —— Boxley *v.* Commonwealth . . . . 902
670. —— "Abuse of Child" . . . . . . . . . . 904
671. —— Assault with Intent to Commit Rape — Intent to Commit Rape must be Proved . . . . . . . . . 904
672. —— Evidence Held Insufficient — Saddler *v.* State — Sanford *v.* State . . . . . . . . . . . . 905
673. —— House *v.* State . . . . . . . . . 907
674. —— State *v.* Neely . . . . . . . . . . 908
675. —— Penetration Proved . . . . . . . . 910
676. —— Intoxication of Prisoner . . . . . . . . 910

---

## PART IV.

### HOMICIDE.

Homicide — New Born Infant — Independent Life. *State* v. *Winthrop*, 43 Iowa, 519 . . . . . . . . . . . . . . . . . 911
Murder — Infanticide — Child Must be Born — Deliberation. *Wallace* v. *State*, 7 Tex. (App.) 570 . . . . . . . . . . . . . 914
Murder — Death Must be Result of Act — Time. *People* v. *Aro*, 6 Cal. 208. 917
Murder — Time of Committal — When Fatal Blow is Struck — *People* v. *Gill*, 6 Cal. 637 . . . . . . . . . . . . . . . . 920

PAGE

Homicide — Effect of Erroneous Treatment of Wound Causing Death. *Parsons* v. *State*, 21 Ala. 300 . . . . . . . . . . . . 922

Homicide — Independent Act of Third Person Intervening. *State* v. *Scates*, 5 Jones (L.), 420 . . . . . . . . . . . . . . 924

Homicide — Cause of Death — Improper Treatment or Neglect Contributing thereto — Malice not Implied. *Morgan* v. *State*, 16 Tex. (App.) 593 . . . . . . . . . . . . . . . . . 926

Homicide — *Corpus Delicti*, Must be Proved. *Ruloff* v. *People*, 18 N. Y. 179. 939

Homicide — *Corpus Delicti* Must be Proved — Confessions. *State* v. *German*, 54 Mo. 526 . . . . . . . . . . . . . . 953

Homicide — Intent to Cause Death or Bodily Harm Essential. *Wellar* v. *People*, 30 Mich. 276 . . . . . . . . . . . . . 958

Murder by Poison — Knowledge — Circumstantial Evidence. *People* v. *Stokes*, 2 N. Y. Cr. Rep. 382 . . . . . . . . . . . . 962

Homicide — Poisoning — Intent to take Life Essential. *Ann* v. *State*, 11 Humph. 159 . . . . . . . . . . . . . . . 968

Homicide by Poisoning — Proof — Symptoms. *Joe* v. *State*, 6 Fla. 591; 65 Am. Dec. 579 . . . . . . . . . . . . . . . 974

Homicide — Intent to commit Misdemeanor only — Manslaughter and not Murder. *Smith* v. *State*, 33 Me. 48; 54 Am. Dec. 607 . . . . 981

Murder — Presumption of Malice. *State* v. *Coleman*, 7 Rich. (S. C.) 185 . 987

Homicide — Felonious Homicide — No Intent to take Life — Wantonness. *Darry* v. *People*, 10 N. Y. 120 . . . . . . . . . . . . 990

Degrees of Murder — Murder in First Degree — Specific Intent to Kill Essential. *Bratton* v. *State*, 10 Humph. 103 . . . . . . 1012

Homicide — Murder by Poison — Not *per se* Murder in First Degree. *Lane* v. *Com.*, 59 Pa. St. 371 . . . . . . . . . . . . 1017

Homicide — Murder by Drowning — Murder in Second Degree. *Johnson* v. *Com.*, 24 Pa. St. 387 . . . . . . . . . . . . 1022

Degrees of Murder — Murder in the Second Degree. *State* v. *Mahly*, 68 Mo. 315 . . . . . . . . . . . . . . . . 1025

Degrees of Murder — Homicide Committed in Perpetrating another Felony. *State* v. *Stock*, 68 Mo. 555 . . . . . . . . . . . 1028

Murder — Degrees of Offense when Perpetrated in Commission of Another Felony. *Pliemling* v. *State*, 46 Wis. 516 . . . . . . . 1037

Murder — Manslaughter — Mutual Combat — Heat of Passion — Degrees of Murder. *People* v. *Sanchez*, 24 Cal. 17 . . . . . . . 1042

Degrees of Murder — Murder in First Degree — Murder in Second Degree. *People* v. *Long*, 39 Cal. 694 . . . . . . . . . . . 1046

Murder in the First Degree — Premeditation not Proved. *People* v. *Mongano*, 1 N. Y. Crim. Rep. 411 . . . . . . . . . . 1048

Murder in the First Degree — Premeditation. *People* v. *Conroy*, 2 N. Y. Crim. Rep. 247 . . . . . . . . . . . . . . . 1052

Murder in the First Degree — Burden of Proof. *McDaniel* v. *Commonwealth*, 77 Va. 281 . . . . . . . . . . . . . . . 1065

Murder in the First Degree — Premeditation — Deliberation. *State* v. *Robinson*, 73 Mo. 306 . . . . . . . . . . . . . 1070

Degrees of Murder — Murder in the Second Degree. *State* v. *Curtis*, 70 Mo. 594 . . . . . . . . . . . . . . . . 1072

PAGE

Degrees of Murder — Deliberation — Incorrect Definition of Terms. *State* v. *Sharp*, 71 Mo. 218 . . . . . . . . . . . 1077
Murder and Manslaughter — Intent to Kill. *Poplee* v. *Freel*, 48 Cal. 436 1082
Murder in Second Degree — Intent to Kill Must be Shown. *Daly* v. *People*, 32 Hun. 182 . . . . . . . . . . . . . . 1083
Homicide — Provocation — Adequate Cause — Erroneous Treatment. *Brown* v. *State*, 38 Tex. 482 . . . . . . . . . . . 1085
Homicide — Killing after Provocation in Heat of Passion. *McCann* v. *People*, 6 Park. 629 . . . . . . . . . . . . 1089
Homicide — Provocation — Husband and Wife — Adultery. *Price* v. *State*, 18 Tex. (App.) 474 . . . . . . . . . . . . 1095
Murder — Manslaughter — Provocation — Adequate Cause. *Hudson* v. *State*, 6 Tex. (App.) 564 . . . . . . . . . . . . . 1100
Homicide — Murder — Cooling Time. *State* v. *Moore*, 69 N C. 267 . 1107
Manslaughter in First Degree — Attempt to Commit Abortion. *State* v. *Emmerich*, 1 West Rep. 760 . . . . . . . . . . . 1113
Manslaughter — Use of Deadly Weapon. *People* v. *Crowey*, 56 Cal 36 1110
Manslaughter — Railroad Company — Negligence. *Commonwealth* v. *Fitchburg R. Co.*, 120 Mass. 373 . . . . . . . . . . . 1117
Manslaughter — Railroad Company — Killing Passenger. *Commonwealth* v. *Fitchburg R. Co.*, 126 Mass. 472 . . . . . . . . . 1126
Manslaughter — Negligence of Servants of Railroad — Negligence of Railroad. *Commonwealth* v. *Boston and Maine R. Co.*, 133 Mass. 883 1129
Manslaughter — Conductor of Railroad Train. *Commonwealth* v. *Hartwell*, 128 Mass. 415 . . . . . . . . . . . . . . 1133

## NOTES.

SECTION 677. Murder — Violence Essential . . . . . . . . 1138
678. —— False Swearing . . . . . . . . . . 1138
679. —— New Born Infant — Infanticide . . . . . 1139
680. —— Death Must Take Place Within Year and Day . 1139
681. —— Homicide — Death Must be in Consequence of Prisoner's Act . . . . . . . . . . . . . . 1139
682. —— Death Occasioned Partly by Predisposing Cause . 1139
682*a*. —— Death from One of Two Uncertain Causes . . 1140
683. —— Death from Subsequent Medical Operation . . 1140
684. —— Improper Medical Treatment — Texas Statute . 1141
685. —— *Corpus Delicti* Must be Proved . . . . . 1141
686. —— *Corpus Delicti* not Proved — Nor that Death was Result of Crime . . . . . . . . . . . . . 1142
687. —— Intent to Kill Essential . . . . . . . . 1155
688. —— Murder by Poisoning — Knowledge must be Proved 1155
689. —— Symptoms . . . . . . . . . . . 1155
690. —— Intent to Commit Felony — Misdemeanor . . 1155
691. —— Malice, when not Presumed . . . . . . . 1155
692. —— Intent to take Life — Murder . . . . . . 1155
693. —— Degrees of Murder . . . . . . . . . 1155
694. —— Intent Requisite . . . . . . . . . 1155

PAGE

SECTION 695. —— Deliberation and Premeditation Essential . . 1156
696. —— Killing not *Prima Facie* Murder in First Degree . 1156
697. —— Murder in Second Degree — Premeditation . 1156
698. —— Implied Malice — Erroneous Instruction . . 1156
699. —— Erroneous Charge — Whitaker *v.* State . . . 1157
700. —— Implied Malice — Erroneous Charge — Reynolds *v.* State 1160
701. —— Evidence Insufficient to Convict of Murder in First Degree — Cox *v.* State . . . . . . . . 1166
702. —— Benevids *v.* State . . . . . . . . 1169
703. —— Robinson *v.* State . . . . . . . . 1174
704. —— Murder in Second Degree — Evidence Insufficient 1180
705. —— Evidence Insufficient to Convict . . . 1180
705*a*. —— Nolen *v.* State . . . . . . . . . 1181
706. —— Intent to Kill Essential in Manslaughter . . 1189
707. —— Provocation Reduces Crime to Manslaughter . 1189
708. —— Provocation — Heat of Passion . . . . . 1189
709. —— Husband and Wife . . . . . . . 1192
710 —— Parent and Child . . . . . . . . 1192
711. —— Killing Without Design to Effect Death — Provocation 1192
712. —— "Adequate Cause" . . . . . . . 1196
713. —— "Adequate Cause"— Causes not Mentioned in Statute 1196
714. —— Resisting Arrest — Provocation . . . . . 1197
715. —— Inciting to Commit Suicide . . . . . . 1197
716. —— Sparring Match — Death Resulting From . . 1197
717. —— Railroads — Killing of Passenger . . . . 1199

# DEFENCES TO CRIME.

## CHAPTER VII.

### CRIMES AGAINST THE PROPERTY OF INDIVIDUALS — (CONTINUED).

### PART I.

### FORGERY.

#### FORGERY — INTENT TO DEFRAUD ESSENTIAL.

#### STATE *v.* REDSTRAKE.

[39 N. J. (L.) 365.]

*In the Supreme Court of New Jersey, 1877.*

**H. Forged his Father's Indorsement** to a promissory note and negotiated it to R. Before the note came due the father learned of the forgery. R., when the note came due, knowing of the forgery, and knowing that H.'s father knew of the forgery, left the note at the bank where it was payable with instructions to make demand, and protest it if not paid. *Held,* that R. was not guilty of uttering forged paper with intent to defraud.

On rule to show cause.

The defendant was indicted for forging, and also for uttering as true, five several promissory notes.

The first was a note for $800, of the date of October 7, 1874, drawn to the order of Clement Hall, and signed by Louis M. Hall.

The second was for $800, of the date of October 16th, 1874, drawn in the same form.

The third was for $1,000, of the date of October 29th, 1874, drawn in the same form.

The fourth, a note of $6,500, of the date of November 10th, 1874, drawn in the same form.

The fifth was for $750, of the date of December 7th, 1874, drawn in the same form.

There was a count in the indictment for forging and procuring the forging of the first named note.

Then followed a count for uttering and causing the same to be

uttered as true, with intent to defraud the said Clement Hall, and divers other persons unknown, etc.

Then followed a third count for forging the second note, and a fourth count for uttering the same, and so there were alternate counts for forging and uttering the five notes, making in all, ten counts.

The evidence upon the trial, disclosed the fact that the name Louis Hall, the maker of the several notes, was written by said Hall, and the name Clement Hall on the back, was also written by Louis Hall, without the knowledge of said Clement Hall, who was the father of Louis. Louis, long before maturity, passed these notes to the defendant, James J. Redstrake, with the forged indorsement of the name of the payee Clement Hall, then upon them.

To sustain the counts for forgery, it was insisted that, while the name of the payee was forged by the hand of Louis Hall, yet that such act was counseled, procured, and induced by said Redstrake.

To show this, a long course of dealing between Louis Hall and Redstrake was proven, in the course of which a large number of notes, purporting to be of persons in the county, were purchased by Redstrake of Hall; which notes were, by Hall, sworn to have been forged paper. The circumstances under which these and the notes in question were negotiated, were relied upon to show that he, Redstrake, counseled and procured the forgery of the notes named in the indictment.

To sustain the counts for uttering, the same evidence was relied upon to show that Redstrake had a knowledge of the forged character of this paper; that while having such knowledge he did that which constituted an uttering of the same. It consists in this: The notes were all drawn payable at the banking-house of the Salem National Banking Company. All the notes were by Redstrake, left at the said bank, before maturity, for collection, with direction to present for payment and to protest. That thereafter demand was made, and the said notes were regularly protested.

The jury found the defendant not guilty, upon the counts for forging, and guilty upon the counts for uttering.

Upon motion of the counsel for the defendant, a rule to show cause why there should not be a new trial was entered, and the hearing upon the rule was referred to this court for its advisory opinion.

Argued at February term, 1877, before BEASLEY, Chief Justice, and Justices KNAPP and REED.

For the State, *M. P. Grey*, and *A. Browning*.

For the defendant, *W. E. Potter* and *S. H. Grey*.

The opinion of the court was delivered by

REED, J. The primary question in this case is, whether, upon the facts proven, this verdict should stand — whether the presentation of

these notes to the cashier of the Salem National Banking Company, with direction to present for payment and protest, followed by such presentation and protest, present a state of facts which, upon the assumption that the defendant had a guilty knowledge of their falsity, will support this conviction for uttering and publishing under our statute.

Forgery and uttering is a branch of the more comprehensive crime of cheats, actual or attempted.[1]

As a cheat, it was indictable when successful.[2] When either successful or unsuccessful, the attempt, when made by the fabrication or alteration of certain instruments, was forgery.

By the common law of England, it was supposed to consist in the making or altering a matter of record, or an authentic matter of public nature, as a parish register or deed. As if a man makes a feoffment of lands to J. S., and afterwards makes a deed of feoffment of the same lands to J. D., of a prior date, in order to defraud his own feoffee; or where one is directed to draw a will and inserts legacies therein of his own head; or cuts a name from a letter and writes over the name a general release; or where one makes any fraudulent alteration of the form of a true deed in a material part of it.[3]

Down to the time of Elizabeth, there is no case which extended the scope of the crime of forgery to writing of an inferior degree to those above mentioned.

In the fifth year of Elizabeth, the first statute was passed concerning forgery and uttering. This statute made it a crime to forge any obligation, or bill obligatory, or acquittance, or release, or other discharge of any debt. It also made it a crime to pronounce, publish, or give in evidence any such false paper as true, knowing the same to be forged.

Although long after that time, in 1727, in the case of *Rex* v. *Ward*,[4] it was held that an indictment for forging and uttering an indorsement on the back of a certain certificate was good at common law.

The decision was partly put upon the ground that the statute 5 Elizabeth,[5] used the word "writing," in the preamble of the act, in contradistinction to deed, and so included writing of the class which included the certificate in question.

This decision evidently assumed that the statute of Elizabeth was not intended to extend the crime of forgery and uttering to any new class of instruments, but was intended to impose an additional punishment for the forging of instruments theretofore indictable. The statute of George II.,[6] extended the class of instruments, by express mention, to promissory notes and their indorsement and assignment. It makes

1 1 Bish. Cr. L., sec. 423; 2 *Id.*, sec. 498.
2 2 East P. C. 825.
3 1 Hawk. P. C. 335.
4 2 Str. 747.
5 ch. 14.
6 ch. 25.

the false making of such, with intent to defraud any person whatsoever, or the uttering or publishing as true any such false paper, with intent to defraud, a felony.

By the statute 7 George II.,[1] this was extended so as to include receipts, acceptances and orders for the payment of money or delivery of goods.

The substance of these three statutes is re-enacted in this State, and now embodied in section 173 of the revised act for the punishment of crimes.

We observed that forgery and uttering were each either an accomplished or an attempted cheat. A material element, essential to constitute either crime, is a design to affect the rights of another.

As it would be essential, under an indictment for obtaining the property of another by the use of a false or forged paper as true, to show that a fraud was actually accomplished, so under an indictment for forging or uttering, either the same should be shown, or else an intent to do the same.[2]

Whether the statute of 5 Elizabeth,[3] was or was not intended to extend the class of writings which might be the subject of forgery, beyond the class indictable at common law, it is clear that it did not change, or intend to change, the character of the elements essential to constitute the common-law crime of forgery or uttering.

The act provides that the forgery, as well as the pronouncing or publishing, must be done to the intent that the estate of a freeholder, etc., * * * or the right, title in the same shall be molested or troubled, etc.

Says East;[4] "The deceitful and fraudulent intent appears to be the essence of this offense, and this is indeed particularly expressed in the statute 5 Elizabeth,[5] and in most, if not all, the other acts."

"The nature of forgery," says Hawkins,[6] "does not seem so much to consist in the counterfeiting a man's hand and seal, which may often be done innocently, but in the endeavoring to give an appearance of truth to a mere deceit and falsity, and either to impose that upon the world as the solemn act of another, which he is in no way privy to, or at least to make a man's act appear to have been done at a time when it was not done, and by force of such falsity to give it an operation which in truth and justice it ought not to have."

The language of our act, like the English acts, makes the "intent to prejudice, injure, damage or defraud any person or persons, body pol-

1 ch. 22.

2 Rex v. Powell, 2 Wm. Bl. 787; Rex v. Holden, 2 Taunt. 333.

3 ch. 14.

4 5 P. C. 854.

5 ch. 14.

6 1 P. C. 335.

itic or corporate," the material element of the crime of forgery, as well as of uttering the false paper as true.[1]

The very act of forgery itself will be sufficient to imply an intent to defraud, or, at all events, it will be sufficient if, from the circumstances of the case, the jury can fairly infer that it was the intention of the party to utter the forged instrument. If, however, it appears that no fraud whatever could have been effected by the forgery, then no fraud could be intended, and the defendant will be entitled to an acquittal.[2]

Where a man erased the word "Libris," and inserted the word "Marcis," in a bond made to himself, it was held not forgery, because the erasure could not be prejudicial to any one but himself, and there was no appearance of a design to cheat.[3]

Tested by this rule, was there that in this case from which the jury could infer a design to defraud?

That the presentation of a note at bank, with a direction to present for payment and protest, followed by such presentation and protest, when the party causing the presentation has a clear knowledge of the falsity of the indorsement, may be an uttering within the statute, I have no doubt.

In most instances it would be so. If the maker of the note had no knowledge of the falsity of the payee's signature, the presentation for payment by order of a person whose only right to payment was derived from the title which such false indorsement was supposed to confer, would be an uttering with intent to defraud. By such presentation he would knowingly assert a right to such paper, with a manifest design to induce the bank, by such false indorsement on behalf of the maker, to pay to an unentitled party the amount of the note, to the clear prejudice of the bank. But in this case the maker was the forger himself. He had full knowledge of the character of the notes, the place where they were payable, and the time at which they matured. He knew they were payable at bank. By a presentation there he certainly could not be deceived as to the character of the paper. If the notes had been presented to him by Redstrake directly, and to save his credit, character, and liberty, he had paid them, no one would say that the notes were uttered to him as true, or for the purpose of defrauding him by such uttering.

The presentation to the bank, as his agent, could not be said to be done to defraud him; nor could it have worked prejudice to the bank except by an almost impossible combination of circumstances, which required the co-operation of the ostensible payee of the notes, a very respectable man, and of Redstrake and Hall, in a conspiracy to defraud

1 sec. 173.

2 2 Archb. Cr. Pl. & Pr. *546.

3 Blake *v.* Allen, Moore, 619. See, also, Bac. Abr., "Forgery," A.

the bank, by inducing them to pay money to the wrong party, and then, by the maker afterwards repudiating the payment, and the real payee claiming the amount of the notes, or a right to the paper, and so hold the bank responsible for the erroneous payment.

This would involve an inquiry into the manner in which Redstrake procured the paper, if not from the payee; and if from the payee, how it happened that his signature was forged.

The scheme is too chimerical to receive consideration, and there is nothing in the evidence to show that by the presentation any one could have been defrauded by the supposition that the indorsements upon the notes were true.

There was also notice of protest given to Clement Hall, whose name as indorser was forged. This means that he was informed that the note had been presented for payment, and dishonored, and that the holder looked to Hall for payment.

Whether this was such an assertion or declaration that the paper was good as would amount to an uttering is not a matter of express authority. The reasoning in the following cases goes far toward supporting such a doctrine: *Commonwealth* v. *Searle*,[1] *United States* v. *Mitchell*,[2] *Queen* v. *Green*.[3] In the last case the paper was not exhibited, but its contents stated, and the judge held it an uttering. But whether the act of giving the notice of protest was or was not an uttering is immaterial, as the facts in the case show no design to cheat by an assertion of the veracity of the indorsement.

Long before the prosecution and notice, Clement Hall knew of the existence of the forged paper. He heard that Redstrake held forged paper against him on December 19th. Redstrake knew that he had knowledge of their falsity. He wrote the letter to Hall on January 1st. After that date the notes were presented, and notices of protest were sent and received.

There could not have been in the mind of Redstrake any design to defraud Hall by an assertion of their genuineness. A design to compel him, Clement Hall, to redeem paper which both he and Redstrake knew to be false, for the purpose of saving his son, would not be an uttering as true.

I think there were no circumstances in the case upon which the verdict can stand, in respect to that element of the crime — an intent to defraud by means of the uttering as true.

*There should be a new trial.*

[1] 2 Binn. 332.
[2] 1 Bald. 366.
[3] Jebb's Cr. Cas. 281.

## FORGERY — INTENT TO DEFRAUD SOME ONE ESSENTIAL — COLLEGE DIPLOMA.

## R. *v.* HODGSON.

[Dears. & B. 3.]

*In the English Court for Crown Cases Reserved, 1856.*

1. **An Intent to Defraud some Person** is essential to the crime of forgery.
2. **A. Forged a Diploma** of the College of Surgeons with the general intent to make the public believe that he was a member of the college, and he showed it to a number of persons to induce such belief, but he had no intent to defraud any particular individual. *Held*, that A. was not guilty of forgery.
3. **A Diploma** is not a public document, *semble.*

The following case was reserved and stated for the consideration and decision of the Court of Criminal Appeal by Mr. Baron BRAMWELL, at the Staffordshire Spring Assizes, 1856.

Henry Hodgson was indicted at common law for forging and uttering a diploma of the College of Surgeons. The indictment was in the common form.

The College of Surgeons has no power of conferring any degree or qualification, but before admitting persons to its membership, it examines them as to their surgical knowledge, and if satisfied therewith, admits them, and issues a document called a diploma, which states the membership. The prisoner had forged one of these diplomas. He procured one actually issued by the College of Surgeons, erased the name of the person mentioned in it, and substituted his own; changed the date, and made other alterations to make it appear to be a document issued by the College to him. He hung it up in his sitting room, and on being asked by two medical practitioners whether he was qualified, he said he was, and produced this document to prove his assertion.

When a candidate for an appointment as vaccinating officer he stated he had his qualification, and would show it if the person inquiring (the clerk of the guardians, who were to appoint to the office) would go to his (the prisoner's) gig. He did not, however, then produce, or show it.

The prisoner was found guilty; the facts to be taken to be: that he forged the document in question with the general intent to induce a belief that the document was genuine, and that he was a member of the College of Surgeons, and that he showed it to two persons, with the particular intent to induce such belief in those persons; but that he had no intent in forging, or in the uttering, and publishing (assuming there was one) to commit any particular fraud or specific wrong to any individual.

I reserved, for the opinion of the Court of Criminal Appeal, the question whether, on these facts, he ought to have been found guilty on any of the counts.

G. BRAMWELL.

APRIL 29, 1856.

This case was argued on May 3, 1856, before JERVIS, C. J., WIGHTMAN, J., CRESSWELL, J., ERLE, J., and BRAMWELL, B.

*Scotland* (*E. V. Richards* with him), appeared for the Crown, and *Bryne*, for the prisoner.

*Bryne*, for the prisoner. No offense at common law was committed. The definition of forgery in 2 Russell on Crimes and Misdemeanors,[1] is said to be "the fraudulent making or alteration of a writing to the prejudice of another man's right;" and at page 362 it is said that the "fraud and intention to deceive constitute the chief ingredients of this offense." In order to support the conviction it must be shown that the prisoner had a definite object in view in the forgery, and intended to commit a fraud upon some individual. This case does not disclose any distinct intention to defraud; and the jury have negatived the intention to commit any particular fraud, or to deceive any individual. The other side will rely on *Regina* v. *Toshack*.[2] There the prisoner forged a certificate of the master of a vessel, representing that the prisoner was an able seaman, and had served on board a certain vessel.

ERLE, J. This seems very analogous to forging the certificate in that case. The prisoner used the diploma in his endeavors to get appointed to the poor-house. If an incompetent man were appointed to such a situation, in consequence of his appearing to have this qualification, a large class of persons might suffer. I do not see any great distinction between the danger of loss of life at sea, through the employment of an incompetent pilot, and the danger of loss of life on land through the employment of an incompetent surgeon.

*Bryne*. The Trinity House certificate of fitness to act as a pilot, which was the thing forged in *Toskack's Case*, confers a distinct privilege, and is essential to the employment, and is that upon which those who employ the pilot rely; and in that case an intent to defraud particular persons was alleged and proved. Here there is only a general intent, and the act is not done by the prisoner for the purpose of obtaining any particular benefit, but merely to induce the belief that he was qualified to act as a surgeon. There is an entire absence of intent to prejudice another person. Suppose a man was to concoct a pedigree, and hang it up in his room for the purpose of raising his credit, that would not be a forgery at common law. The diploma of the College of

[1] p. 318.

[2] 1 Den. C. C. 492.

Surgeons does not confer any distinct qualification to practice as a surgeon; nor did the prisoner produce it for the purpose of procuring the appointment. It was absolutely necessary in *Regina* v. *Toshack*, that the prisoner should produce the preliminary certificate in order to effect his object.

JERVIS, C. J. One test is this, and it is in your favor. Suppose this had been an indictment before Lord Campbell's act[1] had passed, an intent to defraud some particular person must have been stated — who could have been named? My brother WIGHTMAN suggests that the intent was to defraud the guardians of the poor; but when the document was forged, it was not forged with that intent.

*Bryne.* No one could have been named as the person whom it was intended to defraud. There was no intent, at the time when the certificate was altered, to use it for the purpose of defrauding any person. In *Regina* v. *Sharman*,[2] the prisoner uttered the instrument with a distinct and specific object in view, namely, to obtain the emoluments of the situation of a schoolmaster for which he had applied. In this case no uttering with an intent to defraud is shown.

*Scotland*, for the Crown. The certificate in this case is a document of a public nature, the forgery of which is in itself criminal, whether any third person be injured by it or not,[3] and, therefore, the conviction would be supported by evidence of an intention to issue it *malo animo*.

CRESSWELL, J. What do you mean by a document of a public nature?

*Scotland.* A document which affects all the public. This diploma is ssued by a chartered body, the College of Surgeons, and confers a qualification. The qualification may not be such as to secure in all respects exclusive privileges, but it is an important qualification recognized by law, and the diploma is the only evidence of the qualification.

WIGHTMAN, J. Suppose it had been the certificate of some eminent surgeon?

*Scotland.* That, without an act or charter attaching some value to t, would not be of a public nature. A document of a public nature is one which relates to all the subjects of the realm.[4] A member of the College of Surgeons is, by statutes relating to vaccination, gaols, poor law unions, lunatic asylums, etc., entitled to various privileges, and he is also exempt from some public obligations, such as serving on juries.

BRAMWELL, B. But the possession of the diploma can not be said in any way to confer these privileges, which depend upon the statutory enactments.

*Scotland.* Still they render it a matter of great public importance that none but duly qualified persons should be able to represent them-

1 14 and 15 Vict., ch. 100.

2 Dears. C. C. 285.

3 1 Hawk. P. C., ch. 41, sec. 11.

4 Rex *v*. Ward, 2 Ld. Raym. 1461.

selves as members of the College of Surgeons, and the ill consequences to the public are sufficient to make this a forgery, if done *malo animo*. In East's Pleas of the Crown, forgery is defined to be the making or altering of a written instrument "for the purpose of fraud or deceit." In 2 Russell on Crimes,[1] it is said; "It is clearly agreed that at common law the counterfeiting a matter of record is forgery; for since the law gives the highest credit to all records it can not but be of the utmost ill consequence to the public to have them either forged or falsified. Also it is agreed to be forgery, to counterfeit any matter of a public nature."

WIGHTMAN, J. The charge is that of forgery with intent to deceive. The question is, whom did he intend to deceive when the forgery was committed? It may have been done years ago.

JERVIS, C. J. How would you have framed an indictment on these facts before Lord Campbell's act?

ERLE, J. Would it not have been enough to allege an intent to deceive divers persons, to the jurors unknown, to wit, all the patients of his late partner; and would not that have been proved?

*Scotland.* I submit that it would.

JERVIS, C. J. I should consider that a dangerous doctrine. The intent must not be a roving intent, but a specific intent.

*Scotland.* There must be a specific intent to defraud, but not to defraud any particular individual. It would, I submit, have been sufficient to show by allegations that the document was of a public nature setting out the certificate itself. The general intention to defraud appearing on the face of the indictment, and proved by the false making of the certificate, would have been sufficient. In *Rex* v. *Ward*,[2] it appears to have been assumed that if the fraud might injure any one the offense would be committed.

JERVIS, C. J. Hardly so. The words of the indictment in *Rex* v. *Ward*, are *nequiter machinans et intendens præfatum ducem de prædicto alumine decipere et defraudare*. The intent to defraud a particular individual is alleged, the name having been already mentioned.

*Scotland.* In 2 Russell on Crimes,[3] a case is cited from 1 Levinz,[4] where it was held that a certificate of holy orders was of a public nature.

JERVIS, C. J. Upon reference to Levinz it appears that the case there was an application for a prohibition to stay proceedings in the ecclesiastical court, with a view to deprive the offender of orders, which it was suggested he had obtained by forgery; and the court refused the prohibition.

[1] p. 357.
[2] 2 Ld. Raym. 1461.
[3] p. 357.
[4] p. 138.

*Scotland.* Section 8 of 14 and 15 Victoria,[1] not only dispenses with the necessity of alleging an intention to defraud any particular person, but also with the necessity of proving it.

JERVIS, C. J. Formerly the indictment must either have alleged an intent to defraud a person named or as you say, have shown that that was unnecessary on account of the public nature of the instrument forged. Now, the particular person need not be named, but with that exception the law is not altered. Before the new law whom should you have stated in the indictment the prisoner intended to defraud?

*Scotland.* Any one of the persons who might be defrauded by the use of the pretended qualification at the time of the forgery; one of the properly qualified practitioners in the immediate neighborhood, or one of the persons on whom the defendant attended professionally. If necessary to allege and prove a particular intent to defraud, it would be enough to allege any one who might be defrauded. The law infers that a man intends the ordinary consequences of his act. A man may be guilty of forging a bill of exchange, though not actually put in circulation.

*Bryne* was not called upon to reply.

JERVIS, C. J. I am of opinion that this conviction is wrong. The recent statute for further improving the administration of criminal justice[2] alters and affects the forms of pleading only, and does not alter the character of the offense charged. The law as to that is the same as if the statute had not been passed. This is an indictment for forgery at common law. I will not stop to consider whether this is a document of a public nature or not, though I am disposed to think that it is not a public document; but whether it is or not, in order to make out the offense, there must have been, at the time of the instrument being forged, an intention to defraud some person. Here, there was no such intent at that time, and there was no uttering at the time when it is said there was an intention to defraud.

WIGHTMAN, J. I am entirely of the same opinion. Before the late statute it was necessary to allege an intent to defraud some one, and there must be an intention to do so now. In this case it does not appear that at the time when the forgery was committed there was an intention to defraud any one.

CRESSWELL, J., and ERLE, J., concurred.

BRAMWELL, B. I thought that it was of considerable importance that this point should be determined, and I therefore reserved it, but I quite concur in the judgment which has been given.

*Conviction quashed.*

[1] ch. 100.

[2] 14 and 15 Vict., ch. 100.

## FORGERY — MUST BE OF SOME DOCUMENT OR WRITING — ARTIST'S NAME ON PAINTING.

## R. *v*. Closs.

[Dears. & B. 460.]

*In the English Court for Crown Cases Reserved, 1858.*

1. **A Forgery Must be of Some** document or writing.
2. **Picture — Fraudulent Use of Artist's Name.** — The painting an artist's name in the corner of a picture in order to pass it off as an original picture by that artist is not a forgery.

The following case was reserved and stated at the Central Criminal Court.

The prisoner was tried at the October Sessions of the Central Criminal Court on an indictment, the first count of which charged him with obtaining money by false pretenses, and upon this he was acquitted. He was however found guilty upon the remaining counts of the indictment, which were as follows: —

2d. Count. And the jurors aforesaid, upon their oath aforesaid, do further present that before the time of the commission of the offense in this count hereinafter stated and charged one JohnLinnell, of Redhill, in the County of Surrey, an artist in painting of great celebrity and well known as such to the liege subjects of our lady the Queen, had painted a certain large and valuable picture whereon he had painted his name to denote that the said picture had been painted by him the said John Linnell. And the jurors aforesaid upon their oath do further present that the said Thomas Closs, being a dealer in pictures, well knowing the premises aforesaid and being a person of fraudulent mind and disposition and devising and contriving and intending to cheat and defraud, on the 24th day of July, in the year of our Lord 1857, and on divers other days between that day and the time of taking this inquisition, knowingly, willfully, falsely, fraudulently and deceitfully and within the jurisdiction aforesaid, did keep in a certain shop wherein he the said Thomas Closs did carry on his said trade of a dealer in pictures, a certain painted copy of the said picture, on, which said painted copy was then and there unlawfully painted and forged the name of the said John Linnell, with intent thereby and by means thereby to denote that the said copy of the picture was an original picture painted by the said John Linnell. And the jurors aforesaid upon their oath aforesaid do further present that the said Thomas Closs, well knowing the said picture so in his possession to be such copy of the said picture so painted by the said John Linnell as aforesaid and well knowing the

name of the said John Linnell so painted upon the said copy to be forged did willfully, falsely, fraudulently and deceitfully and within the jurisdiction aforesaid offer and expose for sale the said copy with said forged name so upon it, and did offer, utter, dispose of, sell and put off to Henry Fitzpatrick, the said painted copy as and for the genuine picture of the said John Linnell, with intent to cheat and defraud the said Henry Fitzpatrick of his moneys and valuable securities, and that the said Thomas Closs did so fraudulently cheat and defraud the said Henry Fitzpatrick of, and did so fraudulently obtain from the said Henry Fitzpatrick valuable securities (to wit), a cheque and three bills of exchange with intent to defraud.

3d. Count. And the jurors aforesaid upon their oath aforesaid do further present that before the time of the commission of the offense in this count hereinafter stated and charged one John Linnell, of Redhill, in the County of Surrey, an artist in painting of great celebrity, and well known as such to the liege subjects of our lady the Queen, had painted a certain large and valuable picture whereon he had painted his name to denote that the said picture had been painted by the said John Linnell. And the jurors aforesaid upon their oath aforesaid do further present that the said Thomas Closs being a dealer in pictures and being a person of fraudulent mind and disposition, and devising, contriving and intending to cheat and defraud on the 24th day of July in the year of our Lord 1857, and within the jurisdiction aforesaid unlawfully, willfully and wickedly did procure and have in his possession, for the purposes of sale a certain painted copy of the said picture on which said painted copy of the said picture was then and there unlawfully painted, and forged the name of the said John Linnell. And the jurors aforesaid upon their oath aforesaid, do further present that the said Thomas Closs, well knowing the name of the said John Linnell, so painted upon the said copy to be forged, did then and there within the jurisdiction aforesaid, unlawfully, deceitfully, wickedly and fraudulently offer, sell, dispose of utter and put off to the said Henry Fitzpatrick, the said painted copy of the said original painted picture with the name of the said John Linnell so painted and forged thereon as aforesaid, and the said forged name of the said John Linnell for a certain large sum of money, to wit, the sum of £130, to the great damage and deception of the said Henry Fitzpatrick, to the evil example of all others in the like case offending and against the peace of our lady, the Queen, her crown and dignity.

It was objected by the prisoner's counsel, in arrest of judgment, that these counts disclosed no indictable offense, and the judgment was respited until the next session, that the opinion of this court might be

taken whether or not the second and third counts, or either of them, sufficiently showed an offense indictable at common law. The prisoner remains in custody.

This case was argued, on the 21st November, 1857, before COCKBURN, C. J., ERLE, J., WILLIAMS, J., CROMPTON, J., and CHANNELL, B.

*Metcalfe* appeared for the Crown, and *McIntyre*, for the prisoner.

*McIntyre*, for the prisoner. The second and third counts are bad in arrest of judgment. The second count charges in substance a cheat at common law, and that cheat is not properly laid. An indictment for a cheat at common law should so set out the facts as to make it appear on the record that the cheat charged would affect, not a private individual, but the public generally.[1] The obtaining money by means of a mere assertion, or by the use of a false, private token, is not an indictable offense at common law.[2] In this count the allegation is, that a false token of a private character was used.

The third count is for forgery of the name of John Linnell on a picture. Forgery is defined to be the fraudulent making or alteration of a writing, to the prejudice of another's right.[3] In the case of a written instrument, the forgery of the signature is really the forgery of the whole indictment, and is always laid in the indictment. Unless, therefore, an indictment would lie for the forgery of a picture, this count can not be supported. The averments in this count amount to no more than this, in substance, — that the prisoner falsely pretended that the picture was Linnell's. To falsely pretend that a gun was made by Manton would be no offense at common law; and no case has gone the length of holding that to stamp the name of Manton on a gun would be forgery.

CROMPTON, J. That would be forgery of a trade-mark, and not of a name.

COCKBURN, C. J. Stamping a name on a gun would not be a writing; it would be the imitation of a mark, not of a signature.

*McIntyre*. The name put by a painter in the corner of a picture is not a signature. It is only a mark to show that the picture was painted by him. Any arbitrary sign or figure might be used for the same purpose instead of the name; it is a part of the painting, and every faithful copy would contain it. The averments mean that the whole picture was made to represent the whole of the original; and the averment of the imitation of the signature is no more than an averment of the imitation of a tree or a house in the original. There is no allegation that the picture was passed off as the original, or the signature as the genu-

1 2 Russ. on Cr. 280.

2 2 East P. C. 820.

3 2 Russ. on Cr. 318.

ine signature, neither is there any averment that the name was painted for the purpose of inducing the belief that the picture was the original.

*Metcalfe*, for the Crown. It is not necessary to show that the cheat alleged in a count for cheating at common law is one which affects the public generally. If to a bare lie you add a false token it is indictable, and it is a mistake to suppose that the public must be affected.

ERLE, J. The prisoner did not get the money for the name but for the picture.

*Metcalfe*. He obtained it by the whole transaction. In *Worrell's Case*[1] deceitfully counterfeiting a general seal or mark of the trade, on cloth of a certain description and quality, was held to be an indictable cheat. This case and *Farmer's Case*[2] show that the fraud need not be of a strictly public nature, and that any device calculated to defraud an ordinarily cautious person is indictable. In this case the picture was in fact a device calculated to deceive the public.

The third count for forgery is good. In *Regina* v. *Sharman*,[3] it was decided that it is an offense at common law to utter a forged instrument, the forgery of which is an offense at common law, and that the effecting the fraud is immaterial. This decision overruled the decision in *Regina* v. *Boult*.[4]

A false certificate in writing is the subject of an indictment at common law.[5]

I therefore contend that where, as here, the name of the artist is painted on the picture it is in the nature of a certificate, and the fact that the signature is on canvas, instead of being on a separate piece of paper, does not render the offense less indictable.

WILLIAMS, J. But it is consistent with all the allegations that the prisoner may have sold the picture without calling attention to the signature.

*Metcalfe*. The forging the name on a picture is in fact the forgery of the picture.

COCKBURN, C. J. If you go beyond writing where are you to stop? Can sculpture be the subject of forgery?

*McIntyre*, replied.

*Cur. adv. vult.*

The judgment of the court was delivered on 30th November, 1857 by COCKBURN, C. J. The defendant was indicted on a charge, set out in three counts of the indictment, that he had sold to one Fitzpatrick a

1 Trem. P. C. 106.
2 Trem. P. C. 100.
3 Dears. C. C. 285.
4 2 C. & K. 604.
5 Reg. *v.* Toshack, 1 Den. C. C. 492.

picture as and for an original picture painted by Mr. Linnell, when in point of fact it was only a copy of a picture, which Mr. Linnell had painted; and that he passed it off by means of having the name of "J. Linnell" painted in the corner of the picture, in imitation of the original one, on which that name was painted by the painter. Upon the first count, for obtaining money by false pretenses, the defendant was acquitted; the second was for a cheat at common law; and the third was for a cheat at common law by means of a forgery. As to the third count we are all of opinion that there was no forgery. A forgery must be of some document or writing, and this was merely in the nature of a mark put upon the painting with a view of identifying it, and was no more than if the painter put any other arbitrary mark as a recognition of the picture being his. As to the second count, we have carefully examined the authorities, and the result is that we think if a person, in the course of his trade openly and publicly carried on, were to put a false mark or token upon an article, so as to pass it off as a genuine one when in fact it was only a spurious one, and the article was sold and money obtained by means of that false mark or token, that would be a cheat at common law. As, for instance, in the case put by way of example during the argument, if a man sold a gun with the mark of a particular manufacturer upon it, so as to make it appear like the genuine production of the manufacturer, that would be a false mark or token, and the party would be guilty of a cheat, and therefore liable to punishment if the indictment were fairly framed so as to meet the case; and therefore upon the second count of this indictment, the prisoner would have been liable to have been convicted if that count had been properly framed; but we think that count is faulty in this respect, that although it sets out the false token, it does not sufficiently show that it was by means of such false token the defendant was enabled to pass off the picture and obtain the money. The conviction, therefore, can not be sustained.

CROMPTON, J. The modern authorities have somewhat qualified the older ones, but I do not wish to pledge myself to the view taken as to the nature of the false token, which would amount to a cheat at common law. I would be inclined to adopt the view taken by the rest of the court, but do not pledge myself to it. I concur in the judgment that this conviction can not be be sustained, upon the grounds stated by the chief justice.

*Conviction quashed.*

## FORGERY — MUST BE OF SOME DOCUMENT — COUNTERFEITING PRINTED WRAPPERS.

## R. v. Smith.

[Dears. & B. 566.]

*In the English Court for Crown Cases Reserved, 1858.*

1. **Forgery is the Making of a False Document** to resemble a genuine one.
2. —— **Wrappers of Baking Powders not Documents.** — Therefore to imitate the wrappers of a baking powder of celebrity for the purpose of palming off a spurious article is not forgery.

The following case was reserved and stated by the Recorder of London: —

*John Smith* was tried before me, at the Central Criminal Court, upon an indictment charging him with forging certain documents, and with uttering them, knowing them to be forged.

It appeared that the prosecutor George Borwick, was in the habit of selling certain powders, some called Borwick's Baking Powders, and others, Borwick's Egg Powders.

These powders were invariably sold in packets, and were wrapped up in printed papers.

The baking powders were wrapped in papers which contained the name of George Borwick; but they were so wrapped, that the name was not visible till the packets were opened.

It was proved that the prisoner had endeavored to sell baking powders, but had them returned to him, because they were not Borwick's powders.

Subsequently, he went to a printer, and representing his name to be Borwick, desired him to print 10,000 labels as nearly as possible, like those used by Borwick, except, that the name of Borwick was to be omitted in the baking powders.[1]

The labels were printed according to his order, and a considerable quantity of the prisoner's powders were subsequently sold by him as Borwick's powders wrapped in those labels.

On the part of the prisoner, it was objected that the making or uttering such documents, did not constitute the offense charged in the indictment.

This point I determined to reserve for the consideration of the Court of Criminal Appeal; and I left it to the jury to find whether the labels

[1] This seems to be an error. The name of Borwick was on the label, but the signature of Borwick, and the notification that without such signature no powder was genuine were omitted.

so far resembled those used by Borwick, as to deceive persons of ordinary observation, and to make them believe them to be Borwick's labels, and whether they were made and uttered by him with intent to defraud the different parties by so deceiving them, directing them in that case to find the prisoner guilty.

The jury found him guilty.

The labels marked "genuine" sent herewith, were those used by the prosecutor; those marked "imitation" were the labels the subject of this prosecution, and reference can be made to them if necessary.

The prisoner has been admitted to bail to await the decision of the Court for the Consideration of Crown Cases, upon the foregoing facts.

RUSSELL GURNEY.

The following is a copy of the genuine baking powder label: —

Patronized by the Army and Navy: — Borwick's Original German Baking Powder, for making bread without yeast, and puddings without eggs. (Directions improved by the Queen's private baker.)

By the use of this preparation as the saccharine properties of the flour, which are destroyed by fermentation with yeast, are preserved, the bread is not only more nutritive, but a larger quantity is obtained from the same weight of flour.

Bread made with yeast, if eaten before it becomes stale, ferments again in the stomach, producing indigestion and numerous other complaints; when made with this powder it is free from all such injurious effects.

The powder is equally valuable in making puddings and pastry, which it deprives of all their indigestible properties; and if dripping or lard be used instead of butter, it removes all unpleasant taste.

It will keep any length of time and in any climate. In the sick hospitals of the Crimea it was found invaluable.

The public are requested to see that each wrapper is signed

GEORGE BORWICK.

Without which none is genuine.

Sold retail by most chemists in 1d, 2d, 4d and 6d packets, and in 1s, 2s 6d and 5s tins.

Wholesale by George Borwick, 24 and 25 London Wall, London.

The imitation label which the prisoner used was as follows: —

Patronized by the Army and Navy. — Borwick's Original German baking powder for making bread without yeast, and puddings without eggs. (Directions improved by the Queen's private baker.)

By the use of this preparation, as the saccharine properties of the flour, which are destroyed by fermentation with yeast, are preserved; the bread is not only more nutritive, but a larger quantity is obtained from the same weight of flour.

Bread made with yeast, if eaten before it becomes stale, ferments again in the stomach, producing indigestion and numerous other complaints; when made with this powder, it is free from all such injurious effects.

The powder is equally valuable in making puddings and pastry, which it deprives of all their indigestible properties; and if dripping or lard be used instead of butter, it removes all unpleasant taste.

It will keep any length of time or in any climate. In the sick hospital of the Crimea it was found invaluable.

Sold retail by most chemists in 1d, 2d, 4d and 6d packets, and in 1s, 2 s, 6d and 5s tins.

The following is a copy of the genuine egg powder label: —

BORWICK'S METROPOLITAN EGG POWDER.

A vegetable compound, being a valuable substitute for EGGS. One packet is sufficient for two pounds of flour, and equal to four eggs.

*Directions.* — Mix with the flour, then add water or milk for plum, batter and other puddings, cakes, pancakes, etc.

PRICE, ONE PENNY.

To be had of all grocers, oilmen and corn-chandlers.

This label was imitated by the prisoner exactly, without any alteration whatever.

This case was argued on the 24th of April, 1885, before Pollock, C. B., Willes, J., Bramwell, B., Channell, B., and Byles, J.

*Huddleston*, Q. C. (*Poland* with him), appeared for the Crown, and *McIntyre* for the prisoner.

*McIntyre*, for the prisoner. The real offense committed by the prisoner was that he put off his own baking powder and egg powder as Borwick's Baking Powder and Egg Powder, passing off the spurious powder as genuine by means of the printed wrapper. A printed wrapper like this is not a document, and is not the subject of forgery at common law. In *Regina* v. *Closs*,[1] it was held that forgery must be of some document or writing, and therefore that the painting an artist's name in the corner of a picture, in order to pass it off as an original picture by that artist, was not a forgery.

Pollock, C. B. Suppose a man opened a shop and painted it so as exactly to resemble his neighbor's, would that be forgery?

*McIntyre*. No. The case of *Regina* v. *Toshack*,[2] will perhaps be relied on by the other side. It was there held that a false certificate in

[1] Dears. & B. C. C. 460.

[2] 1 Den. C. C. 492.

writing of the good conduct of a seaman was the subject of an indictment at common law; but here there was no false certificate, and placing the powder within these wrappers was no more than asserting that the powder was manufactured by Borwick.

The court here called upon

*Huddleston*, Q. C., for the prosecution. The jury have found that the labels were made and uttered by the prisoner with intent to defraud. They are therefore false documents, made and uttered by the prisoner with intent to defraud, and the prisoner is properly convicted of forgery. In 4 Blackstone's Commentaries,[1] cited in 2 Russell on Crimes,[2] forgery is defined to be "the fraudulent making or alteration of a writing to the prejudice of another man's right." In 2 East's Pleas of the Crown,[3] also there cited, the definition is "a false making, or making *malo animo* of any written instrument for the purpose of fraud and deceit." The definition of Grose, J., in *Rex* v. *Parkes and Brown*,[4] is: "The false making a note or other instrument with intent to defraud." The definition in 4 Comyns' Digest:[5] "Forgery is where a man fraudulently writes or publishes a false deed or writing to the prejudice of the right of another;" and again in the same page:[6] "And finally, it is now settled that the counterfeiting of any writing with a fraudulent intent, whereby another may be prejudiced, is forgery at common law." A printed document may be the subject of forgery as well as a written one. In Tomlin's Law Dictionary forgery is defined as "the fraudulent making or alteration of any record, deed, writing, instrument, register, stamp, etc., to the prejudice of another man's right." Forgery may therefore be properly defined as the alteration or making a false document with intent to defraud; and looking at the finding of the jury the instrument comes within that definition.

Pollock, C. B. It is elevating a wrapper of this kind very much to call it a document or instrument.

*Huddleston*, Q. C. This is a printed forgery. In *Regina* v. *Hodgson*,[7] the document alleged to have been forged was a diploma of the College of Surgeons; and the ground on which the conviction was quashed was, not that such a document was not the subject of forgery, but because there was no evidence of an intention to defraud any particular person. All that was decided in *Regina* v. *Closs*,[8] was that an artist's name painted upon a picture was an arbitrary mark, by which the artist was enabled to identify his own work, and was not such a writing as could be the subject of forgery.

[1] p. 247.
[2] p. 318.
[3] ch. 19, sec. 1, p. 852.
[4] 2 Leach, C. C. (4th ed.) 785; Stark Cr. Pl. (2d ed.) 503.
[5] p. 406, tit. Forgery (A 1.)
[6] note (d) 7.
[7] Dears. & B. C. C. 3.
[8] Dears. & B. C. C. 460.

BRAMWELL, B. Suppose the prisoner had written a letter purporting to come from Borwick, stating that the powder was genuine?

*Huddleston*, Q. C. I submit it makes no difference whether the representation is written or printed. These labels are made to resemble Borwick's label, and are in the nature of certificates that the powder is genuine. In *Regina v. Toshack*,[1] a certificate by the master of a vessel of the service and good conduct of a seaman was held to be the subject of forgery at common law. That the document there was as to the character of an individual is an immaterial ingredient in the case; and it would have been equally the subject of forgery if it had been as to any other matter, the intent being to defraud.

In *Regina* v. *Sharman*,[2] the certificate of a clergyman that the prisoner had had the charge of a school, was in like manner held to be the subject of a forgery. The wrapper in this case identifies the powder as having been manufactured by Borwick, and is as it were a certificate of the character of the article inclosed. The certificates in the cases of *Toshack* and *Sharman* certified that a man had done certain things. Here the wrapper is in effect a certificate that Borwick had put his powder in the packet. In those cases it would have made no difference if the entire documents had been printed. Bank of England notes are now entirely printed.

WILLES, J. The forgery of bank-notes is provided for by statute.

*Huddleston*, Q. C. Here the entire document is not imitated, but that will not affect the question. Where the offense consists in the false making of an instrument in resemblance to another genuine instrument it is not essential that the resemblance should be complete in every respect. It is sufficient if it be strong enough to effect the particular fraud, and to prevail over that degree of caution, prudence, and discretion which ought to be used in the usual course of affairs; and here the jury have found that the labels so far resembled those used by Borwick as to deceive persons of ordinary observation and to make them to believe them to be Borwick's labels. On this point (which was not dealt with in the judgment) the learned counsel cited *Rex*. v. *Elliott*,[3] *Rex* v. *Collicott*,[4] and Starkie on Criminal Pleading.[5]

*McIntyre*, in reply, was stopped by the court.

POLLOCK, C. B. We are all of opinion that this conviction is bad. The defendant may have been guilty of obtaining money by false pretences; of that there can be no doubt; but the real offense here was the inclosing the false powder in the false wrapper. The issuing of this wrapper without the stuff within it would be no offense. In the print-

[1] 1 Den. C. C. 492.
[2] Dears. C. C. 285.
[3] 1 Leach, C. C. (4th ed.) 175.
[4] Russ. & Ry. C. C. 212; *s. c.* 4 Taunt. 300; 2 Leach, C. C. (4th ed.) 1048.
[5] 2d ed. secs. 503, 504.

ing of these wrappers there is no forgery, nor could the man who printed them be indicted. The real offense is the issuing them with the fraudulent matter in them. I waited in vain to hear *Mr. Huddleston* show that these wrappers came within the principle of documents which might be the subject of forgery at common law. Speaking for myself, I doubt very mnch whether these papers are within that principle. They are merely wrappers, and in their present shape I doubt whether they are anything like a document or instrument which is the subject of forgery at common law. To say that they belong to that class of instruments seems to me to be confounding things together as alike which are essentially different. It might as well be said, that if one tradesman used brown paper for his wrappers, and another tradesman had his brown paper wrappers made in the same way, he could be accused of forging the brown paper.

Willes, J. I am entirely of the same opinion. I agree in the definition of forgery at common law, that it is the forging of a false document to represent a genuine document. That does not apply here, and it is quite absurd to suppose that the prisoner was guilty of ten thousand forgeries as soon as he got these wrappers from the printer; and if he had distributed them over the whole earth and done no more he would have committed no offense. The fraud consists in putting inside the wrappers powder which is not genuine and selling that. If the prisoner had had one hundred genuine wrappers and one hundred not genuine, and had put genuine powder into the spurious wrappers and spurious powder into the genuine wrappers he would not have been guilty of forgery. This is not one of the different kinds of instruments which may be made the subject of forgery. It is not made the subject of forgery simply by reason of the assertion of that which is false. In cases like the present the remedy is well known; the prosecutor may, if he pleases, file a bill in equity to restrain the defendant from using the wrapper, or he may bring an action at law for damages, or he may indict him for obtaining money under false pretenses; but it would be straining the law to hold that this was a forgery.

Bramwell, B. I think that this was not a forgery. Forgery supposes the possibility of a genuine document, and that the false document is not so good as the genuine document, and that the one is not so efficacious for all purposes as the other. In the present case one of these documents is as good as the other — the one asserts what the other does — the one is as true as the other, but one gets improperly used. But the question is whether the document itself is a false document. It is said that the wrapper is so like one used by somebody else that it may mislead; but that is not material to the question we have to decide. The prisoner may have committed a gross fraud in using the

wrappers for that which was not the genuine powder, and may possibly be indicted for obtaining money under false pretenses, but I think he can not be convicted of forgery.

CHANNELL, B. The conviction must be quashed. The prisoner may have rendered himself liable to an indictment for obtaining money by false pretenses, but he was not properly convicted of forgery.

BYLES, J. Every forgery is a counterfeit. Here, there was no counterfeit. The offense lies in the use of the wrapper.

*Conviction quashed.*

---

## FORGERY — BILL OF EXCHANGE — INCHOATE INSTRUMENT.

## R. v. HARPER.

[14 Cox, 574.]

*In the English High Court, Crown Cases Reserved.*

**The Prisoner was Indicted in the First Count for Forging** and uttering an indorsement on a bill of exchange, in the second count on a paper writing in the form of and purporting to be a bill of exchange, and in the third count on a certain paper writing. The facts were these: The prosecutor wrote the body of the bill of exchange, but without signing the drawer's name, and sent it to the prisoner, who was to accept it and procure an indorsement by a solvent person, and return it to the prosecutor. The prisoner accepted it, and forged the indorsement of another person's name, and returned it. *Held*, that the prisoner could not be convicted upon this indictment, as the document was only an inchoate instrument of no value when the prisoner forged the instrument.

John Harper was convicted of forgery before me at the Durham Assizes, under the following circumstances: —

Messrs. Watson & Son, of Kilmarnock, having supplied Harper with some machinery, drew a bill upon him for the price, and forwarded it to him for acceptance, unsigned by the drawers. It had been arranged that Harper should procure the indorsement of a solvent person, and should himself accept the bill. Harper returned it accepted by himself, and purporting to be indorsed by one Hunt. It was proved that Hunt's indorsement had been forged by Harper. On getting the bill back, Watson & Son indorsed it, and paid it into the bank for collection when due. They did not at any time sign it as drawers. The following is a copy of the bill of exchange: —

£22, 10s, 4d — Kilmarnock, Nov. 2, 1880.

One month after date pay to me or order the sum of £22, 10s, 4d, that being for value received in machinery.

Mr. J. Harper, contractor and builder, Rutland Street, Pallion, Sunderland. Indorsed, John Hunt, John Watson & Son. Accepted payable at the Union Bank of London, John Harper.

The indictment contained six counts, which charged Harper: 1. With feloniously forging a certain indorsement to and on a bill of exchange. 2. With feloniously forging an indorsement to and on a certain paper writing, which said paper writing is in the form of and purports to be a bill of exchange unsigned by any drawer thereof. 3. Feloniously forging a certain indorsement to and on a certain paper writing. In the fourth, fifth and sixth counts, he was charged with feloniously uttering the documents described in the first, second and third counts. I was of opinion that all the counts were bad except the first and fourth; but I left the whole matter to the jury. The jury returned a general verdict of guilty, and I sentenced Harper to be imprisoned with hard labor for nine months, but suspended the execution of the sentence till the decision of this case by the Court for Crown Cases Reserved. The question for the court is whether, under the circumstances stated, Harper was properly convicted of either of the offenses charged in the first or fourth counts of the indictment, and whether any of the other counts charge a felony.

J. F. STEPHEN.

No counsel appeared to argue on either side.

Lord COLERIDGE, C. J. The court is of opinion that the conviction on this indictment can not be supported. The prisoner was convicted generally of forging an indorsement on a bill of exchange. All the counts of the indictment were for forging an indorsement on a bill of exchange, or on a paper writing in the form of and purporting to be a bill of exchange, or on a certain paper writing. The document, however, was but an inchoate bill of exchange. A bill of exchange was formally drawn up and sent to the prisoner for his acceptance, and he was to accept it and to procure the indorsement of a solvent person to it, but there was no drawer's name attached to the bill. The prisoner returned the bill accepted by himself, and with the name of Hunt as the indorsee upon it, but he had forged Hunt's indorsement. Under these circumstances the prisoner can not be convicted upon this indictment, for this document was clearly not a bill of exchange. In *McCall* v. *Taylor*,[1] it was held that an instrument in the form of a bill of exchange, addressed to and accepted by the defendant, but without the names of either a payee, or drawer, is neither a bill of exchange nor a promissory note, but only an inchoate instrument. In that case Erle, C. J., said: "The instrument has no date and no drawer's name, but the defendant wrote his acceptance across it, and the question is, has the holder of such an instrument a right to declare on it, either as a bill of exchange or promissory note? It certainly is not a bill of exchange, nor is it a

[1] 34 L. J. 365, C. P.

promissory note. It is in fact only an inchoate instrument, though capable of being completed." Erle, C. J., further cited the case of *Stoessiger* v. *Southeastern Railway Company*,[1] as in point. In that case the question arose whether a document in the form of a bill of exchange for £11, 10s, but which had no drawer's name upon it, was a bill, note or security for the payment of money exceeding £10, within the Carriers' Act,[2] and it was held that it was not. In this case we are clearly of opinion that this was a mere inchoate instrument, of no value in the shape in which it was when the prisoner wrote the indorsement upon it. This is quite clear, as well upon principle as upon the authorities.

GROVE, HAWKINS and LOPES, JJ., concurred.

STEPHEN, J. Although I agree with the rest of the court that this conviction should be quashed, yet it seems to me that this case has all the effects of forgery, and I think that the prisoner would not have been relieved from them, if he had been indicted for forgery at common law.

*Conviction quashed.*

---

## FORGERY — INSTRUMENT MUST BE VALID — WHAT IS AN ACCOUNTABLE RECEIPT.

## STATE v. WHEELER.

[19 Minn. 98.]

*In the Supreme Court of Minnesota, 1872.*

1. **Forgery — Instrument Must be Valid.** — An instrument to be the subject of forgery, must be a valid instrument on its face or be proved so.

2. —— **"Accountable Receipt" — Case in Judgment.** — An indictment for the forgery of an "accountable receipt for personal property," viz: an elevator ticket for wheat, alleged that the defendant "did falsely make, forge, alter, and counterfeit a certain false, forged, altered, and counterfeited accountable receipt for personal property, viz.: an elevator ticket for wheat, which false, forged, altered, and counterfeited accountable receipt for personal property, viz.: an elevator ticket for wheat, is of the tenor following, that is to say: 'St. Paul and Sioux City Elevator Co., St. Peter, * * * Received of J. S., load No. 20, ticket No. 2402, account of W. B. N. or bearer, No. 1 Wheat, 84 5-60 bushels. M. Good, Inspector,' with intent thereby then and there to injure and defraud contrary to the form of the statute," etc., etc. *Held*, that inasmuch as no connection between the subscriber of the instrument and said elevator company appeared on the face thereof; as it can not be intended in support of the indictment, that "M. Good, Inspector," was an agent of the company, the indictment presents the case of an accountable receipt, not purporting to be signed by any authorized agent of the company and not on its face of any apparent legal effect; and there being no averment in the indictment of any connection between said subscriber and said company, which would give it such effect, the indictment was insufficient.

[1] 3 El. & B. 549; 23 L. J. 549, Q. B.

[2] 11 Geo. IV. & 1 Wm. IV. ch. 68, sec. 1.

The defendant was arraigned in the District Court for Nicollet County upon an indictment charging that, at a time and place therein mentioned, he "did falsely make, forge, alter, and counterfeit a certain false, forged, altered, and counterfeited accountable receipt for personal property, to wit, an elevator ticket for wheat; which false, forged, altered, and counterfeited accountable receipt for personal property, to wit, an elevator ticket for wheat, is of the tenor following, that is to say: —

"The wheat named herein to be held at risk of owner for loss or damage from fire, lightning, or heating."

St. Paul & Sioux City Elevator Company,
St. Peter, 9 mo., 29 day, 1871.
Received of J. Simmons, Mornoka,
Load No. 20, ticket No. 2402, account
of W. B. N. or bearer, No. 1 Wheat,
Bin No. 7, No. 84 05-60 Bushels.
M. GOOD, Inspector.

"To be indorsed by the party to whom paid;

with intent thereby then and there to injure and defraud, contrary to the form of the statute," etc.

To this indictment the defendant demurred; but his demurrer was overruled and he was tried and convicted. A motion in arrest of judgment was likewise overruled, and the defendant was sentenced to imprisonment at hard labor for two years. The case comes to this court upon writ of error.

*E. St. Julian Cox*, for plaintiff in error.

*F. R. E. Cornell*, Attorney-General.

*By the Court*, RIPLEY, C. J. As an instrument, to be the subject of an indictment for forgery, must either appear on its face to be, or be in fact, one which, if true, would possess some legal validity; [1] so, if it do not so appear on the face of the instrument set out in the indictment, facts must be averred which will enable the court to see that, if it were genuine, it would possess such validity.[2]

Tried by this rule, this indictment is insufficient. It is found under General statutes: [3] "Whoever falsely * * * forges any * * * accountable receipt for money, goods, or other property, with intent to injure or defraud any person, shall be punished," etc.

The instrument set out purports to be a statement by "M. Good, in-

[1] 2 Bish. Cr. L., sec. 503.

[2] 2 Bish. Cr. L., secs. 512, 513; People *v.* Shall, 9 Cow. 778; People *v.* Harrison, 8 Barb. 560; Com. *v.* Ray, 3 Gray, 441; 2 Russ. on Cr. 374; Rex *v.* Wilcox, Russ. & Ry. 50.

[3] ch. 96, sec. 1.

spector," that the St. Paul and Sioux City Elevator Company had received at St. Peter eighty-four bushels and five pounds of number one wheat, for account of W. B. N. or bearer.

It is said by the defendant in error that the legal effect of this kind of instrument is to entitle the innocent holder for value to that number of bushels of number one wheat on presentation to the St. Paul and Sioux City Elevator Company.

Suppose that it is, how does that appear on the face of this instrument.

In point of fact it does not purport to be signed on behalf of the company.

The addition of "inspector" after the name of the subscriber does not indicate, in itself, the existence of any relation whatever between himself and the company, much less of any such relation as would in itself import any authority on his part to act for it.

It is said by the defendant in error that it is apparent from the mere inspection of the paper, and from the known way in which that kind of paper is used in business matters, that it is possible that this instrument could be used to defraud.

That is to say — to make this indictment good, the way in which such a paper is used in business matters must be known, but that is something of which the court can not take notice. It is a fact to be proved.

If the St. Paul and Sioux City Elevator Company, whether it be a corporation, or a firm, or an individual doing business under that name, receives wheat and gives its obligation to account therefor to any one, or in any way, signed by its agent, it is good against it, and any forgery of such obligation would be indictable; and an indictment, setting out such forged instrument would be good without extrinsic averment.

But the company would not be bound by such an instrument signed by a mere stranger. Therefore, if no connection between the company and the subscriber of the instrument appear on its face, such connection must be averred.

It can not be intended, in support of the indictment, that "M. Good, inspector," was an agent of the company. The paper must purport on its face to be good and valid for the purpose for which it was created. This does not; no connection appearing between the company and the signor of the instrument.

A statement by a stranger that the company had received said wheat for said purpose would, as already remarked, of itself import no legal liability on the part of the company. Nor would it import any on the part of such stranger.

A note, purporting to be the note of the elevator company, and signed

"M. Good, inspector," would no more import validity of itself, than the note in the case of *People* v. *Shall*, already cited, which was payable in work, and did not purport to be for value, "though in coupling a genuine note like it with a consideration, a cause of action would be made."

So, here, in coupling such an instrument as the one before us with the fact of an authority in "M. Good, inspector," to issue it, a liability in the company would appear.

Herein is the distinction between this case and that of *People* v. *Stearns*,[1] cited by the defendant in error.

The New York statute provided that "the counterfeiting with intent to injure or defraud, of any instrument or writing, being or purporting to be the act of another, by which any rights or property whatever shall be, or purport to be, in any manner affected, by which any person may be affected or in any way injured in his person or property, shall be forgery in the third degree."

The following was held to be within the statute: "To the cashier of the Union Bank: Sir—Please deliver to Messrs. Burton, Gurley & Edmonds the plates of our bank, and receive them again on deposit, and oblige your obedient servant, G. C. Gwathmay, cashier, Bank of Kentucky, Louisville, December 20, 1857," without any extrinsic averment in the indictment that G. C. Gwathmay had authority to make such order, or that the cashier of the Union Bank had any control over the plates. "It seems difficult," says Cowen, J., in delivering the opinion of the court, "to mistake the apparent import of the instrument in question. It purported to be an order from an officer representing the Bank of Kentucky, duly empowered to make it, which order was directed to another, purporting to be the depositary, and desiring him to deliver the plates of the bank."

It appeared, therefore, that, from the language of the instrument itself, it might have the effect to defraud.

The case at bar is of an accountable receipt, not purporting to be signed by an officer of the elevator company duly empowered to sign it. It is not on the face of the instrument of any apparent legal effect.[2]

The demurrer should have been sustained. The judgment of the District Court is reversed.

[1] 21 Wend. 409.

[2] People *v.* Shall, *supra*.

## FORGERY—PAPER WHOSE PURPOSE HAS BEEN SATISFIED.

# PEOPLE *v.* FITCH.

[1 Wend. 198; 19 Am. Dec. 477.]

*In the Supreme Court of New York, August, 1828.*

**Fraudulent Alteration of Satisfied Order by Drawer not Forgery.**—An alteration of the date of an order for the delivery of goods, made by the drawer with fraudulent intent, after the order had been satisfied and returned to him, is not forgery.

Indictment for forgery, tried at the Genesee Oyer and Terminer. The indictment contained two counts, the first charging the defendant with the forgery of a certain order previously drawn by himself; and second, charging him with uttering and publishing the order as true, with intent to defraud one Bangs. It appeared that the order in question was drawn by the defendant November 4, 1823, on a settlement of accounts between himself and one Bangs, and that it directed Kellogg, the drawee, to deliver a certain cow to Bangs, and that the defendant at the same time gave a note to Bangs for the balance between them; that the order was presented, and the cow delivered to Bangs, and that the plaintiff afterwards sued the defendant on the note mentioned above; that the defendant set off the order referred to when it appeared that the date had been altered from November 4th to November 14th; and an opinion being expressed to that effect, the defendant withdrew the order, and the suit was discontinued; that the defendant afterwards sued Bangs for the price of the cow delivered by Kellogg when Bangs set off the note; and on the trial, the delivery of the cow being proved, the order, however, not being produced, the present defendant obtained judgment for the balance of the price of the cow after deducting the amount of the note. The judge charged the jury that the order being *functus officio*, the subsequent alteration of it was not forgery under the statute, but that they might find the defendant guilty at the common law if they thought the alteration proved. The jury found the defendant guilty under the first count, but not guilty under the second; whereupon judgment was suspended until the advice of this court could be taken.

*L. Rumsey*, district attorney, cited: 2 East's Pleas of the Crown,[1] 5 Chitty's Criminal Law,[2] 5 Johnson,[3] Archbold,[4] East's Criminal Law,[5] McNally's Evidence,[6] 1 Chitty's Criminal Law.[7]

1 pp. 852, 855, 979.
2 pp. 199, 780, 799.
3 p. 236.
4 pp. 189, 192.
5 pp. 854, 855.
6 p. 439.
7 p. 238.

*H. J. Redfield*, for the defendant, cited: 4 Blackstone's Commentaries,[1] East's Criminal Law,[2] 2 Lord Raymond,[3] *Rex* v. *Knight.*[4]

*By the Court*, SAVAGE, C. J. Is this forgery? Forgery has often been defined by learned jurists. By Mr. Justice Blackstone, "forgery is the fraudulent making or alteration of a writing to the prejudice of another's right;" by Buller, justice, "the making of a false instrument with intent to deceive;" by Baron Eyre, "a false signature with intent to deceive." Again, "the false making an instrument which purports on the face of it to be good and valid for the purposes for which it was created with a design to defraud;" by Grose, Justice, "the false making of note or other instrument with intent to defraud;" by Mr. East, the false making of any written instrument for the purpose of fraud and deceit;"[5] by Mr. Chitty, "the false making or alteration of such writings as either at common law or by statute, are its objects with intent to defraud another."[6] This writer notices a distinction between forgery and fraud; that the latter must actually take effect, while the former is complete, though no one is actually injured if the tendency and intent to defraud be manifest. As to what false making is necessary to constitute the offense, it has been held that a party may make a false deed in his own name by antedating, for instance, so as to prejudice a prior grantee. So by indorsing a bill of exchange in his own name when he is not the real payee.[7] On this principle we held Peacock guilty of forgery for indorsing the permit for the delivery of a quantity of coal in his own name, knowing that he was not the real consignee of the coal, though of the same name.[8] So making a fraudulent alteration or erasure in any material part of a true instrument or any alteration which gives it a new operation, as by altering the date of a bill of exchange after acceptance whereby the payment was accelerated.[9]

As to what shall be considered a warrant or order under the statute, the document forged must be such as appears to give the bearer a disposing power over the property which he demands; it must assume to transfer the right, at least of the custody of the goods to the offender.[10]

Such are the principles applicable to cases of forgery of the description of the present. This is not like the case of a bill of exchange with the date altered after acceptance, and before payment. Here the order was paid. Suppose a bill of exchange or promissory note, paid and taken up by the maker, who then, for purposes of fraud, alters the date,

[1] p. 245.
[2] pp. 840, 861.
[3] p. 1461.
[4] Salk. 375.
[5] 2 East's P. C. 852, 853.
[6] 3 Chit. Cr. L. 1022.
[7] 2 East's P. C. 855; 4 L. R. 28.
[8] 6 Cow. 72.
[9] 4 L. R. 320; 3 Chit. Cr. L. 1038; 2 East's P. C. 355.
[10] 3 Chit. Cr. L. 1033.

would such alteration constitute forgery? Suppose the defendant in this case, instead of prefixing the figure one to the four in the date of the order which had been paid and taken up, had drawn an entire new order of the date of the fourteenth of November, would that have been forgery? Here was no intermeddling with an instrument the property of another. Here was no use of the name of another. Here was indeed a fraudulent intent; but in the act of altering the date, or drawing a new order of his own there was no necessary tendency to fraud. The order was not at all necessary to aid in the perpetration of the fraud which the defendant contemplated, and which he effected without the order. The paper in his own hands could have no effect, and was no evidence in his defence to the action on the note; and had he produced the witness to prove the delivery of the cow under it, that witness must have falsified the order and defeated the fraud. It is not necessary, however, that fraud should be perpetrated to constitute this offense. An intent is sufficient, with a tendency to effectuate fraud. My objections to this conviction are: 1. That this paper after it was delivered up to the defendant, was no instrument at all, in the legal acceptance of the term. 2. There was no false making. The order purported to be drawn by the defendant and it was so drawn. It purported to be dated the fourteenth of November, and it was so dated. 3. The order had no tendency to aid in the fraud. I am, therefore, of opinion that the Court of Oyer and Terminer be advised to arrest the judgment.

---

## FORGERY — FICTITIOUS DECREE OF COURT.

## Brown v. People.

[86 Ill. 239.]

*In the Supreme Court of Illinois, 1878.*

**A Fictitious Decree** of a court of another state, got up with intent to deceive, is not the subject of forgery.

Error to Knox County.

Breese, J., delivered the opinion of the court.

This is an indictment preferred by the grand jury of Knox County, at the June term, 1876, against John Brown, for forgery. The charge was, that in the county of Knox, on the 1st day of February, 1876, defendant unlawfully feloniously and willfully, contriving to injure, damage and defraud one Eliza Penn, did then and there unlawfully,

feloniously, knowingly and falsely forge and counterfeit a certain instrument in writing purporting to be a public record, viz.: a decree of divorce pretended to be granted in Marion County Circuit Court of the State of Indiana; which said false, forged, and counterfeited instrument of writing, is as follows: —

STATE OF INDIANA, } *ss.*<br>MARION COUNTY, }

*In Marion County Circuit Court, to January Term, A. D. 1876.*

JOHN W. BROWN }<br>*vs.* } *Divorce.*<br>MARY J. BROWN, }

And now this cause coming on for a final hearing in said court, and the evidence being heard, and it was proven that John W. Brown was married to Mary J. Shum, now Mary J. Brown, was guilty of repeated abuse and desertion for the space of two years previous to the filing of the bill for divorce in this cause; and it appearing by the evidence that the said parties have one child, named Clara Brown, by said marriage, aged about three years. It also appearing by the evidence that the said Mary J. Brown was guilty of repeated abuse, and further that she, Mary J. Brown, deserted and left her husband on or about the 15th day of January, A. D. 1874, without cause or provocation; now, therefore, it is ordered and decreed by the court, that the said John W. Brown and Mary J. Brown, are henceforth and forever divorced, and that the bonds of matrimony heretofore existing between them are forever dissolved, and that the said Mary J. Brown retain the care and custody of said child, Clara Brown, till she becomes of the age of fourteen years, and that said John W. Brown pay the costs of this case to the officers and witnesses.

C. H. MAFFIT,<br>*Judge Circuit Court, Marion County, Ind.*

The indictment properly concludes. A motion was made to quash the indictment, which was denied, and the defendant, pleading not guilty, was put upon his trial before a jury, who found him guilty as charged, and fixed his punishment at two (2) years confinement in the penitentiary.

A motion for a new trial was made and denied, and a like disposition was made of defendant's motion in arrest of judgment, and judgment rendered on the verdict.

To reverse this judgment, defendant has obtained a writ of error, and brought the record to this court.

Various errors are assigned, but we have considered but one, which strikes at the foundation of the prosecution; it is this: The instrument of writing set out in the indictment does not on its face purport to be an authenticated copy of a record, and no indictment could be founded upon it. The statute[1] is in these words: "Every person who shall shall falsely make, alter, forge, or counterfeit any record or other authentic matter of a public nature * * * with intent, etc. Every person so offending shall be deemed guilty of perjury and shall be punished." The section embraces almost every conceivable instrument of writing known to the law and in common use in the various transactions of life, and the whole purport of it leads to the conclusion that the instrument alleged to be forged, must be such an imstrument which, if genuine, would be effective. A glance at this alleged forged record will satisfy any one, that it has few if any indications of a record of a court. It could deceive no one. Even the young woman whom it is alleged it was designed to deceive and defraud, testified on her recross-examination, as follows: "At the time he showed the divorce, I glanced at it, and said it was no divorce, because there was no seal or stamp on it. He says that it is legal." Again she stated, when the divorce decree was shown to her, she looked at it and said she could get up just as good a one. Again her brother Charles, testified that all he knew about it, was what his sister told him. She said it was not a legal divorce, as it had no stamp on it.

Nobody could be deceived by such an instrument of writing who was not quite willing to be deceived. The paper does not purport to be a copy of any record, nor has it the semblance of one, save in a few particulars. The worst that can be said of the instrument is that it is a fictitious decree, and for making such no penalty is provided by the statute, whilst there is a severe penalty provided by section 107 against any one who shall make, utter, or publish with an intention to defraud any other person, or with like intention shall attempt to pass, utter or publish, or shall have in his possession with like intent, any bill, note or check, or other instrument of writing for the payment of money or property, etc., knowing the same to be fictitious, viz.: that he shall be imprisoned in the penitentiary, etc.

The instrument in question is at best but a fictitious decree of a court of another State, got up with the intent to deceive no doubt, but against which no penalty seems to be provided by law.

The instrument not being or purporting to be a record, no indictment for forging it can be founded on it. And the finding and judgment were erroneous. The judgment is reversed, and the prisoner will be discharged.

[1] Rev. Stat. cap., 38, sec. 105.

## FORGERY — SEAL OF COURT — UTTERING FALSE IMPRESSION OF SAME — INSTRUMENT FORGED MUST BE APPARENTLY VALID.

## FADNER *v.* PEOPLE.

[2 N. Y. Crim. Rep. 553.]

*In the Supreme Court of New York, Fourth Department, May, 1884.*

1. **Forging any Instrument** or writing which, as appears on its face, would have been void, if genuine, is not an indictable offense.
2. **The Plaintiff in Error on a Trial for Bigamy**, put in evidence an alleged copy of a decree granting him a divorce from his first wife, and he was thereby acquitted. On the back of the paper was an impression purporting to be the seal of New York County, and also the following writing: "Filed August 14, 1879. A Copy. Hubert O. Thompson, clerk." He was indicted for forgery in having uttered a false and forged impression of the seal of the Supreme Court with intent to defraud, and it appeared on the trial that no such judgment had ever been granted, and that the alleged copy was a forgery. *Held*, that assuming the act of the prisoner in uttering the false impression of the seal falls within the condemnation of 2 Revised Statutes,[1] and constitutes forgery, if the same is published in connection with, and as any part of a certificate which the county clerk, as keeper of the seal, is authorized to make, in his official capacity, yet, as the pretended certificate was not in the form prescribed by the Code of Civil Procedure,[2] it was void on its face, and the alleged decree was inadmissible in evidence, and the acts specified did not furnish the basis for an indictment for forgery.

WRIT of error to the Court of Sessions of Oneida County, to review the trial and conviction of the plaintiff in error Frederick C. Fadner of forgery.

The plaintiff in error was tried and convicted in the Oneida County Court of Sessions, Hon. N. B. SUTTON, County Judge, presiding, with associates, and sentenced to State prison for the period of seven years and six months.

The indictment was found in January, 1881, and contained four counts. In the first Fadner is charged with forging the impression of the seal of New York County, which is the seal of the Supreme Court in and for the county of New York. In the second count he is charged with having uttered a false and forged impression of the same seal, with an intent to defraud, knowing the same to be forged. In the third count he is charged with having forged the seal of the county of New York, that is, the metallic instrument with which the impression is made. In the fourth count it is averred that he uttered the forged seal, that is, put in circulation the metallic instrument, purported to be the genuine seal of said county.

The trial court ruled, that upon the evidence, there could be no conviction upon the first, third and fourth counts of the indictment, and so instructed the jury.

[1] p. 674, sec. 39.

[2] secs. 633, 957, 958.

On the second count the jury rendered a verdict of guilty as charged therein.

In the second count of the indictment, it is charged, that the defendant feloniously and falsely did utter and publish as true, with intent to injure and defraud (certain specified persons), a certain false, forged, falsified and counterfeit impression of a certain seal, purporting to be the impression of the county seal, and of the clerk of the county of New York, and of the courts of record in and for said county and of the Supreme Court in and for said county, which said last mentioned false, forged, falsified and counterfeited impression of said seal, purporting to be the impression of the seal of said county, and of the clerk of said county and of said court, is as follows: that is to say (full description of seal); the same being fitted and impressed on and to a certain instrument in writing, purporting to be a certificate, order, judgment, decree, allowance and proceeding of the Supreme Court of the State of New York, and for the county of New York, the same being a competent court, and purporting to be for that court and entered in said court in the words and figures following: that is to say (here follows judgment and decree).

The decree purported to have been entered August 14, 1879, in an action brought by the prisoner Fadner against Alta Fadner, his wife, at a special term of the Supreme Court, in and for New York County, at which Hon. CHARLES H. VAN BRUNT, presided, and it also purports to grant to the plaintiff therein (the prisoner), a divorce from the defendant therein, his said wife, on the ground of her adultery. At the end of the paper in the usual place was a signature which purported to be that of said justice in his official capacity, and on the back thereof, were the impression of the seal and the certificate of the clerk. The indictment did not charge, that the paper purporting to be a decree was false or counterfeited.

The defendant took divers exceptions, which bring up the question whether or not the offense of forgery was proved. On the same grounds defendant moved in arrest of judgment.

Further facts appeared in the opinion.

*J. I. Sayles*, for the prisoner, plaintiff in error.

*William A. Matteson*, District-Attorney, for the People, defendant in error.

BARKER, J. The first point made by the plaintiff in error is, that the facts set forth in the second count of the indictment, and upon which he was convicted, do not constitute the crime of forgery, nor was that offense proved by the evidence produced on the trial.

As the count in the indictment upon which the defendant was found guilty, only charges the publishing and uttering of a forged and coun-

terfeited impression of the seal of the county clerk of the city and county of New York, that act must be declared a crime by some provision of the statute relative to forgery, or the same is not an indictable offense in this State.

By the common law it was not forgery, to make and publish, as true, a false and forged impression of a seal, but it was high treason in a subject of the realm of England to counterfeit the king's great or privy seal.[1]

Under our statute it constitutes forgery to make and forge an impression purporting to be the impress of a genuine seal of a public officer authorized by law to have and keep a seal. The entire provision is as follows: Section 24. "Every person who shall forge or counterfeit the great or privy seal of this State; the seal of any public officer authorized by law; the seal of any court of record, including Surrogate's Court, or the seal of any body corporate, duly incorporated by or under the laws of this State, or who shall falsely make, forge, or counterfeit any impression purporting to be the impression of any such seal, with an intent to defraud, shall, upon conviction, be adjudged guilty of forgery in the second degree."[2]

Prior to this enactment there was no provision by statute creating and defining the offense which is mentioned therein.[3] It will be observed that there is no provision in this section of the statute against uttering and publishing a false impression of a seal. The act declared to be a forgery is the making of a forged and counterfeit seal, or the false making of an impression purporting to be the impression of a genuine seal.

If no other provision can be found in the statute than that contained in the twenty-fourth section, then, under the laws of this State, it is not forgery or a crime of any character, to utter and publish as true a false impression of the seal of a court of record, and it was so conceded by the learned district attorney. It is argued in behalf of the People, in support of the conviction, that the false and forged impression of a court of record is a "counterfeit instrument," within the meaning of the provisions contained in section 39, which declares that "every person who shall be convicted of having uttered and published as true, and with intent to defraud, any forged, altered or counterfeited instrument, or any counterfeit gold or silver coin, the forging, altering or counterfeiting of which is hereinbefore declared to be an offense, knowing such instrument or coin to be forged, altered or counterfeited, shall suffer the same punishment herein assigned for the forging, altering or counterfeiting the instrument or coin so uttered, except as in the next

[1] 4 Bla. Com. 83, 247; 1 Colby's Cr. L. 557.

[2] 2 Rev. Stats. m. p. 671.

[3] See the revisor's note to this section.

section specified." Such was the construction put upon this section of the statute by the court below, and the jury were instructed that a false impression of a genuine seal purporting to be the impression of such seal, was a written instrument, within the purview of the statute.

In disposing of the case as now presented, we shall not enter upon a discussion of this question, but leave the same unsolved, and assume, for the purposes of this case, that the act of the defendant in uttering the false impression of the seal falls within the condemnation of section 39, and constitutes the crime of forgery, if the same is published in connection with and as a part of any certificate, which a county clerk, as keeper of the seal, is authorized to make in his official capacity.

To constitute the complete crime of forgery in falsely making and forging an impression purporting to be the impression of the official seal of the clerk of the court, as mentioned in the twenty-fourth section, the same must be impressed upon a paper of some kind purporting to be a legal and valid document, and also purporting to be duly authenticated. The mere forging the impression of an official seal, disconnected from a certificate made by the clerk, could not deceive any person. So, to constitute forgery, in uttering and publishing as true, a false and counterfeit impression of the seal, it is also necessary that the impression so published should be in like form and manner attached to and be a part of certification, purporting to be made by the clerk of the court. No one but the clerk, or some one of his deputies, is authorized by law to use the seal of the court. Unless the impression of the seal is made to accompany the clerk's certificate, attached to some record or document in his official custody, or placed in his hands for his certification in his official capacity, it is a misuse of the same which the law presumes every citizen knows. The statute on the subject authorizes seals to be made, kept and used by the county clerk, for these purposes and none other, and he is made the sole and only lawful custodian of the same. On the back of the paper writing, purporting to be a decree in a divorce suit, the impression was made. The inscription on the face of the true seal was "New York Seal." On the face of the counterfeit impression, the same words appear in like juxtaposition. On the right hand of the impression are the following words: "Final, August 14th, 1879." "A copy." "Hubert O. Thompson, clerk." No other words or figures are written near the impression, or over it, of what purports to be the signature of the clerk. The paper or document, upon which the seal is impressed and the certificate written, purports to be a decree in a suit in which the defendant is plaintiff, and Alta Fadner defendant, granted at a Special Term of this court held in and for the city and county of New York,

and the same was offered in evidence in the Oneida County Court of Sessions, and the same was received by the court as proper and competent evidence, on the trial of the defendant, on an indictment charging him with the crime of bigamy. If these documents had been genuine and in due form, they would have constituted competent and material evidence in his behalf. He was acquitted on the trial by the verdict of the jury. The People on the trial of the case now here, gave evidence tending to prove that the paper purporting to be a decree was wholly false and fabricated, and that there was no record of the same in the office of the clerk of this court in and for the city and county of New York.

The evidence also tended to show that the impression of the seal alleged to be forged and counterfeited, was in form and similitude like the genuine seal kept and used by the county clerk, but that in fact it was false, forged and counterfeited.

We now come to what I regard as the important question we have before us, and it is whether the making the false impression of the seal and forging of the clerk's certificate, constituted the crime of forgery under the law of this State.

The rule, as now established, is this, if the instrument be invalid on its face, it can not be the subject of a forgery. Forging any instrument or writing which, as appears on its face, would have been void, if genuine, is not an indictable offense.[1]

The English cases are to the same effect, and the rule applies as well to the statutory offense of forgery as to common-law cases. If the impression of the seal had been taken from the true one and the clerk's certificate had been ungenuine, the certificate would have been incomplete and imperfect, and did not authorize the court to receive in evidence the documents to which they were attached. That paper purported to be a judgment of this court, and was offered and received in evidence in another tribunal, and could not have been legally used as evidence, without a certification in form and to the effect as provided by law. By section 933 of the Code, provision is made that copies of papers duly filed, kept and recorded in the office of one of the clerks of this county, may be read in evidence in place of the originals when properly certified by the clerk. The form and contents of such certificate, and the mode and manner of attestation, are contained in sections 957 and 958. The officer making the certificate must state therein that the paper or document has been compared by him with the original, and that it is a correct transcript therefrom and of the whole of the

1 People *v.* Shall, 9 Cow. 778; People *v.* Fitch, 1 Wend. 198; People *v.* Stearns, 21 *Id.* 409; People *v.* Harrison, 8 Barb. 560; Cunningham *v.* People, 4 Hun, 455; 2 Bish. Cr. L., sec. 538; Warburton's Am. Cr. L., par. 1438.

original, and the certificate must then be attested by the official seal of the officer.

This certificate, if genuine, is clearly defective in form and substance. The defect is fatal to the validity of the same, and it is apparent on the face of it. It ought not to have deceived any one. Because it did deceive, the court below, undoubtedly through inadvertence, can not in law make it a forgery. It was decided in *People* v. *Harrison*,[1] that an indictment would not lie for forging a certificate of an acknowledgment of a deed, when the certificate did not state that the grantor acknowledged the execution of the conveyance, the statute requiring the certificate to state that fact.

In *People* v. *Cunningham*,[2] it was said criminal forgery can not be made out by imputing a possible or even actual ignorance of the law, to the person intended to be defrauded. If, therefore, a statute authorizes an instrument not known to the common law, and so prescribes its form as to render any other form null, forgery can not be committed by making a false statutory one, in a form not provided by statute, even though it is so like the form prescribed as to be liable to deceive most persons.[3]

In *People* v. *Shall*,[4] the indictment charged the defendant with making and forging an instrument in the following form: "Three months after date, I promise to pay Sebastian I. Shall, or bearer, the sum of three dollars in shoemaking, at cash price, the work to be done at his dwelling-house." It was held that the forging and passing an instrument in that form did not constitute the crime of forgery, the instrument on its face being invalid and not enforceable against its maker, as it did not express any consideration. The court remarked that the instrument, to be the subject of forgery, must purport on the face of it to be good and valid for the purpose for which it was created.

For the reason that criminal forgery was not averred in the second count in the indictment, nor proved on the trial, the conviction should be reversed and a new trial awarded. We have not inspected the evidence for the purpose of determining whether it was sufficient to warrant the conviction under the count charging the defendant with making and forging the seal, as that question was withdrawn from the consideration of the jury.

We entertain very serious doubts as to the correctness of some of the rulings receiving evidence over the defendant's objection, and if there should be a retrial upon some of the other counts of the indictment, it is not likely that the same class of evidence will be offered in the same

[1] *supra.*
[2] *supra.*
[3] 2 Bish., sec. 658; People *v.* Harrison, *supra.*
[4] *supra.*

form and for the same purpose as it was upon this, and we therefore pass over these exceptions.

At the time of the trial of and sentence, the Code of Criminal Procedure was in full force and effect, and the proper manner of bringing the case into this court for review, was by appeal and not by writ of error; but, as the District-Attorney has waived the point, that the case is not properly here, we give the defendant the benefit of the errors which have been pointed out, and reverse the judgment, and grant a new trial on the indictment in the Oneida County Court of Sessions.

SMITH, P. J., and HARDIN, J., concurred.

---

## FORGERY — MUST PURPORT TO BE ACT OF ANOTHER — FICTITIOUS NAME.

### COMMONWEALTH *v.* BALDWIN.

[11 Gray, 197.]

*In the Supreme Judicial Court of Massachusetts, 1858.*

**Signing a Promissory Note** in the name of a fictitious firm, with intent to defraud, and falsely representing that the firm consists of the writer and another person, is not forgery.

THOMAS, J. This is an indictment for the forging of a promissory note. The indictment alleges that the defendant at Worcester in this county, "feloniously did falsely make, forge and counterfeit a promissory note, which false, forged and counterfeit promissory note is of the following tenor, that is to say: —

"$457.88.

"WORCESTER, August 21, 1856.

"Four months after date we promise to pay to the order of Russell Phelps, four hundred fifty-seven dollars 88/100, payable at Exchange Bank, Boston, value received.

"SCHOULER, BALDWIN & CO.

"With intent thereby then and there to injure and defraud said Russell Phelps."

The circumstances under which the note was given are thus stated in the bill of exceptions: Russell Phelps testified that the note was executed and delivered by the defendant to him at the Bay State House in Worcester, on the 21st of August, 1856, for a note of equal amount,

which he held, signed by the defendant in his individual name, and which was overdue; and that in reply to the inquiry who were the members of the firm of Schouler, Baldwin & Co., the defendant said: "Henry W. Baldwin and William Schouler, of Columbus." He further said that no person was represented by the words "& Co." It appeared in evidence that the note signed Schouler, Baldwin & Co., was never negotiated by Russell Phelps. The government offered evidence which tended to prove either that there never had been any partnership between Schouler and Baldwin, the defendant; or, if there ever had been a partnership, that it was dissolved in the month of July, 1856.

The question raised at the trial and discussed here is whether the execution and delivery of the note, under the facts stated, and with intent to defraud, was a forgery.

It would be difficult perhaps by a single definition of the crime of forgery to include all possible cases. Forgery, speaking in general terms, is the false making or material alteration of or addition to a written instrument for the purpose of deceit and fraud. It may be the making of a false writing purporting to be that of another. It may be the alteration in some material particular of a genuine instrument by a change of its words or figures. It may be the addition of some material provision to an instrument otherwise genuine. It may be the appending of a genuine signature of another to an instrument for which it was not intended. The false writing, alleged to have been made, may purport to be the instrument of a person or firm existing, or of a fictitious person or firm. It may be even in the name of the prisoner, if it purports to be, and is desired to be received as the instrument of a third person having the same name. As a general rule, however, to constitute forgery, the writing falsely made must purport to be the writing of another party than the person making it. The mere false statement or implication of a fact, not having reference to the person by whom the instrument is executed, will not constitute the crime.

An exception is stated to this last rule by Coke, in the Third Institute,[1] where A. made a feoffment to B. of certain land, and afterwards made a feoffment to C. of the same land with an antedate before the feoffment to B. This was certainly making a false instrument in one's own name; making one's own act to appear to have been done at a time when it was not in fact done. We fail to understand on what principle this case can rest. If the instrument had been executed in the presence of the feoffee, and antedated in his presence, it clearly could not have been deemed forgery. Beyond this, as the feoffment took effect, not by the charter of feoffment, but by the livery of seisin — the entry of

[1] p. 169.

the feoffee upon the land with the charter and the delivery of the twig or clod in the name of the seisin of all the land contained in the deed — it is not easy to see how the date could be material.

The case of *Mead* v. *Young*,[1] is cited as another exception to the rule. A bill of exchange payable to A. came into the hands of a person not the payee, but having the same name with A. This person indorsed it. In an action by the indorsee against the acceptor, the question arose whether it was competent for the defendant to show that the person indorsing the same was not the real payee. It was held competent, on the ground that the indorsement was a forgery, and that no title to the note could be derived through a forgery. In this case of *Mead* v. *Young*, the party assumed to use the name and power of the payee. The indorsement purported to be and was intended to be taken as that of another person, the real payee.

The writing alleged to be forged in the case at bar was the handwriting of the defendant, known to be such and intended to be received as such. It binds the defendant. Its falsity consists in the implication that he was a partner of Schouler and authorized to bind him by his act. This, though a fraud, is not, we think, a forgery.

Suppose the defendant had said in terms, "I have authority to sign Schouler's name," and then had signed it in the presence of the promisee. He would have obtained the discharge of the former note by a false pretense, a pretense that he had authority to bind Schouler. "It is not," says Sergeant Hawkins, "the bare writing of an instrument in another's name without his privity, but the giving it a false appearance of having been executed by him, which makes a man guilty of forgery."[2]

If the defendant had written upon the note, "William Schouler, by his agent, Henry W. Baldwin," the act plainly would not have been forgery. The party taking the note knows it is not the personal act of Schouler. He does not rely upon his signature. He is not deceived by the semblance of his signature. He relies solely upon the averred agency and authority of the defendant to bind Schouler. So, in the case before us, the note was executed in the presence of the promisee. He knew it was not Schouler's signature. He relied upon the defendant's statement of his authority to bind him as partner in the firm of Schouler, Baldwin & Co. Or if the partnership had in fact before existed, but was then dissolved, the effect of the defendant's act was a false representation of its continued existence. In the case of *Regina* v. *White*,[3] the prisoner indorsed a bill of exchange "per procuration, Thomas Tomlinson, Emanuel White." He had no authority to make

[1] 4 T. R. 28.

[2] 1 Hawk., ch. 70, sec. 5.

[3] 1 Den. 208.

the indorsement, but the twelve judges held unanimously that the act was no forgery.

The *nisi prius* case of *Regina* v. *Rogers*,[1] has some resemblance to the case before us. The indictment was for uttering a forged acceptance of a bill of exchange. It was sold and delivered by the defendant as the acceptance of Nicholson & Co. Some evidence was offered that it was accepted by one T. Nicholson in the name of a fictitious firm. The instructions to the jury were perhaps broad enough to include the case at bar, but the jury having found that the acceptance was not written by T. Nicholson, the case went no further. The instructions at *nisi prius* have no force as precedent, and in principle are plainly beyond the line of the settled cases.

The result is that the exceptions must be sustained, and a new trial ordered in the Common Pleas. It will be observed, however, that the grounds on which the exceptions are sustained seem necessarily to dispose of the cause.

*Exceptions sustained.*

---

## FORGERY — INSTRUMENT MUST PURPORT TO BE THE ACT OF ANOTHER.

## STATE v. YOUNG.

[46 N. H. 266.]

*In the Supreme Court of New Hampshire, 1865.*

1. **It is not Forgery at Common Law** or under the New Hampshire statute for one to make a false charge in his own book accounts. Ordinarily, the writing or instrument which may be the subject of forgery, must be, or purport to be, the act of another, or it must be at the time the property of another, or it must be some writing or instrument under which others have acquired some rights, or have in some way become liable, and where these rights or liabilities are sought to be affected or changed by the alteration without their consent.
2. **A Forged Writing or Instrument** must, in itself, be false, that is fictitious, not genuine, a counterfeit, and not the true instrument which it purports to be, without regard to the truth or falsehood of the statement which the writing contains.

The grand jury found a bill of indictment against the respondent, containing two counts, as follows, viz.: —

"The grand jurors for the State of New Hampshire, upon their oath, present that Otis Young, junior, of Plymouth, in the county of Grafton, husbandman, on the twenty-fifth day of July, in the year of our Lord one thousand eight hundred and sixty-five, at Gilford, in the county of

[1] 8 C. & P. 629.

Belknap aforesaid, with force and arms, did falsely make and counterfeit a certain writing purporting to contain evidence of the existence of a certain debt, contract, and promise, contracted and made by one Charles C. Rogers, of Sanbornton, in said county of Belknap, Esquire, for the payment of fifteen dollars, which said false and counterfeit writing is as follows: '159, March 14, C. C. Rogers, Dr., to one vest chain, $15;' contained in a certain book of accounts of him, the said Otis Young, junior, with intent, him the said Charles C. Rogers, to defraud, contrary to the statute in such case made and provided and against the peace and dignity of the State.

"And the jurors aforesaid, on their oath aforesaid, do further present, that said Otis Young, junior, on the day and year aforesaid, at Gilford aforesaid, with force and arms, feloniously did falsely and fraudulently alter a certain writing purporting to contain evidence of the existence of a certain debt, contract and promise, contracted and made by Charles C. Rogers, of Sanbornton, in said county of Belknap, Esquire, for the payment of fifteen dollars, which said writing so falsely and fraudulently altered, was originally contained in a certain book of accounts of him, the said Otis Young, junior, as follows, that is to say, '159, March 15, C. C. Rogers, Dr., to one vest chain, $5,' by inserting the figures '15' instead of the figure '5,' thereby causing said writing to read as follows: '159, March 14, C. C. Rogers, Dr., to one vest chain, $15,' with intent him, the said Charles C. Rogers, to defraud, contrary to the statute in such case made and provided, and against the peace and dignity of the State."

To this indictment the respondent demurred generally and the State join, and the questions of law were reserved.

*Blair*, solicitor for State.

*J. J. W. Burrows*, for defendant.

SARGENT, J. Lord Coke says: "To forge is metaphorically taken from the smith, who beateth upon his anvil and forgeth what fashion or shape he will; offense is called *crimen falsi*, and the offender *falsarious* and the Latin word to forge is *falsare fabricare*, and this is properly taken where the act is done in the name of another person." [1]

"Forgery at common law denotes a false making (which includes every alteration or addition to a true instrument), a making *malo animo*, of any written instrument for the purpose of fraud and deceit." [2]

Forgery is the making or materially altering, with intent to defraud, of any writing which, if genuine, might apparently be of legal efficacy, or the foundation of a legal liability. [3]

[1] 3 Inst. 169.
[2] 2 East P. C. 852.
[3] 1 Bish. Cr. L., sec. 423; 2 Bish. Cr. L., sec. 432.

Our statute against forgery is as follows: "If any person shall falsely make or counterfeit or fraudulently alter any public record, any writ, process, or proceeding of any court of this State, any certificate or attestation of a justice of the peace, notary public, clerk of any court, town clerk or other public officer, in any matter wherein such certificate or attestation may be received as legal proof, any charter, will, deed, bond or writing obligatory, * * * bill of exchange, promissory note, order, acquittance, discharge for money or property * * * any certificate or accountable receipt for money or property, any warrant, or request for the payment of money, or the delivery of any property, or writing of value, or any writing whatever purporting to contain evidence of the existence or discharge of any debt, contract or promise, with intent that any person may be defrauded, he shall be punished," etc.

The. indictment in this case was intended to be founded upon the last clause of the statute, and it is claimed that the entry upon his account book by the respondent of a charge against the complainant for a vest chain, was a writing purporting to contain evidence of the existence of a debt, contract or promise, within the true meaning and intent of the statute.

In examining our statute it will be seen that almost every form of writing or instrument known to the law is specifically enumerated as the subject of forgery, but no mention is made of accounts or books of account. Is it not probable, then, if the law was intended to apply to so common a thing as accounts, they would have been mentioned with the other writings specified?

The terms "writing," "instrument," and "written instrument," are used indiscriminately in defining forgery at common law. Thus, Blackstone says forgery is the fraudulent making or alteration of a writing, etc. Baron Eyre says it is the false making of an instrument, etc. Grose, J., says it is the false making of a note or other instrument, etc. East says it is the false making of any written instrument, etc.[1] We see no reason why the term "writing" in our statute is not to be understood in the same technical sense as when used by these early writers, when defining forgery at common law.

It has been held in New York that, at common law, an indictment for forging an order, by fraudulently altering its date by the signer of an order after it had been answered and returned to him, with intent to defraud the man to whom it was given, could not be sustained, on the ground that when the order had performed its office, and was returned to the man who gave it, it was his own paper, and that to alter its date, or even to write a new order like the first one with only a change of date,

[1] 2 East P. C. 852, 853.

would only be making a new order, which any man may do without its being forgery, even though done with a fraudulent intent, and because there was no intermeddling with an instrument or writing which was the property of another. It is also suggested that, if a bill of exchange or promissory note be paid and taken up by the maker, who then for the purpose of fraud alters the date of the note, such alteration would not constitute forgery at common law.[1]

The statute of New York, which was in force in 1837,[2] provided that "the counterfeiting with intent to injure or defraud, of any instrument or writing, being or purporting to be the act of another, by which any rights or property whatever, shall be or purport to be affected," etc., shall be forgery in the third degree.[3]

So the statute of Missouri, against forgery, employs this phrase: "Any instrument or writing being or purporting to be the act of another, by which any pecuniary demand or obligation shall be or purport to be transferred, created, increased, discharged, or diminished," etc.[4]

It may well be doubted whether the statutes enlarge or limit the common law in relation to forgery of instruments or writings, or whether they only simply express, in describing the offense, what had been understood as the legal construction of the word instrument or writing at common law. For Lord Coke, in his Institutes, says, as we have before seen, that forgery "is properly taken, when the act is done in the name of another person."

An exception to this rule is stated by Coke, and also in Hale's Pleas of the Crown,[5] and in 1 Hawkins' Pleas of the Crown,[6] and in 2 East's Pleas of the Crown,[7] and in some of the older writers, that a person may be guilty of the false making of an instrument although he sign and execute it in his own name, in case it be false in any material part, and calculated to induce and thereby to give credit to it as genuine and authentic, when it is false and deceptive. This happens, they say, when one having conveyed land, afterwards, for the purpose of fraud, executes an instrument purporting to be a prior conveyance of the same land. Here, it is said, the instrument is designed to obtain credit by deception, as purporting to have been made at a time earlier than the true time of its execution.

But the Massachusetts Commissioners, in their report of 1844, discard the doctrine, not deeming it well founded on authority, and Mr. Bishop in his Criminal Law,[8] says we may at least doubt whether

1 People v. Fitch, 1 Wend. 198; People v. Cady, 6 Hill, 490.
2 Rev. Stats., p. 560, 661. sec. 33.
3 People v. Stearns, 21 Wend. 409.
4 State v. Fowley, 18 Mo. 445.
5 p. 683.
6 p. 263.
7 p. 855.
8 vol. 2, sec. 481.

the giving a second deed in the case put, could be deemed forgery in a country where we have registry laws; but, he adds, that perhaps if a man should surreptitiously get hold of his own instrument after it had been delivered, and alter it, the alteration would be forgery, and he cites *People* v. *Fitch*,[1] where it is said that if the maker of a bill of exchange, after acceptance, should alter the date whereby the payment was accelerated, that would be forgery. This would, of course, be so, because after the acceptance it becomes the contract of the acceptor; it is then his promise or writing, and an alteration by the maker would then be the altering of the writing of another. He also cites *Commonwealth* v. *Mycall*,[2] where a justice of the peace had issued a writ which had been served and returned, and he then altered it in a material part and it was held forgery. We might also add that where a man had made a promissory note and delivered to the payee, and while it was his property and in his possession, the maker should surreptitiously get possession of it, and so alter it as to make it read for a less amount, or to be paid at a more distant time, that might be forgery.

The rule, then, seems to be that the writing or instrument which may be the subject of forgery, must generally be, or purport to be, the act of another, or it must at the time be the property of another, or it must be some writing or instrument under which others have acquired some rights or have become liable in a certain way, and when these rights or liabilities are sought to be affected or changed by the alteration without their consent, as in the case of the alteration of the note above mentioned. In that case, if the magistrate had made some mistake in his writ, he was at perfect liberty to correct the error, and to make any alteration he saw fit, before it went from his hands for service; but after service and return, when the rights and liabilities of others had become involved, and others had become interested by being made parties to the proceding, such an alternation might be forgery if material and made without their consent.

A man may make a statement in writing of a certain transaction, and may represent and assert ever so strongly that his statement is true; but if it should prove that by mistake he is in error, and that his statement is entirely wrong, that could not be forgery; and suppose we go further, and admit that the statement was designedly false, when made, and so made for the purpose of defrauding some one, it does not alter the case, it is no forgery. The paper is just what it purports to be, it is the statement of the man that made it, it is a true writing or paper, though the statement it contains may be false. The truth may be forged as well as falsehood. So, in case of a charge on book account,

[1] 1 Wend. 198.

[2] 2 Mass. 136.

the charge may in first instance be erroneous, and no one would claim that the person making it might not correct it, so as to make it right, and that would be no forgery. But if A. gives B. his promissory note, and by mistake the amount of the note is made ten or fifty dollars too small, B. can not alter the note after he has received it from A., so as to correct this error without the consent of A. That would be forgery.

A. may make a charge on his book against B. for an article which he never had, or he may charge for an article actually delivered a larger sum than was agreed on. It is a false account, and may have been so made for the purpose of defrauding B., but it is no forgery.

The writing is just what it purports to be, a charge made by A. on his book against B.; it may be wrong in amount, or the whole charge may be a fabrication throughout, still it is A.'s charge against B., and though wrongfully made is no forgery. To forge a writing, necessarily implies that a writing be made which shall appear and purport to be something which it is not in fact, or that a writing be so changed or altered that it shall not be or purport to be what it was designed to be. But in making a false account the writing is what it was designed to be.

To forge or to counterfeit is to falsely make, and an alteration of a writing must be falsely made to make it forgery at common law, or by our statute. The term falsely, as applied to making or altering a writing in order to make it forgery has reference not to the contracts or tenor of the writing, because a writing containing a true statement may be forged or counterfeited as well as any other, but it implies that the paper or writing is false, not genuine, fictitious, not a true writing without regard to the truth or falsehood of the statement it contains — a writing which is the counterfeit of something which is or has been a genuine writing, or one which purports to be a genuine writing or instrument when it is not. The writing or instrument must itself be false, not genuine, a counterfeit, and not the true instrument it purports to be.

We think it plain that a man can not falsely make or falsely alter his own account against another while in his own book, and in his own possession, and before any settlement or adjustment of the same, whereby any person but himself has acquired any interest in or right to the same, as evidence or otherwise, so as to make it forgery. He may make false charges in his book, or he may alter the charges on his book so as to make them more true or more false, so far as the contents of the charge is concerned, but still it is his own account; just what it purports to be; it is his own property in which no one has acquired any right or interest; it is his own true writing, as much if the charge is false as though it were true. The character of the writing as being

false or fictitious, instead of genuine, is not altered by the truth or falsity of the statement that the writing may contain.

Our attention has been called to two cases by the State's counsel as favoring the doctrine that this indictment may be sustained. The first is *Biles* v. *Commonwealth*,[1] where it was held that the making of a false entry in the journal of a mercantile firm by a confidential clerk and book-keeper, with intent to defraud his employers, is a forgery at common law. Edwin R. Biles, the defendant, was charged with having made a false and forged entry in the journal of Haskins, Hieskell & Co. with intent to defraud said firm. It was charged that said Biles was, at the time, the confidential clerk and book-keeper of said firm, and was entrusted and employed by them to keep the books of said firm, to make entries therein, and to have the sole charge and keeping of said books of account, and of the posting, settlement and balancing thereof. The clerk had under head of "Cash Dr. to sundries," entered twelve bills receivable amounting in all to $6,455.63 when correctly footed, but had altered or forged the footing and carried it out $5,955.63, the result of which forgery was to represent the cash received five hundred dollars less than the actual amount, and thereby enable the clerk to abstract that sum from the funds of the firm. Upon this evidence and proof that Biles was clerk and book-keeper as charged, a verdict of guilty was sustained.

The decision seems to be based upon the ground that the entry in question was, as between the clerk and the firm for whom he acted, in substance an acquittance, or in the nature of a receipt from the firm to the defendant; that, as confidential book-keeper, he received the amount of bills receivable; to discharge himself from liability, he enters the several items in the journal, as the agent of the firm, and then, not as the agent of the firm, but as an individual, for his own wicked game, so erases, or alters, or makes a figure or figures in the sum total, representing the addition of the entire entry, as to deceive and thereby defraud his employers. The court say: "We can see no distinction between this case and the very numerous decided cases, wherein to forge a receipt has been held to be a forgery."

Upon the ground assumed by the court in that case, it is in accordance with the other adjudged cases; but whether the court were correct or not in all their conclusions in that case, the decision is clearly no authority for the validity of this indictment.

The other case referred to is *Barnum* v. *State*.[2] Barnum had been indicted and convicted of a forgery under the following circumstances: Barnum had an account against one Ayer, which was settled in full on

1 32 Pa. St. (8 Casey) 529.

2 15 Ohio, 717.

Barnum's book, March 1, 1841, and this settlement was signed by both parties, or purported to be, in full of all demands to date; and, on the 30th day of April, 1845, Barnum fraudulently altered the figure 1, into a figure 4. So that it then purported to be a settlement in full to March 1, 1844, the said Ayer then holding a claim for hats and cloth against Barnum, which had accrued between 1841 and 1844, and which therefore designed falsely to be brought within the terms of the settlement, and to be cut off or discharged by it with intent to defraud said Ayer. It was held that the charge was well made and the indictment sufficient, but the verdict was set aside because certain evidence was excluded on trial, which was held to be competent and material.

In this case, although the receipt was signed by both parties on the defendant's book, yet it was the receipt of both parties in which both had an interest, and to the benefit of which both had a right, and for either falsely or fraudulently to alter it was just as much forgery as though it had been signed by the other party alone, which would be the ordinary case of forging a receipt of another person, which, at common law and by the express provisions of our statute, would be forgery. We have been unable to find any case or any precedent which in any way authorizes the present indictment, and from the examination we have made, we are satisfied that the demurrer must be sustained.

*Indictment quashed.*

---

## FORGERY — UNAUTHORIZED COUNTY BONDS.

### People *v.* Mann.

[75 N. Y. 484; 31 Am. Rep. 482.]

*In the Court of Appeals of New York, 1878.*

**A County Treasurer** without authority issued and negotiated instruments for the payment of money, purporting in the body to be the obligations of the county, but signed only by him in his own name with the addition "treasurer." *Held,* not to be forgery, the same not "being or purporting to be the act of another," within the statute.

Conviction of forgery. The defendant was county treasurer of Saratoga County, and without authority made the instrument of which the following is a copy, which the payee discounted, he receiving the proceeds: —

"No. —. Saratoga County Treasurer's Office,
Ballston Spa, June 16, 1875.

"In pursuance of a resolution passed November, 1874, by the Board of Supervisors of Saratoga County, the county of Saratoga promises

to pay at the Saratoga County Treasurer's office, on or before the 15th of February, 1876, to the First National Bank of Ballston Spa, or bearer, $10,000, at seven per cent interest, value received.

"$10,000. HENRY A. MANN,
"*Treasurer.*"

*Esek Cowen*, for plaintiff in error. The defendant was properly convicted of forgery in the third degree.[1]

*Nathaniel C. Moak*, for defendant in error.

RAPALLO, J. The statute under which the defendant in error was convicted defines the offense of forgery in the third degree to be, so far as applicable to this case, falsely making or altering, with intent to defraud, any instrument or writing "being or purporting to be the act of another," whereby any pecuniary demand shall be or purport to be created, etc.

We can not adopt the interpretation of this statute claimed by the counsel for the People. He contends that one who without authority makes an instrument purporting in its body to be the contract or obligation of a county, though he signs his own name to it as the official representative of the county, comes within the purview of the act. That the words "purporting to be the act of another" are synonymous with "purporting to be the contract or obligation of another." We think that the "act" referred to in the statute is the making of the instrument, and that the offense consists in falsely making an instrument purporting to be made by another. The offense intended to be defined by the statute is forgery, and not a false presumption of authority. One who makes an instrument signed with his own name, but purporting to bind another, does not make an instrument purporting to be the act of another. The instrument shows upon its face that it is made by himself and is in point of fact his own act. It is not false as to the person who made it, although by legal intendment it would if authorized be deemed the act of the principal and be as binding upon him as if he had actually made it. The wrong done where such an instrument is made without authority, consists in the false assumption of authority to bind another, and not in making a counterfeit or false paper.

Supposititious cases have been ingeniously suggested for the purpose of showing that unless the construction claimed is adopted, forgeries of corporate names and of the names of joint stock companies might not be reached by the statute. It will be time to deal with those cases

1 Noakes *v.* People, 25 N. Y. 380, 384; People *v.* Stearns, 21 Wend. 409; 23 *Id.* 637; Queen *v.* Ritson, L. R. 1 C. C. 200; People *v.* Graham, 6 Park. Cr. 135; Rex *v.* Parkes, 2 East P. C. 963; Barfield *v.* State, 29 Ga. 127; People *v.* Peacock, 6 Cow. 72.

when they arise. It is sufficient for the purposes of the present case that the instrument which the defendant is charged with having forged, purports on its face to have been made by himself and not by any other person.

The judgment of the general term should be affirmed.

All concur, except HAND, J., not voting.

*Judgment affirmed.*

---

## FORGERY — FALSE ASSUMPTION OF AUTHORITY.

## STATE *v.* WILLSON.

[28 Minn. 52.]

*In the Supreme Court of Minnesota, 1881.*

1. **The Terms "False" "Forged" and "altered"** as used in General Statute, 1878,[1] are used in the same sense in which these terms are used in section 1 of that chapter, and refer to the same kind, or classes of instruments. Therefore, the instrument, the uttering and publishing of which would be an offense under section 2, must be one, the making of which would be an offense under section 1. This statute enumerates the instruments which may be the subjects of forgery, but does not assume to change the existing rules of law as to what constitutes a false or forged instrument.
2. **Making and Uttering Instrument as Agent Under False Assumption of Authority.** — Where one executes an instrument purporting on its face to be executed by him as the agent of a principal therein named, when he has in fact no authority from such principal to execute the same, he is not guilty of forgery; the instrument is not a false or a forged deed within the meaning of the statute. There is no false making of the instrument, but a mere false assumption of authority. Therefore, when such instrument is uttered by the party, who thus signs it under the false assumption of authority, he is not guilty of uttering a false deed within the meaning of the statutė.

The defendant was convicted in the District Court for the county of Hennepin, of the crime of uttering a false deed, after a trial by jury, YOUNG, J., presiding, and was sentenced to imprisonment for two years and six months. This appeal is taken from the judgment.

*Benton, Burton & Roberts*, for appellant.

*William J. Hahn*, Attorney-General, for the State.

MITCHELL, J. The defendant was indicted, under General Statutes, 1878,[2] for uttering and publishing as true a false deed, knowing the same to be false, with intent to injure and defraud. The indictment set out in *hæc verba* the alleged false deed, which purports, on its face, to be a deed of conveyance of land by one James D. Hoitt to Joseph F. Miller, and to be signed H. H. Willson, per procuration of said Hoitt, the form of the signature being "James D. Hoitt, by H. D.

[1] ch. 96 sec. 2.

[2] ch. 96, sec. 2.

Willson his attorney in fact." Upon the trial of the cause it appeared that the defendant signed the deed in question, claiming the authority so to do under a power of attorney from Hoitt. The falsity of the deed, claimed by the State, consisted, not in any simulation or imitation of the signature of Hoitt, or in putting forth the instrument with the false pretense that the signature was the personal act of Hoitt, but in the false assertion, contained in the instrument, that he, the signer thereof, was authorized so to make and sign it in behalf of Hoitt, when in fact he had no such authority.

Upon this state of facts appearing from the evidence, when the prosecution rested, the defendant moved for a dismissal of the action, upon the ground that the instrument was not a "false" deed. The court denied the motion, and the case having been submitted to the jury, resulted in a verdict of guilty, whereupon defendant moved for a new trial, which was denied, and defendant appealed. The same question was raised by the defendant in other forms, and numerous exceptions were taken by him to the rulings of the court on other questions; but, under the view we take of the law applicable to the case, the foregoing is a sufficient statement of the facts for the purposes of a decision of this appeal.

The real question, therefore, is whether an instrument, which appears on its face to have been executed by an agent authorized, while in truth he was not so, is a false instrument; or to state the proposition in another form, when an instrument is really, in all its parts, written or signed by the individual by whom it purports to be written or signed, and the falsity consists, not in the simulation or counterfeiting of the act of another, but in the false assertion which the instrument contains that he, the writer and signer thereof, is authorized so to make and sign it in behalf of another, as it purports to be, is it a false instrument within the meaning of the statute, and upon negotiation of such instrument by the person who has so prepared it, is that person guilty of uttering a false instrument?

The terms "false" and "forged" as used in section 2, under which the indictment was framed are used in the same sense in which these words are used in section 1. Section 2, was never designed to apply to a different class of instruments from those referred to in section 1. Section 1 refers to the making of the instruments and section 2, to uttering or publishing them, and is to be interpreted exactly as if read, "Whoever utters and publishes as true any instrument mentioned in section 1." The instrument, the uttering of which is made an offense under section 2, must be one, the making of which would be an offence under section 1. It will be observed that neither section attempts to define what is a false or forged instrument. It was the

object of the statute to embrace in general language all instruments which might be properly the subject of forgery, and not to establish any new kind of crime, or to change the previous rule of law as to what constituted a false or forged instrument. In that respect our statute has not attempted to change the common law. Therefore, in order to determine what is a false instrument, we must resort to the common law on that subject. Now, according to the ordinary and popular meaning of the words "false or forged," as applied to a note or other instrument in writing, we always understand one that is counterfeit or not genuine, — an instrument by which some one has attempted to imitate another's personal act, and by means of such imitation, to cheat and defraud, and not the doing something in the name of another, which does not profess to be the other's personal act, but that of the doer thereof, who claims by the act itself to be authorized to obligate the individual for whom he assumes to act. This definition of the words, "false" and "forged" is abundantly sustained by authority as the proper legal definition of these words.

In *State* v. *Young*,[1] the court say: "The term 'falsely' * * * has reference not to the contents or tenor of the writing, or to the fact stated in the writing, * * * but it implies that the paper or writing is false, not genuine, fictitious, not a true writing, without regard to the truth or falsehood of the statement it contains." In *Rex* v. *Arscott*,[2] the defendant had indorsed on a bill of exchange, "Received for R. Aickman, G. Arscott." Littledale, J., says: "To forge a receipt for money is writing the name of the person for whom it is received. But in this case the acts done by the prisoner were receiving for another, and signing his own name." In *Regina* v. *White*,[3] a bill of exchange payable to the order of Thomas Tomlinson, was indorsed by the prisoner "Per procuration, Thomas Tomlinson, Emanuel White." White had no authority whatever from Tomlinson. It was held by a unanimous court of fifteen judges, that this was not forgery.

In *Heilbonn's Case*,[4] a bill of exchange had been made payable to the order of Charles Macintosh & Co. It was indorsed by Heilbonn, "Received for Chas. Macintosh & Co., Alex. Heilbonn." Heilbonn had no authority to make the indorsement. The court said: "It is the essence of forgery that one signs the name of another to pass it off as the signature, or counterfeit of that other. This can not be when the party openly and in the face of the papers declares that he signs for another." In *Commonwealth* v. *Baldwin*,[5] the prisoner made and

1 46 N. H. 266.
2 6 C. & P. 408.
3 2 C. & K. 404.
4 1 Park. Cr. (N. Y.) 429.
5 11 Gray, 197.

delivered a note signed, "Schouler, Baldwin & Co.," stating at the same time that he and Schouler composed the firm. There was no such partnership. It was held not to be forgery. The court say: "As a general rule, however, to constitute forgery, the writing falsely made must purport to be the writing of another party than the person making it. The mere false statement or implication of a fact not having reference to the person by whom the instrument is executed, will not constitute the crime." This case is referred to approvingly in *Commonwealth* v. *Foster*,[1] and the court there say: "The distinction is plainly drawn * * * between one who assumes to bind another either jointly with himself or by procuration, however groundless and false may be his pretense of authority so to do, and who signs in such a manner that the instrument may purport to bear the actual signature of another party having the same name."

To the same effect is the case of *Mann* v. *People*.[2] In this case the defendant made and issued an instrument for the payment of money, purporting to obligate the county of Saratoga, and to be issued pursuant to a resolution of the board of supervisors of the county, and signed Henry A. Mann, Treasurer. Defendant had no authority whatever to sign or issue such an instrument. The court decided that this did not constitute forgery, and held, in substance, that when one executes and issues an instrument, purporting, on its face to be executed by him as agent of a principal therein named, he is not guilty of forgery, although he has in fact no authority from such principal to execute or issue the same. In fact, we have found no authority to the contrary, and the text-writers uniformly lay down or approve of the same rule.

Now, in the case under consideration, the deed does not purport to be the personal act of Hoitt. The instrument, on its face, purports to be the defendant's own act, but one which he was authorized to do for and in the name of Hoitt. The reader of the deed could not misunderstand it. By its terms, the defendant declares that he made the writing, but that he so made it for Hoitt and by authority from Hoitt. The falsity, if any, consists in the claim of authority from Hoitt. The law, as we have seen, is well settled that if a person sign an instrument with his own name per procuration of the party whom he intends or pretends to represent, it is no forgery, it is no false making of the instrument, but merely a false assumption of authority. This deed, therefore, is not a false deed, and consequently, in uttering or publishing it, defendant was not guilty of uttering or publishing a false deed. If defendant made a false and fraudulent claim of authority to execute this deed, and by

[1] 114 Mass. 311.

[2] *Ante*, p. 50.

means thereof obtained money or property from another, he might be guilty of obtaining money or property under false pretenses, but not of the crime with which he is charged in the indictment. We are, therefore, of opinion that court below erred in not granting a dismissal of the action, upon motion of the defendant, when the State rested. The defendant was, upon the evidence, clearly entitled to a dismissal of the action, or to a verdict of acquittal under the direction of the court.

Ordered, therefore, that the judgment be reversed, and defendant absolutely discharged.

---

## FORGERY — INDUCING PERSON TO SIGN PAPER BY FRAUD NOT.

## HILL *v.* STATE.

[1 Yerg. 76; 24 Am. Dec. 1441.]

*In the Supreme Court of Tennessee, 1824.*

**Writing a Note for a Person,** and inserting a larger sum than the real amount due, and falsely and fraudulently reading it over to him as for the latter amount, with a view to defraud and injure him, is not forgery.

The facts are stated in the opinion.

*By the Court*, PECK, J. It is charged in the indictment, " that Jonathan Hill, a certain bond, writing obligatory, bill of exchange and promissory note, for the payment of money, falsely purporting to be genuine from a certain Daniel Ireland, then and there did feloniously cause and procure to be made, altered, forged and counterfeited" — here the note is set out and the indictment proceeds — " did feloniously and falsely make, alter, forge and counterfeit; and feloniously and falsely there and then did cause and procure the said bond, writing obligatory, bill of exchange, and promissory note, for the payment of money, etc., against the form of the statute."

There is no plea or issue on the record, though it appears that the defendant was present in court, and a jury sworn, who found this special verdict. " That on the third day of April, 1882, in the county of Williamson, the accused sold land to Daniel Ireland for four hundred and sixty-five dollars, to be paid in installments at stated periods. That the note on which the indictment is founded, was executed at the time and place aforesaid, in part payment for the land. That Ireland was an illiterate man; that the accused wrote the note with the other notes for the consideration money in presence of the said Ireland and the subscribing witness, and made it together with the other notes, over

to the prosecutor in the hearing of the subscribing witness. That he, the accused had written the note in question for one hundred dollars, when it should have been written for sixty-five dollars, and it was by the accused, falsely and fraudulently read over as a note for sixty-five dollars, when, in fact it was written for one hundred dollars, and that it was done with a view to defraud and injure the said Daniel," etc.

On this special finding the Circuit Court gave judgment against the prisoner from which judgment this writ of error is prosecuted. Waiving for the present the form of the indictment and want of plea and issue let us inquire if the facts found constitute the offense of forgery.

Forgery at the common law is the falsely making a note or other instrument with intent to defraud. The definition implies that there must be an act done or procured to be done, to constitute this offense. The above definition is taken from 2 Leach's Criminal Law,[1] where the author says: "A note or other instrument may be falsely made, either by putting on it the name of a person who does not exist, or by putting on it the name of one in existence, without his consent, or by altering it," etc. Here the accused has put no name to the instrument, but it is found by the special verdict that he wrote the note for the wrong sum, and then induced the signing by a false reading; still it was the real signature of the person, and all that can be said is that he was cheated by a false representation of the accused. This though a cheat was not a forgery.

In *Woodward's Case*[2] [where] a soldier was induced to sign his own name to a fabricated country bank-note, though done knowingly, and for the purpose of fraud, it was held no forgery; and the court immediately on hearing that it was the real signature of the prisoner, said that he must of necessity be acquitted, for that being signed by his own name, it could not be a false instrument and therefore not a forgery.

The case relied upon is that in 3 Institutes:[3] "If any person writeth the will of a sick man inserting the clause concerning the devise of any lands and tenements which he had in fee simple, falsely without any warrant or direction of the devisor, albeit he did not forge or falsely make the whole will; yet he is punishable by the statute 5 Elizabeth, etc., as has often been held in the Star Chamber." There is evidently an ambiguity in the language used by Lord Coke in this place, for it is not expressed where the insertion of the clause was made. But this is explained in 3 Dyer,[4] in *Sir John Marvin's Case*: "It was moved for a doubt if one who writes the will of a man lying mortally sick, insert a clause or article in the will, after the testator is speechless and without memory and he did not command the writer beforehand to put in the

1 p. 785.
2 Leach Cr. L. 783.
3 p. 170, margin.
4 p. 288 a.

article or clause, whether this be forgery under the statute, etc., and it was agreed and resolved by the best opinion there that it was not, nor was it the intention of the makers of said law."

I quote this at large to show that it must be a making or an alteration of the instrument without the consent of him who would purport to have made it.

But it can not be pretended that any false bond uttered to induce a real signing of an instrument, can make a forgery under our statute;[1] because the party himself signed this deed, *prima facie*, it is his bond; and to avoid it from the facts found, he must under the law, plead a special *non est factum*, to wit, must confess that he did seal the instrument, but that he was induced to do it by the false reading, and therefore not his deed.

I am of opinion that the facts found make out nothing more than a cheat for which the party might have been and yet ought to be indicted. For these reasons and the want of an issue in the case, the judgment must be reversed.

WHYTE, J., concurred.

HAYWOOD, *contra*, on the first point; accord on the second.

*Judgment reversed.*

---

FORGERY — PUBLIC WRITINGS.

## ROGERS v. STATE.

[8 Tex. (App.) 401.]

*In the Court of Appeals of Texas, 1880.*

**The Fabrication of a Certificate of a Notary Public,** purporting to authenticate the acknowledgment of a conveyance or transfer, is not an offense against the laws of this State.

APPEAL from the District Court of Travis. Tried below before the Hon. E. B. TURNER.

The indictment was found in May, 1878, and charged that the appellant on July 1, 1873, forged the certificate of a certain notary public of Cameron County to a transfer of a land certificate for three hundred and twenty acres. The jury found the appellant guilty, and assessed his punishment at two years in the penitentiary.

The time of the fabrication of the certificate, according to the evidence, was July 1, 1873, as laid in the indictment. The evidence is

[1] See East, 850, sec. 5.

elaborate, but no detail of it is necessary, in view of the single question of law determined in the opinion of the court.

*Joe H. Stewart* and *Bethel Copwood*, for the appellant.

*Thomas Ball*, Assistant Attorney-General, for the State.

Clark, J. At the threshold of our investigations in this case, a grave question is presented touching the character of the instrument set out in the indictment and alleged to be forged, the solution of which depends alone upon a proper construction of our laws relating to the offense of forgery in force on the first day of July, 1873, the date of the alleged commission of the offense of which the appellant has been convicted.

A fundamental purpose to be subserved in the adoption of a general system of penal laws in 1856, and manifest from the terms of more than one general provision incorporated therein, was to exclude an appeal to any system of foreign laws, written or unwritten, in the designation or description of offenses, and to hold no citizen amenable to criminal prosecution in this State, unless the offense of which he was charged was expressly defined and the penalty affixed by the written law of this State.[1] So careful was the law-making power in its endeavor to carry out this essential idea, and to provide proper safeguards for the protection of the citizen against prosecutions for acts not criminal under our law, that it was further enacted, in 1858, as amendatory of a provision substantially similar in the original Code, that "no person shall be punished for an offense which is not made penal by the plain import of the words of a law."[2] These provisions are necessary to be borne in mind in ascertaining whether a certificate of acknowledgment to an instrument for registration comes within the meaning of "an instrument of writing," as employed in our statutes relative to forgery. And this must be determined affirmatively before it becomes necessary to consider any of the other errors assigned by appellant as cause for reversal of the judgment of conviction.

At common law, one of the chief excellences of which system was its comprehensive adaptability to the ever varying phases of human conduct, an affirmative solution of the question, though not entirely free from difficulty, could nevertheless in our opinion, be reached and sustained upon satisfactory principles. Its definition of the offense of forgery, to wit, "the fraudulent making or alteration of a writing to the prejudice of another man's right,"[3] is sufficiently comprehensive to embrace every character of writing, official or unofficial, and to render amenable to punishment any person who might concoct, manufacture, or alter any instrument whatsoever, that could in any manner

1 Pasc. Dig., art. 1605.

2 Pasc. Dig., art. 1611.

3 4 Bla. Com. 247.

tend to the prejudice of another's right, provided the same was done with a fraudulent intent. And numerous cases could be readily cited, showing convictions for forging almost every class of writing known to the affairs of men. But our Code, like all other works of a similar nature, possesses no such flexibility, and in its attempt to more specifically define many offenses known to the common law, it often hedges the prosecution with new and arbitrary rules, which tend sometimes to the failure of justice; which may be, and most probably is, a lesser evil than an appeal to some vast and unfamiliar system of laws in order to sustain prosecution for crime.

Our definition of forgery is as follows: "He is guilty of forgery who, without lawful authority, and with intent to injure or defraud shall make a false instrument in writing, purporting to be the act of another, in such manner that the false instrument so made would, if the same were true, have created, increased, diminished, discharged, or defeated any pecuniary obligation, or would have transferred, or in any manner have affected, any property whatever." [1]

Without further legislative provision, this statute, standing alone, might be held sufficient to support a prosecution and conviction for forgery of a certificate of acknowledgment. The latter is certainly "an instrument in writing," in its common acceptation at least, and in some manner its fabrication would necessarily affect property of some kind. In the particular case at bar, the forgery of the notary's certificate to the transfer of the land certificate, if in fact it was forged, gave the transfer additional efficacy as an instrument for use in the general land office, besides apparently perfecting it for registration upon the county records of the State.

But the Legislature has left but little latitude to the courts for construction and interpretation of the statute itself, and the several terms and phrases employed in defining the offense. The terms "instrument in writing," "alter," "another," "pecuniary obligation," etc., are all carefully defined and explained, so as to leave little or nothing to intendment in the administration of the law; and these definitions are as much a part of the law of forgery in this State as the statute quoted at length. In ascertaining, therefore, what is meant by an instrument which would "in any manner have affected any property whatever," recourse must be had to the statute, and there we find its definition as follows: "By an instrument which would 'have transferred, or in any manner have effected,' property, is meant, every species of conveyance or undertaking, in writing, which supposes a right in the person purporting to execute it, to dispose of or change the character of property of every kind, and which

[1] Pasc. Dig., art. 2093.

can have such effect when genuine." [1] The instrument assigned as a forgery in this case is certainly neither a conveyance nor an undertaking in any sense in which those terms can be employed, nor does it suppose a right in the person purporting to execute it (the notary) to dispose of or change the character of the land certificate, nor could it have had such effect if genuine. But our decision need not rest on this ground.

Plainly to us, the legislative mind, in the enactment of the statute, was not contemplating an official but a private act, and the former is altogether excluded by the plain import of the language employed. It seems not improbable that if the legislative purpose had been to include an official writing or certificate like this before us, exact terms would have been used to manifest this intention, especially in view of the particular exactness with which it was sought to define every offense and to prescribe the essentials of each. And if the law had already fully provided for the punishment of this class of forgeries, it would not have been necessary that they should be included expressly in the act of July 28, 1876, which provides for the detection and conviction of all forgers of land-titles.[2] The fact that acknowledgments and proofs for record were then for the first time expressly enumerated as subjects of forgery, while not conclusive, is most significant as tending to manifest the legislative opinion that past legislation had failed to provide for that class of offenses. Be that as it may, the laws in force at the time it is alleged this forgery was committed are unmistakable in their terms, and even a casual examination of them is most convincing that the act for which the appellant has been convicted was not provided for by the laws in force at the date of its alleged commission.

The authorities cited for the prosecution in support of the conviction, as well as others examined in the course of our investigation, being based altogether upon statutory provisions of a nature essentially different from ours, fail to support the proposition that in our State a conviction may be had for forgery of a certificate of acknowledgment prior to the act of 1876. In *People* v. *Marion*,[3] a conviction of this character was sustained, but under a statute expressly providing for the punishment of any person who should falsely make, alter, forge, or counterfeit any certificate or attestation of any clerk, notary public, etc.[4] So also in New York, Pennsylvania, Massachusetts, and other States, similar statutes have long prevailed, upon which these decisions are based.[5] Similar statutes have also prevailed in England for more

[1] Pasc. Dig., art. 2103.
[2] Laws 1876, ch. 61.
[3] 29 Mich. 31.
[4] 2 Comp. L., Mich., 1525.
[5] 2 Whart. Cr. L., secs. 1313, 1417.

than a century past, all of which were finally embodied in 24 and 25 Victoria,[1] and upon these statutes most, if not all, of the decisions of that country, since the period indicated, have been founded. We have been able to find no statutes similar to ours in force in any other State, nor any adjudication by courts of last resort in other States, upon which this conviction can be rested.

Because the act for which appellant has been convicted was not made penal by the plain import of the words of any law in force at the date of its alleged commission, the judgment is reversed and the cause dismissed.

*Reversed and dismissed.*

---

## NO PRESUMPTION OF GUILT FROM UTTERING.

## MILLER v. STATE.

[51 Ind. 405.]

*In the Supreme Court of Indiana.*

1. **The Uttering and Publishing** of a forged instrument by the prisoner raises no presumption of law that he committed the forgery.
2. **On a Charge of Forgery** the uttering and publishing of the forged instrument are circumstances to be weighed by the jury in connection with other evidence in the case.

WORDEN, J. The appellant was indicted for forgery; the indictment containing two counts. The first charged him with having forged the name of Calvin Mullen upon the back of a draft drawn by the First National Bank of Xenia, Ohio, upon the First National Bank of Cincinnati, Ohio, for the sum of eight hundred dollars, payable to the order of said Calvin Mullen.

The second count charged him with having uttered and published as true a forged and counterfeited indorsement of said draft, purporting to be the indorsement upon the same of the name of said Calvin Mullen.

The defendant moved to quash each count, but the motion was overruled. Each count, it seems to us, was good.

The defendant moved to require the prosecutor to elect on which count he would put the defendant on trial, but the motion was overruled. Doubtless the court might, in its discretion, have required the election to have been made, but there was no error in refusing to do so.[2]

On the trial, there was a general verdict of guilty, and the defendant was sent to the State's prison for the term of eight years.

[1] ch. 98.

[2] Mershon v. State, 51 Ind. 14.

Several reasons were stated for a new trial, but we deem it necessary to notice only one. The court instructed the jury, amongst other things, as follows: —

"If it is shown that the indorsement is forged, and that the defendant had in his possession and passed said check, with the forged indorsement thereon, the presumption arises that the defendant made the indorsement, and unless that presumption is explained and rebutted, it will be sufficient evidence to warrant you in coming to the conclusion that the defendant made such indorsement."

The charge thus given was radically wrong. The draft or bill of exchange, being indorsed by the payee in blank, would pass from hand to hand by delivery, without any further indorsement, so as to vest the title in each successive holder. The count charging the defendant with having uttered and published the forged indorsement as true, necessarily contained the allegation that the defendant knew the indorsement to have been forged at the time he uttered and published it as true.[1] The *scienter* is a necessary ingredient of the offense charged in the second count, and the allegation must be supported by competent evidence.

Now, it might happen that a bill, thus apparently indorsed by the payee in blank, might pass through innocent hands, and it can not be law that each person through whose hands such a bill might pass, the indorsement turning out to be forgery, is to be presumed *prima facie* to have made the forged indorsement. If the instruction be correct, then it follows that, while on a charge of uttering and publishing as true any such forged indorsement, a party could not be convicted without averment and proof of the *scienter*, yet he might be convicted on a charge of the forgery of the indorsement without any other proof than the mere uttering and publishing as true of the forged indorsement.

We do not think it can be laid down as a rule of law that the uttering and publishing as true of a commercial instrument, with the name of the payee forged thereon, raises a presumption that the person uttering and publishing is guilty of forging the indorsement. On a charge of the forgery of the name, the uttering and publishing are circumstances to be considered by the jury, with any other evidence bearing on the question of the forgery, and what weight shall be given to the uttering and publishing is to be determined by the jury, in the same manner as they determine the weight of other evidence in criminal cases.

The judgment below is reversed, and the cause remanded for a new trial.

The clerk will give the proper notice for a return of the prisoner.

[1] 2 G. & H. 446, sec. 30.

## NOTES.

§ 405. **Forgery — Intent to Defraud Essential.** — An intent to defraud is essential to the crime of forgery,[1] and the intent must be to defraud some particular person.[2]

In *Montgomery* v. *State*,[3] it was held in the Court of Appeals of Texas that the intent was not proved. The forgery for which the indictment in this case was presented, and of which the defendant was convicted, consisted in writing, without lawful authority, the name of "A. H. Montgomery," across the back of a bank check for $60, which he cashed at the banking house of Putman, Chambers & Co., Gainesville, Cooke County, Texas. His punishment was assessed by the jury at imprisonment in the penitentiary for two years.

The instrument upon which the name of A H. Montgomery was alleged to have been written by the appellant without authority, was as follows:—

"No. 21,526. NATIONAL BANK OF LANCASTER.
"LANCASTER, KY., NOV. 22, 1880.

"Pay to the order of A. H. Montgomery, sixty dollars.
"To the Mercantile National Bank, New York City.
"WM. H. KINNAIRD, Cashier.
"WM. H. KINNAIRD, Cash'r.
"GEORGE DENNY, Pres't."

The names of A. H. Montgomery and A. M. Montgomery were indorsed across the back.

A. H. Montgomery testified for the State, that he lived in Denton County, one and a half miles south of Pilot Point. He received his mail matter at Pilot Point. The witness was originally from Kentucky. His wife's name was Mattie Montgomery. The witness was familar with the signature of the cashier of the Lancaster, Kentucky, National Bank. The check in question being exhibited to the witness, he testified that it was sent to him by his wife's brother James, as rent for a small piece of land. The first the witness ever saw of the check was when it was sent to him by Putman, Chambers & Co., with a letter asking if the indorsements on the back were genuine. The two signatures "A. H. Montgomery" and "A. M. Montgomery" are not the signatures of the witness. He did not sign this check nor authorize the defendant nor other person to sign it for him.

L. B. Edwards testified, for the State, that the first time he saw the defendant was about the last of December, 1880, when the latter came into the banking-house of Putman, Chambers & Co., and cashed a check for $60. The witness recognized the check shown him as the one he, as cashier, cashed for the defendant. The defendant wrote the two signatures, "A. H. Montgomery" and "A. M. Montgomery," on the back of the check. When the defendant came to the bank and exhibited the check, the witness told him to indorse it by writing his name across the back. He wrote the indorsement, "A. M. Montgomery," and the witness told him that the check was payable to "A. H. Montgomery," and not to "A. M. Montgomery." Defendant said that it ought to be A. M.

1 State *v.* Redstrake, 39 N. J. L. 365.

2 R. *v.* Hodgson, Dears. & B. 3 (1856).

3 12 Tex. (App.) 323 (1882).

Montgomery. The witness told him there must be some mistake if his name was A. M. Montgomery. The defendant then said, "Yes, it should be 'A. M. Montgomery;'" he had a letter, which he looked at and then wrote the name "A. H. Montgomery." The witness understood the defendant to be A. M. Montgomery and that the check was his. The witness paid the defendant the money on the check and sent it to New York. It was soon returned with information that the bank at Lancaster, Kentucky, refused to pay it. It was marked "forged indorsement." On cross-examination, the witness stated that he could not remember that he told the defendant that clerks in banks sometimes make mistakes. As a fact, they sometimes do make mistakes. When checks are drawn on Putman, Chambers & Co.'s bank in favor of the wife it is common for the husband to sign his wife's name, but such practice is not permitted with bills of exchange. The defendant did not say that his name was A. M. Montgomery. The witness inferred it from the transaction.

J. A. Bolton testified, for the State, that he was the sheriff of Cooke County, Texas, and arrested the defendant on this charge in December, 1881. He told the defendant that he wanted him to go to Gainesville about a check. Defendant said that he knew nothing about a check. After studying awhile he said that he had cashed a check there for his daughter. The defendant was apparently a very poor man. He had not been able to give his bond of $500.

Miss Mollie Montgomery testified, for the defence, that the defendant was her father. They live five miles west of Pilot Point, and Pilot Point is their post-office. There is a private neighborhood box at Baker's store, about a quarter of a mile from defendant's house, where the defendant's family usually got their mail matter. Some time in October, 1880, word was sent her by her little brother that there was a letter for her at Baker's store. She went to the store and Mr. Baker gave her a letter containing a check. That letter the witness had at the trial. The direction on the envelope of this letter was "Miss Mollie Montgomery;" the inside address was "Dear sister," and it was signed "Your brother Jimmie." The letter was read in evidence, and contained mention of but two matters, which the witness did not understand. In the letter the writer stated that "Mr. Dunn's folks were well," and that, in sending the check for the rent money of the witness' land, he had "reserved two dollars to pay for the *Advocate* next year." The witness did not know "Mr. Dunn's folks," nor could she understand why two dollars had been retained to pay for the *Advocate*. She had a brother Jim living in Kentucky, who attended to her father's business there. In writing to the witness for the family he usually signed his letters, "Your brother Jim," and generally commenced them, "Dear sister." Other allusions in the letter were to persons and matters in Kentucky, with which the witness and others of the family were perfectly familiar, and from them the witness entertained no doubt that the letter was intended for her. Her father gets money from Kentucky, and was expecting some when the letter arrived. Her mother's name was Cassey Ann Montgomery. Her maiden name was Howard, which she still retained. All the family thought the check was intended for their mother, and entertained no doubts concerning the name "A. H. Montgomery." There were some words in the letter which could not be made out. It was badly written, in dim ink, but in the handwriting of the witness' brother, — so much so that it was not questioned on that ground. The letter was shown to several neighbors, many of whom advised that the check be cashed. Either the witness or her mother gave the check to the defendant, one day when he was coming to Gainesville to get it cashed. The witness presumed

that he did cash it, as he came back with the money. None of the family heard that anything was wrong with the check until the defendant was arrested, some two months before this trial. This letter was lost at the time of the preliminary trial, but had been since found. The full name of the witness was Mary Jane Montgomery, but she was generally addressed as Mollie Montgomery. Cross-examined she stated that she remembered her father receiving money from Kentucky but once, and that was in 1876, in San Saba County, shortly after they came out to Texas. The amount was about $100, but the witness could not say whether it came by draft or post-office money order. Her father, the defendant, had four farms in Kentucky. One is called the Bloomington, one the White Oak, one the Red Brush, and the other the Blue Grass farm. Her father had said that he would not take $1,000 for his Bloomington farm. A recent letter from the witness' uncle announced the sale of the Blue Grass farm for $1,000. The defendant now owns but one team of horses, and three cows and calves, and raised some three or four bales of cotton this year. Re-direct, the witness stated that she wrote her brother acknowledging the receipt of the letter and contents. She had written to her brother Jim since the defendant's arrest, and is daily expecting a reply.

The defence then read in evidence the written testimony of Mrs. Kate Cassity, daughter of the defendant, taken before an examining court. The substance of it was that, about a year before this trial, her sister Mollie Montgomery received a letter from their brother Jim in Kentucky, inclosing a check. In general detail, so far as her memory served her, this witness corroborated the testimony of Miss Mollie Montgomery, concerning the letter, its contents and its inclosure of the check. Her sister, the witness stated, was sometimes addressed as Miss Mary, sometimes as Miss M. J., but generally as Miss Mollie Montgomery. Her mother's full name was Cassie Ann Howard Montgomery. Her father was expecting a remittance of money from Kentucky at the time that this letter and check were received.

John M. Montgomery, a son of the defendant, testified that he arrived home from Arkansas two or three days after his sister Mollie received the check. He saw the letter and the envelope. The latter was directed to Miss Mollie Montgomery. There were some things in the letter which were understood, and the letter and check were shown by the family to several neighbors, with whom they advised about the matter, relating to them all of the circumstances. Mr. Devault, among the number, pronounced the check all right. The witness thought so too, and offered $55 for it. The defendant has land in Kentucky in charge of two sons, Jim and Tom. He has many other relatives in that State. His father's (the defendant) name is J. J. Montgomery, that of his sister M. J. Montgomery, and that of his mother C. A. H. Montgomery. He knew of no one in his family named A. M. Montgomery.

The defendant brought a great deal of money with him to Texas, but had spent it traveling around. The witness only knew of his own knowledge of his father receiving money from Kentucky but once since they left there, but had heard him say that he received money from there a number of times.

A. J. Devault testified, for the defence, that he was at the defendant's house when they had the letter and check, and saw them at that time. He came with the defendant to Gainesville, when the latter cashed the check. The letter was badly written, in pale ink. The defendant and his family made no secret about the receipt of the letter. It was generally known in the neighborhood.

Cross-examined the witness stated that the envelope was addressed to Mrs. Mollie Montgomery, and not to Miss Mollie Montgomery. He called attention to the name A. H. Montgomery in the check. The defendant has lived near the witness for two years, is a very poor man and generally very hard up for money. The witness can not read writing very well. There are some hands which he can not read at all. This letter was directed in a very dim, and a very bad hand. The witness took the superscription to be Mattie Montgomery.

The written testimony of A. T. Cassity before the examining court was read. His statement was that a year before he lived about a quarter of a mile distant from the defendant. Miss Mollie Montgomery received a letter inclosing a check for $60. The witness did not remember to whom it was payable.

A. W. Hamner testified that in July or August before the receipt of the letter in December, the defendant told the witness that he wanted to buy a couple of horses from him, and that he could get or was expecting money from his boys in Kentucky. He afterwards saw the defendant at Baker's store, when defendant told him he had received money, but not enough to buy the horses, but that he wanted to buy a cow, which the witness sold him.

H. Martin testified that he knew the general reputation of the defendant in the community in which he lives, and that it was good.

J. M. Baker testified that he was the proprietor of Baker's store. The mail for the neighborhood is sent to his store for distribution from Pilot Point. The Montgomerys receive and mail letters at the witness' store. He had noticed letters addressed to James Montgomery both before and since the letter and check were received by the Montgomery family." Letters are usually addressed to "Miss Montgomery," "Miss Mollie Montgomery." The defendant's general reputation in the community was good. He lived about as well as the "common run" of farmers.

WHITE, P. J. A mature consideration of the evidence adduced on the trial below, as the same is shown by the record before us in this case, has failed to convince us of the justice and correctness of the verdict and judgment to that degree of certainty as that we would feel warranted in permitting the conviction to stand as a precedent. There is certainly a strange conjunction of facts, circumstances and coincidences in behalf of defendant which go far to deprive the transaction of that criminal intent essential to constitute the crime charged, and another trial may lead to the development of other facts of a more conclusive and satisfactory character.

Because, in the opinion of the court, the evidence is insufficient to support the judgment, the same is hereby reversed and the cause remanded for a new trial.

*Reversed and remanded.*

§ 406. —— **Forgery Must be of Some "Document."** — And the false making must be of some "document" or "writing."[1] A painting,[2] a printed wrapper for baking powders[3] or a college diploma,[4] is not within these terms.

§ 407. —— **Incomplete Instrument.** — The forgery of an incomplete instrument is not a crime,[5] as making a bank note without the name of any cashier

1 See Foulkes *v.* Com. 2 Rob. (Va.) 836 (1843).

2 R. *v.* Closs, D. & B. 460 (1858).

3 R. *v.* Smith, D. & B. 566 (1858).

4 R. *v.* Hodgins, D. & B. 3 (1856).

5 R. *v.* Turpin. 2 C. & K. 820 (1849); R. *v.* Musgrave, 1 Lewin, 138 (1827).

countersigned thereto[1] or a paper which lacks any signature.[2] So a check payable to the order of ——, is not the subject of forgery.[3]

§ 408 —— **Instrument Must be Valid on its Face.**—The instrument must be valid on its face;[4] if it be of no legal obligation forging it is not a crime.

So the forgery of a certificate of the genuineness of a record is not punishable where the certificate is legally defective.[5] So a bond given by husband to wife not being binding is not the subject of forgery.[6] Nor a void bill of exchange.[7] Nor a guarantee where there is not a debt due to the party to whom the guarantee is given from the one for whom it is given.[8] So an indictment will not lie for forging a certificate of acknowledgment of a deed which certificate does not state as required by law that the grantor acknowledged the execution of the conveyance.[9]

So of a satisfied order for the delivery of goods[10] or a decree of divorce void on its face.[11]

In *Drake* v. *State*,[12] the prisoner was charged with forging a transfer of a bill of exchange by falsely indorsing the name of "Drake Bros." The bill was payable to Blake Bros. It was held that as the indorsement of strangers to the bill could not legally transfer it, the charge was not sustained. "Drake Bros.," said the court, "were strangers to the bill and the indorsement of their names thereon, if genuine could not have operated as a transfer of it. No indorsement save that of the names of the payees could have the effect of transferring the title to the bill, and the indorsement alleged to have been falsely made purported to be of quite a different character. The oral representation of the defendant that he was indorsing the name of the payee (which the face of the bill clearly shows to be false) can not constitute the crime of forgery. Nor can the character or effect of the indorsement actually made by the defendant be at all affected by the mistaken belief of the bank official that he was making an indorsement of a wholly different kind."

In *Cunningham* v. *People*,[13] the prisoner had procured engraved public warrants of the State of Mississippi. They had no impression of seals upon them; and by the law of Mississippi, where the warrants were to be passed, a warrant without a seal was invalid, and the forged warrants lacked vitality also, because they did not purport to be registered. It was held that the instruments were not the subject of forgery. "Legal forgery," said the court, "can not be made out by imputing a possible, or even actual ignorance of the law, to a person intended to be defrauded. However dark may be the moral hue of a transaction, courts of justice can only act upon the legal crime, upon criminal breaches of perfect legal obligations. How clear soever the fraudulent purpose unless the writing is sufficient to accomplish that purpose, it is not forgery since, with a single exception, actions only, and not evil intentions, are pun-

1 Com. *v.* Boynton, 2 Mass. 78 (1806).

2 R. *v.* Pateman, R. & R. 454 (1821); R. *v* Harper, 14 Cox, 574.

3 Williams *v.* State, 51 Ga. 535.

4 John *v.* State, 23 Wis. 504 (1868); Henderson *v.* State, 14 Tex. 503 (1855): State *v.* Wheeler, 19 Minn. 98 (1872).

5 Fadner *v.* People, 33 Hun, 240 (1884).

6 State *v.* Lytle, 64 N. C. 255 (1870).

7 R. *v.* Moffatt, 2 Leach, 486 (1787).

8 State *v.* Humphreys, 10 Humph. 442 (1850).

9 People *v.* Harrison, 8 Barb. 560 (1850).

10 People *v.* Fitch, 1 Wend. 198 (1828).

11 Brown *v.* People, *ante*, p. 31; Fadner *v.* People, 2 N. Y. Crim. Rep. 553 (1884).

12 19 Ohio St. 211 (1869).

13 11 N. Y. S. C. 455; 4 Hun; 2 Cow. Cr. Rep. 214 (1875).

ishable by the English law. The invalidity of the warrant upon its face * * * renders it improper to convict the prisoner."

In *Howell* v. *State*,[1] the court in reversing a conviction say: "The defendant was indicted under article 2094,[2] for forgery, in altering the following instrument or memorandum in writing, viz.: 'two hides $4.00; Sitman.' This writing upon its face, is evidence of no pecuniary obligation, and its alteration, by simply changing the figures, could neither, increase or diminish any pecuniary obligation; and, therefore, that act can not be considered forgery under the statute. Forgery is defined by one of the best authorities on criminal law, to be 'the false making, or materially altering with intent to defraud, of any writing which, if genuine, might apparently be of legal efficacy, or the foundation of a legal liability.'[3] This definition of the crime of forgery is very similar, and in no respect in conflict with that given by our statute, and yet the same author says:[4] 'When the writing is invalid on its face, it can not be the subject of forgery.' The instrument under consideration has no date, is addressed to no one, and on its face has no money or value for its object, and indeed, has none of the requisites of an obligation, and the alteration of it could affect the legal liability of no one. The indictment charges that under, and by virtue of this writing, the defendant was authorized to demand and receive of W. G. Randall & Brother, certain moneys. But under the law he had no right to demand of W. G. Randall & Brother, or any one else, any money or other property, upon the face of that instrument. There may have been an understanding between Randall & Brother and Sitman, that they would pay on such a memorandum of Sitman, and if the defendant, having obtained a knowledge of that understanding, has made use of it to swindle Randall & Brother, he is punishable by indictment for swindling, but not for forgery. The court therefore erred in overruling the motion in arrest of judgment, and for which error the judgment is reversed and the case remanded, that a proper indictment may, if thought advisable, be preferred against the defendant.

"*Reversed and remanded.*"

§ 408*a*. **Instrument Void on its Face — Deed of Married Woman without Acknowledgment.** — In *Roode* v. *State*,[5] it was held that a married woman's deed being by statute void without an acknowledgment, an indictment for forgery of such an instrument would not lie. Gantt, J., delivering the opinion of the court, said: "The indictment charges the plaintiff in error with forging and counterfeiting a certain deed purporting to convey the title of certain lots of ground in the village of Nashville, in the State of Michigan. The deed is set forth in *extenso* in the body of the indictment, and by it John K. Roode doth grant, bargain, sell, and convey to one J. E. Davis, the lots described therein, with full covenants of warranty, and then follows this language: 'The said John K. Roode and Maggie Roode relinquish all claims in and to the above described premises.' The names of both John K. and Maggie Roode are signed to the deed; it is regularly executed and acknowledged by John K., but is not acknowledged by Maggie Roode, and the gist of the offense is that the name of Maggie Roode was forged and counterfeited to the instrument with intent to damage and defraud said Maggie Roode, who is the wife of the plaintiff in

[1] 37 Tex. 591.
[2] Pasc. Dig.
[3] Bish. Cr. L. 1008.
[4] vol. II., p. 506.
[5] 5 Neb. 475 (1876).

error. The accused demurred to the indictment on the ground that the facts stated therein are not sufficient in law to constitute an offense punishable by the laws of this State. The demurrer was overruled by the court and exceptions duly taken. After the trial the accused filed a motion in arrest of judgment for the same reasons stated in his demurrer, which motion was overruled and exception was taken. The only questions raised in the case are whether the deed set forth in the indictment is, upon its face, void as to Maggie Roode and whether an indictment for the forgery of such an instrument can, in law, be sustained.

"It is well understood that under the strict rules of the common law the transfer of real estate was by livery of seisin and therefore the validity of the transfer of such estate by deed of conveyance, depends wholly upon statutory authority. It seems that the registration of such deeds of conveyance was intended to stand in the place of livery of seisin; and the validity of registration depends upon the instrument having been first properly acknowledged as required by the statute. Hence, the life and legal effect which such deed acquired is wholly derived from and given to it by the statute, and the execution, acknowledgment, and registration of the deed must be strictly within the province of the law, for in these respects the statute can not be taken as merely directory, but must be considered as matter of substance and must be strictly pursued.[1] And in *Clark* v. *Graham*,[2] it is said that it is perfectly clear that no title to lands can be acquired or passed unless according to the laws of the State in which they are situated.[3]

"The registry laws of Michigan require deeds of conveyance of lands to be acknowledged or proved and recorded, and provide that 'if any such deed shall be executed in any other State, territory or district of the United States, such deed may be executed according to the laws of such State, territory or district, and the execution thereof be acknowledged before any judge of a court of record, notary public, justice of the peace or other officer authorized by law to take such acknowledgment; and in all cases of such acknowledgment there must be attached to the deed a certificate of the clerk or other proper certifying officer of a court of record of the county or district within which such acknowledgment was taken, under the seal of his office, that the person whose name is subscribed to the certificate of acknowledgment was such officer as he is therein represented to be, that he believes the signature of such person subscribed thereto to be genuine and that the deed is executed and acknowledged according to the laws of such State, territory or district.'

"Now, the instrument set forth in the indictment is not acknowledged by Maggie Roode and it is not certified as required by the laws of Michigan; nor is it executed and acknowledged by her according to the laws of Nebraska. Therefore, it need only be observed, that as to Maggie Roode the instrument as a deed does not come within the purview of the laws relating to the transfer of lands by deed of conveyance either in Michigan or Nebraska. Hence, it is clear as to Maggie Roode, the instrument is no deed, and is void upon its face. In *People* v. *Galloway*,[4] it is said that an instrument purporting to be the deed of a *feme covert* is, before acknowledgment, utterly void. It is not her deed.[5]

1 1 Burr. 447; 3 Yeates, 186.

2 6 Wheat. 577.

3 3 Wash on Real Prop. 216; Lies *v*. De Diabler, 12 Cal. 330.

4 17 Wend. 541.

5 Smith *v*. Hunt, 13 Ohio, 260, 268; Carney *v*. Hepple's Heirs, 17 Ohio, 30; Perdue *v*. Aldridge, 19 Ind. 290.

"The next question is can such an instrument legally be the subject of forgery, if not genuine? I think the doctrine can not be maintained upon principle or law that an instrument absolutely void on its face, and which could work no injury to the person for whom it was obtained, can legally be made the subject of forgery if not genuine. In the case of *People* v. *Galloway*,[1] it is said of the statute in relation to forgery that 'it was made to protect men in the enjoyment of their property, and if the instrument can by no possibility prejudice any one in relation to his estate, it will not be on offense within the statute. * * * In prosecuting for forgery it is material that the instrument should not upon its face appear to be illegal and void.'[2] And Baron Eyre said in *Jones & Palmer's Case*,[3] that the instrument to be the subject of forgery must 'purport on the face of it to be good and valid for the purpose for which it was created.'[4]

"The demurrer to the indictment should have been sustained.

"*Judgment reversed.*"

§ 409. —— **Instrument void on its Face — Promise to Pay a Sum in Labor, but no Consideration.** — In *People* v. *Shall*,[5] the prisoner was indicted for forging, the following instrument: —

"Three months after date, I promise to pay Sebastian I. Shall or bearer three dollars in shoemaking at cost price, the work to be done at his dwelling-house. DAVID W. HOUGHTALING"

This was held not the subject of forgery. COWEN, J., delivered the following exhaustive opinion. "It is scarcely necessary to observe that the instrument set out in this indictment is not a promissory note within the statute of Anne; and it is agreed that the writing does not come within any of the statutes of forgery; it being payable neither in money nor goods, but labor.[6] The indictment is therefore, based upon the common law. Another defect renders it utterly void of itself, as a common-law contract. It expresses no value received, nor any consideration whatever, and no action could be maintained upon it if genuine, as a special agreement to perform labor, without averring and proving a consideration, dehors the instrument.[7] The indictment avers no extrinsic fact by which it might be made operative; nor is it conceivable how matter for such an averment could exist. The question presented is, whether the fraudulent making of a writing void in itself, and so appearing in the indictment be the subject of a prosecution for perjury. That it may be we are referred, through Chitty's Criminal Law, to what was said in *Rex* v. *Ward*,[8] that the fabrication of an instrument whereby another may be defrauded is forgery. The information in that case stated that Ward, being chargeable to deliver 315½ tons of alum to Duke Edmund, fabricated a schedule, and indorsed upon it a direction to himself in the name of the duke, to charge 660½ tons of alum to the duke's account, part of the quantity mentioned in the schedule, and out of the proceeds of sales of alum in Ward's hands, to pay himself £10 for every ton according to agreement, and for so doing, the in-

1 *supra*.
2 King *v.* Moffat, 1 Leach, 431.
3 *Id.* 366.
4 2 Bish. Crim. Law, 506.
5 9 Cow. 778 (1829).
6 1 R. L. 404, p. 5.
7 Carlos *v.* Fancourt, 5 T. R.482; Lansing *v.* McKillup, 3 Caines. 287.
8 2 Ld. Raym. 1461, 1466, 1469.

dorsement should be his (Ward's) discharge. This was holding forgery at common law. In answer to an objection taken in arrest, that no publication of the instrument, or actual fraud upon the duke, was averred in the information, the court said that the act was complete by the act of forgery; publication or actual fraud were not necessary; but it was sufficient that the duke might have been defrauded. An objection in arrest was also taken, that the statement of the *onerabilis existens ad deliberandum*, did not lay the time so as to connect it with the instrument forged. This time was holden sufficiently certain; and the information was sustained against every objection. One remark suggested by this case is, that the instrument would have been void in itself; and the averment of *onerabilis existens* became necessary to complete the crime, otherwise the duke could not possibly have been imposed upon; and he was the only person stated in the information to be the object of the fraud. It is plain, too, that such an instrument could have had no legal effect, and could have imposed upon no one, if none of the duke's alum had been in Ward's hands.

Ward's is a leading case. It underwent great examination, and in the course of the discussion almost every authority upon common-law forgeries, then extant, appears to have been considered. The cases referred to were these: *Rex* v. *Stocker*,[1] forgery of a bill of lading; *Roy* v. *Ferrers*,[2] forging the acquittance of a prosecution by Lady Grantham, there being several suits between them; *Farr's Case*,[3] forging a warrant of attorney; *Dudley's Case*,[4] forging a marriage register; *LeRoy* v. *Deakins*,[5] forging a protection in the name of Sir Anthony A. Cooper, who was of the privy council, but not a nobleman. It was objected that because he was not a nobleman nor member of Parliament, the protection was void, none but nobles or members having power to grant such an instrument; and so no one could be imposed upon. The objection was overruled, doubtless on the ground that the defect was latent. It did not appear upon the face of the paper, which purported to be a valid one. *Dornina Regina* v. *Yarrington*,[6] was the forgery of a letter; and the judges in *Ward's Case* refer to manuscript cases of common-law indictments for forging a general release and a bill of exchange; and Fortescue, justice, mentioned a similar indictment for forging the indorsement on an army debenture.[7] In *Savage's Case*,[8] the defendant 'was indicted for forging and publishing of letters of credence to gather money, and was convicted, and judgment given against him upon his own confession, and £100 fine set upon him.' Of *Roy* v. *Ferrers*, it is proper to observe that I have looked into 1 Tremaine's Entries,[9] where the indictment is set forth in full; and I find that, in order to show the application and effect of the forged acquittance, a real demand is recited, which the acquittance purported to discharge. This was evidently necessary, or the instrument would have been no more than blank paper. In all these cases the instruments forged were, as far as we can see, apparently available for the purpose intended; to acquire or defeat some right, or to work a prejudice; and we have seen that, in two of the cases, the papers not being prejudicial on their face, the defect is supplied by averment or recital, showing how they might be made to act injuriously by reason of matter *aliunde*.

1 5 Mod. 137; 1 Salk. 342.
2 1 Sid. 278.
3 Sir T. Raym. 81.
4 2 Sid. 71.
5 1 Sid. 142.
6 1 Salk. 406.
7 2 Ld. Raym. 1465.
8 Style's Rep. 12.
9 fol. 129.

"I now come to a class of cases which hold that a writing void of itself, and not made good by averment, is not the subject of a prosecution for forgery. In *Wall's Case*,[1] the conviction was on an indictment for forging a will of all the premises belonging to J. S., which he bought of T. W. and S. H. The will was attested by only two witnesses, and was, therefore, void as a devise of a freehold; but would have been good as a bequest if the pretended testator's interest had been but a term for years. It was suggested to be the latter, but no such fact appears to have been averred in the indictment, and it was not in proof at the trial. The judges on conference held the conviction wrong, for, as it was not shown to be a chattel interest, it should be presumed to be freehold. In *Moffat's Case*,[2] the conviction was for uttering as true a forged acceptance on a bill of exchange void by the statute 17 George III.,[3] and all the judges held the conviction wrong; for if it had been a genuine instrument it would have been absolutely void, and nothing could have made it good. In the late case of *Rex* v. *Burke*,[4] the defendant was convicted of putting away the following instrument: 'I promise to take this as thirty shillings, on demand, in part for a two pound note value received. For Cundiffe, Brooks & Co., R. Cundiffe,' with intent to defraud the firm of Cundiffe, Brooks & Co. The indictment was drawn as at common law, and called the instrument a promissory note. The defendant was convicted at the Lancashire Summer Assizes, in 1822, after which it was mentioned to the judge of assize that this was not a promissory note, as it was called in the indictment; and he reserved that point. 'It also struck the learned judge that there was great doubt whether the genuine instrument or writing supposed to be forged or uttered had any legal validity, and whether it was not a mere nullity, for the forgery of which no indictment could be sustained; and the lord chief justice concurred in that doubt.' On the case being submitted to the judges they decided that the judgment should be arrested. The report does not mention on which of the two grounds suggested at the assizes the decision of the judges proceeded. It is, however, manifest from the case, that it could not have been the ground mentioned by counsel. Though the indictment might have miscalled the instrument, yet it was set out *verbatim*. Clearly the words promissory note might have been rejected as surplusage, and could not have been the foundation either of a motion in arrest, or an objection for variance. I can not but regard this case as having directly decided the point raised by the judge of assize. The writing was obviously in nature of a receipt or acquittance of thirty shillings on a two pound note; and if the indictment had averred the existence of a note to which it would apply, as in *Roy* v. *Ferrers*, it would have made out the case. *People* v. *Fitch*,[5] also holds that forgery of a paper which, if genuine, would be a legal nonentity, does not form the subject of an indictment. In *Commonwealth* v. *Linton*,[6] the defendant was convicted on an indictment for forging a bail bond. A motion was made in arrest of judgment on the ground that the bail bond was not binding on its face. The court did not question that the objection would have been available if it had been founded on fact, but they applied themselves to show that the bond was good; and on this ground denied the motion. The case of *Ames and others*,[7] is founded on *Savage's Case*, which I before cited from Styles. In *Ames' Case* the

[1] 2 East's P. C. 953, and note (a) and (b).
[2] 2 East's P. C. 954; 2 Leach, 483, S. C.
[3] ch. 30, sec. 1.
[4] 1 Russ. & Ry. Cr. Cas. 496.
[5] 1 Wend. 198.
[6] 2 Va. Cas. 476.
[7] 2 Greenl. 365.

defendant was convicted of forging a written recommendation purporting to be signed by the selectmen of Sangerville, stating that J. L. was a responsible man, able to satisfy a demand of $500; that he had bought Ames' land, etc.; and that they (the selectmen) should not be afraid to be L.'s bondmen for $200 to $300. On motion in arrest the court held that such an instrument, if genuine, would have bound the selectmen as a letter of credit to the amount of $500, or would have subjected them to an action for deceit as a false and fraudulent representation. The court say it would, in either mode, 'operate as the foundation of liability,' and they make this the test of the forgery. In the principal case I have shown that the paper forged, if genuine, would be a mere nullity for any purpose; nor, to my mind, could it be made good by any possible averment. It could not be made the foundation of liability, like the letter of credit. It does not come within any of the cases sustaining indictments, but to me it appears to be directly within the cases cited holding that an instrument purporting to be void on its face, and not shown to be operative by averment, if genuine, is not the subject of forgery. How is it possible in the nature of things, that it should be otherwise? 'Void things are as no things.' Was it ever heard that the forgery of a *nudum pactum*, a thing which could not be declared on or enforced in any way, is yet indictable? It is the forgery of a shadow. I grant that on coupling a genuine note, like the one in question, with a consideration, a cause of action would be made. But you must aver the consideration in your declaration and show it in proof on the trial. It is the subject of a direct issue. In that sense, here may be the forgery of a piece of evidence which might be eked out by other evidence, the whole forming a mischievous compound. That answer would hold equally in every case cited: the void will, the void bill of exchange, the void receipt. We are not to be put in an exploring expedition for possible evils. They must be palpable and tangible; a practicable fraud must be shown in the indictment, so that the finger may be put upon it. That a false writing, purporting to be nothing of itself, may be put to some fancied use as an ingredient in the work of mischief, can not be the criterion of forgery. As Baron Eyre said, in *Jones and Palmer's Case*,[1] the instrument, to be the subject of forgery, must 'purport, on the face of it, to be good and valid for the purpose for which it was created.' This, says Mr. East,[2] 'must be understood in respect to the frame or terms of the instrument or writing itself.'

"I agree that a man ignorant of the technical requisites of a special agreement might be imposed upon by the paper in question. This remark probably embraces a majority of the community in which we live, and most likely the very parties named in the false instrument. In this view, no doubt, the deed of which the defendant stands convicted, involves all the moral guilt of forgery. He believed that he had succeeded in fabricating what purported to be a valid promissory note. But legal forgery can not be made out by imputing a possible or even actual ignorance of the law to the person intended to be defrauded. However dark may be the moral hue of a transaction, courts of justice can only act upon legal crime, upon criminal breaches of perfect legal obligation. Had this paper been used as a token, and thus made the medium of actual fraud by the defendant, he would be punishable as for a cheat. The instrument might, in the relative sense, become the subject of an indictment. It here stands alone; and

[1] 1 Leach, 405.

[2] P. C. 853, note (a).

we do not think that legal forgery can be predicated of such a writing, for the reason fully established by authority and principle, that it is not, on the face of the indictment, of any apparent legal value.

"*Judgment arrested.*"

410. —— **Some one Must be Injured.** — Some one's rights must be prejudiced by the forgery.[1] The making and alteration must injure some one.[2]

Thus an interlineation of words in a lease so as to make it conform to the intention of the parties is not forgery,[3] or a mere verbal alteration in an instrument not affecting its legal obligation,[4] or falsely putting a witness' name to a bond which does not require a witness.[5]

In *Clarke* v. *State*,[6] the indictment charged that C. with intent to defraud L. falsely altered a receipt made by L. to a county treasurer for the payment of certain taxes due from L. for a given year so that the receipt in its altered form represented the payment of a sum larger than originally expressed. It was held not to show any offense. "As by its terms solely the receipt had no legal efficiency as against L., it could not, therefore, in contemplation of law impair any of his rights."

In *Colvin* v. *State*,[7] C. was charged with forging a deed with intent to defraud A. It appeared that C. had given A. the deed as an equitable mortgage to secure a debt for board already due and not to secure the price of future board and without the intent, as A. knew, to board longer with him. This was held not forgery. "No fraud," said the court, "appears to have been perpetrated upon A. The debt already existing was not canceled, but remained due, and the right to enforce payment of it left unimpaired. No new credit from A. was obtained upon the deed. He was in no worse situation after taking the deed than before."

In *R.* v. *Marcus*,[8] A. was indicted for forging a deed of transfer in the L. & C. Railway Company, with the intent (1) to defraud the company, (2) to defraud D. L., (3) to defraud W. B. The facts were that in July, 1845, E. R. transferred by two deeds of transfer, one hundred shares in this company to D. L., and that these deeds purported to be executed by D. L. as transferec; but the signatures D. L. were in fact written by A. with the authority or knowledge of D. L. On August 2, 1845, by seven deeds of transfer which purported to be executed by D. L., as transferor these shares were transferred to five different persons and by one of them ten of the shares purported to be transferred to W. B. The name of D. L. was signed to all these deeds by A. without the authority or knowledge of D. L. On these seven transfers there was a profit which D. L. refused to receive from A., and it did not appear that any further call on these shares could be made. It was held that on these facts A. must be acquitted as neither the railway company, D. L. nor W. B. could be defrauded. CRESSWELL, J., said: "If after hearing my opinion of the law of this case, Mr. Hall wishes the case to go to the jury, I will leave it to them, reserving for the consideration of the judges the question, whether, on this evidence, anything has been proved

[1] State *v.* Ward, 7 Baxt. 76 (1872).

[2] Barnum *v.* State, 15 Ohio, 717; 45 Am. Dec. 601 (1846); Com. *v.* Mulholland, 5 W. N. C. (Pa.) 208 (1878); State *v.* Briggs, 34 Vt. 501 (1861); State *v.* Givens, 5 Ala. 747 (1843); People *v.* Tomlinson, 35 Cal. 503 (1868).

[3] Pauli *v.* Com., 89 Pa. St. 432 (1879).

[4] State *v.* Riebe, 27 Minn. 315 (1880).

[5] State *v.* Gherkin, 7 Ired. 206 (1847).

[6] 8 Ohio St. 630 (1858).

[7] 11 Ired. 361 (1858).

[8] 2 C. & K. 356 (1847).

which shows an intent to defraud in point of law. At present, my view of the case is this: It is not required certainly to constitute in point of law an intent to defraud, that in these cases, the party should have present in his mind an intent to defraud a particular person, if the consequences of his act would necessarily or possibly be to defraud some person; but there must, at all events, be a possibility of some person being defrauded by the forgery; and there does not seem to be any such possibility in the present case, either as regards Mr. Lupton, Mr. Booth, or the company. With respect to Mr. Lupton, the transfers were made to him in consequence of money actually paid, and the person who so procured the transfer got Mr. Lupton's name into the list of proprietors in the company, so as to entitle him to a dividend in their profits, there being, so far as appears, no call of which the company could enforce payment. So that Mr. Lupton might possibly receive money, but could not, under any circumstances, be required to pay any. Neither was there any possibility of the company being defrauded, as it does not appear that they had any power to demand any further calls from the shareholders; so that the substitution of Mr. Lupton's credit for that of any other person, or the substitution of any other person's credit for his, could do no injury to the company.

*Hall.* I submit that there might be a fraud upon Mr. Lupton by the transfer of shares from him, which, in point of fact, stood in his name in the books of the company.

Cresswell, J. It is merely taking from Mr. Lupton something in which he never claimed any interest; and the person to whom the shares are transferred is not prejudiced, inasmuch as he has actually got the shares for which he has paid his money.

*Hall.* Might not Mr. Lupton be liable on his covenants in the transfer? Every person executing a deed conveying property covenants that he has a right to transfer it.

Cresswell, J. But the shares actually are transferred. The purchaser has got them. How could the transferor be damnified by such a covenant, if there is no one in a position to gainsay it? By the company's act the register is the title.

*Hall.* By that act, the company are empowered to make certain calls.

Cresswell, J. So far as appears, these calls may have been made, and the whole money paid on them. In all probability the fact is so. We know that the company have completed the line, and have been working it for a very considerable time.

*Hall.* That being your lordship's opinion, I shall not press the case further.

Creswell, J., directed an acquittal.

*Verdict, not guilty.*

In *State* v. *Smith*,[1] the prisoner was indicted for forging the following paper writing: —

"Rowan County,<br>"State of North Carolina.

"The bearer, Martin Rivers, was raised by William E. Williams, of said county and State: This is to certify that Martin Rivers was free born, and bound to me until he was twenty-one years of age; his time was out in 1819,

[1] 8 Yerg. 150 (1835).

and has conducted himself honestly and soberly, and behaved himself soberly and is a well meaning man. This given under my hand, this May, 1825.

"WILLIAM E. WILLIAMS.

"Signed and witnessed in the presence of

"J. JEFFRIES,
"JEHUGH HAMBLIN."

The indictment alleged that the paper was feloniously and fraudulently delivered to a negro man slave named Charles, the property of James Caruthers, as a certificate of freedom, with the intent to defraud said Caruthers, the defendant Smith, well knowing said negro man Charles to be a slave, and the property of said Caruthers. There are several counts in the indictment, all grounded upon the same paper. One of them charges the intent to defraud William E. Williams. The defendant was convicted generally on all the counts.

CATRON, C. J., delivered the opinion of the court.

"Forgery is the fraudulent making or alteration of a writing to the prejudice of another's rights. This is the definition given by the fortieth section of the penitentiary act, extracted from Blackstone's Commentaries,[1] and must be pursued. The 'prejudice' to another man's right must be an intent to cheat and defraud that other of a right to property, to liberty, etc. This indictment charges the instrument set forth was forged to defraud James Caruthers; and second, to defraud William E. Williams. Could the right to either be prejudiced by the instrument? First, as to Caruthers: Suppose the instrument true, as it purports, and that it had been made by William E. Williams, would it furnish any evidence for any purpose affecting the legal rights of James Caruthers? Suppose the slave Charles had claimed to be free, could the counterfeited paper have been given in evidence to prove the fact? No law authorized William E. Williams to give such certificate, and it could not have any force in law, however it might impose on the confiding integrity of mankind, and afford facilities to the slave to pass as free, and thereby enable him to escape from his master's service. As a falsehood the paper is of a most dangerous character, but this is not the question. Is the counterfeiting of it forgery and felony? Could it defraud Mr. Caruthers of a legal right, had it been made as it purports? As a legal instrument it is nugatory on its face, furnishing no evidence of a right to freedom in the slave, nor could the owner's vested right to his services be legally prejudiced thereby.

"An instrument void in law upon its face is not the subject of forgery, because the genuine and counterfeit would be equally useless, imposing no duty or conferring no right, as the forgery of a will for lands, having only two witnesses when three were required, where the court held the instrument void on its face and no forgery.[2] This adjudication was grounded on *Moffatt's Case*,[3] who was indicted for forging a bill of exchange, void on its face. These were extremely strong cases compared with the present. This instrument claims no pretense on its face to legal validity, and whether true or counterfeit is the assertion of a mere falsehood, calculated to impose upon the credulity of society.

"It is sufficient to say, Mr. Williams, whose name was counterfeited, could sustain no injury by the act of the defendant for the reason that the instrument imposed upon him no duty, nor could its use be to the prejudice of his right.

[1] vol. 4, p. 247.

[2] Vale's Case, 2 East C. L., ch. 19, sec. 45, p. 953.

[3] 2 Leach, 483.

"Much as we may regret the want of power to punish the defendant on this indictment, still we think he is clearly not subject to the penalties of felony and that the judgment must be arrested."

§ 411. —— **Letter of Introduction — No Legal Rights Affected.** — In *Waterman* v. *People*,[1] it was held that a letter of introduction addressed to "any railroad superintendent," and asking courtesies to be shown the bearer was not the subject of forgery. "The writing," said BREEZE, J., "alleged to have been forged was as follows: —

"'THE DELAWARE & HUDSON CANAL COMPANY,<br>"'ALBANY AND SUSQUEHANNA DEPARTMENT,<br>"'ALBANY, N. Y., August 23, 1873.

"'*H. A. Fonda, Superintendent.*

"'TO ANY RAILROAD SUPERINTENDENT: The bearer, T. H. Wiley, has been employed on the A. & S. R. R. as brakeman and freight hand. Any courtesies shown him will be duly appreciated, and reciprocated, should opportunity offer.

"'Very respectfully and truly yours,

"'H. A. FONDA, *Superintendent.*'

"The indictment framed upon this writing contains not a single averment of any extrinsic matter which could give the instrument forged any force or effect beyond what appears on its face. No connection is averred between the party to whom the writing is addressed and the Chicago, Rock Island & Pacific Rail road Company. Nor is it averred that the prisoner attempted to pass the writing upon that company. The writing, if genuine, has no legal validity, as it affects no legal rights. It is a mere attempt to receive courtesies on a promise, of no legal obligation, to reciprocate them. We are satisfied that the writing in question is not a subject of forgery, and no indictment can be sustained on it, and no averments can aid it. It is a mere letter of introduction which, by no possibility, could subject the supposed writer to any pecuniary loss or legal liability. As well remarked by the prisoner's counsel, courtesies are not the subject of legal fraud. The motion in arrest of judgment should have been allowed. To refuse it was error. As no prosecution can be founded on the writing, the judgment must be reversed, and the prisoner discharged from custody.

"*Judgment reversed.*"

§ 412. —— **False Certificate of Character.** — In *Commonwealth* v. *Chandler*,[2] it was held that making a false certificate of character to induce the person to employ the prisoner was not forgery. In the first count the offense was charged as follows, namely: That the defendant, on the 17th of March, 1828, did utter and publish as true to one Samuel G. Perkins, a certain false, forged and counterfeit certificate, purporting to be a certificate of one Mary Eaton, of the character of him, said Vinson, with intent to induce the said Samuel to retain and employ the said Vinson as a domestic in said Samuel's family, at a stipulated rate of wages, and thereby to cheat and defraud the said Samuel, which certificate is as follows, to wit: "March 17, 1828. This is to certify that Vinson Chandler is a good young man, attentive to his duties, and a good disposition young man, as I wish to have in my family. Mrs. Mary Eaton, Pearl Street, Bos-

1 67 Ill. 91.

2 Thatch. Cr. Cas. 187 (1828).

ton." And that he, said Vinson Chandler, then and there well knew the said certificate to be false, forged and counterfeit, against the dignity of the Commonwealth.

The second count set forth that the said Vinson Chandler, on said 17th of March, contriving and intending to deceive Samuel G. Perkins, Esq., one of the good citizens of this Commonwealth, and to induce him to employ and retain the said Vinson in his service, and to pay him a large sum of money as wages, from month to month, did exhibit and deliver to said Samuel a certain false and pretended certificate of one Mary Eaton, purporting to be the certificate of said Mary, that he, said Vinson, was attentive to his duties and of a good disposition, and which said false and pretended certificate is as follows: (as in the first count), which said certificate he, said Vinson, then and there well knew to be false and pretended, against the peace of the said Commonwealth. Upon the prisoner's arraignment he pleaded guilty, and the court took time to consider the sufficiency of the indictment. Upon the 12th, he was brought into court and ordered to be discharged.

THACHER, J. The first question which arises upon this record, is whether judgment can be rendered against the defendant as for forgery, at common law? If judgment can not be rendered as for a forgery, is any offense sufficiently described, to authorize a judgment to be rendered against the defendant, as for a misdemeanor?

1. Forgery at common law, is, in this Commonwealth, as in England, a misdemeanor. For a long time, this offense at common law was limited to the false fabrication of instruments, of a public nature, or to those of peculiar solemnity, as records, deeds, wills and other instruments, under seal; and it was doubted whether it extended to promissory notes of hand, acquittances and other private instruments prejudicial to individuals. But it was settled by *Ward's Case*,[1] and for more than a century it has been established law, both in England, and in this Commonwealth, that to counterfeit any writing of a private nature, with a fraudulent intent, and whereby another may be prejudiced, is forgery at common law.[2] In the case of *Henry Reed*, who was tried at this present term, for altering two forged promissory notes of hand for the payment of money, in the name of James Smith, it appeared at the trial, that no such person as James Smith was in existence; and upon that ground it was denied by D. A. Simmons, Esq., the defendant's counsel, that the offense was a forgery within the statute of 1804.[3] The indictment concluding, "against the peace and the form of the statute," etc., a general verdict was, under my instructions, found against the defendant. Upon looking at the authorities, it appeared to be well settled, that to forge a note or other instrument in the name of a fictitious person, and for the purpose of fraud, is a forgery under the statute in England, and undoubtedly is so by the statute of this Commonwealth.[4] Fraud and deceit are the chief ingredients of forgery, whether by statute or at common law; it is not essential to the offense, that any person should be actually injured, but there must be the intent to deceive; it can not, therefore, be material, whether the fraud should be effected, by using the name of a real or of a fictitious person. Simmons did not afterwards prosecute his motion, and Reed was sentenced under the statute.

[1] 12 Geo. 1.

[2] Bacon Abr. tit. Fergery, B.; Russ. on Cr. 1467; 2 Ld. Raym. 1462.

[3] ch. 120.

[4] Russ. on Cr. 1426; Anne Lewis' Case, Fost. Cr. L. 116.

2. If it had been alleged in this indictment, that the defendant, fabricated or uttered the false certificate in the case, with the evil intent to be retained in the service of Samuel G. Perkins, that after being so retained, he might fraudulently convert to his own use the money or goods of said Perkins without his knowledge, and against his will, I should have considered it a misdemeanor, and upon conviction, either by verdict or confession, he would be punishable for the offense; because this would show an actual intention to defraud, coupled with an act done in pursuance of such unlawful intent.[1]

Such evil design is not charged in either of the counts of this indictment. For it does not follow, that because the defendant meant, as is alleged in the first count, by uttering this letter to induce Perkins to retain and employ him as a domestic servant, that he had the further unlawful design to defraud Perkins of his money or goods. He might have adopted this course to get into the service of a good master, and it is not impossible, although the act was extremely indiscreet, that he might have intended to be a faithful servant. The intent, as alleged in the second count, was to "deceive Mr. Perkins and to induce him to employ and retain the defendant in his service and to pay him large wages from month to month." But it is not alleged that the defendant was not capable of making a good servant, or of deserving and earning large wages; nor that he did not possess such character as is described in the writing and therefore it does not follow, from anything alleged, that Perkins would necessarily have been prejudiced by taking the defendant into his service. The paper is a false token; and if by the unlawful use of it, the defendant had defrauded any one of his money, or goods it would have been a cheat, and he would have been subjected to a heavy punishment. Being, for these reasons, of opinion that this instrument does not come within the description of any of the instruments which are enumerated in the statute, nor within any case of forgery at common law, and that no sufficient offense is described in either count of the indictment, the judgment must be arrested and the prisoner be discharged.

*The prisoner was discharged.*

§ 413. —— **False "Making" Necessary.** — Thus, it is not forgery to, with intent to defraud, rub out and erase an acquittance indorsed on a bond. In *State* v. *Thornburg*,[2] the court say: "Forgery is a false making — making *malo animo* — of a written instrument for the purpose of fraud and deceit, the word 'making' being considered as including every alteration of or addition to a written instrument.[3] The charge against the defendant in the second count is for falsely, wittingly and corruptly rubbing out, erasing and obliterating an acquittance for eleven dollars, which acquittance had been indorsed on the bond mentioned in the indictment, with an intent to defraud one Caleb Lineberger, the obligor, against the form of the statute, etc. We have no statute making the act of erasing, rubbing out, and obliterating an acquittance, forgery; and the intentional destruction of an acquittance, in whatever way, can not be

1 Salk. 375. Unless the falsity tend to the prejudice of another's right, it is not forgery Where the obligee of a bond lessened the sum in the obligation it was considered to his own prejudice, and not forgery. May, 99. It was held by the twelve judges in the case of Parkes and Brown (East, P. C. 964), that where one uttered his own note, but in the name of another, and as the note of that other, it was forgery, and it being in the same name as his own, could not make any difference.

2 6 Ired. (L.) 67 (1845).

3 2 Russ. on Cr. 317; 2 East's P. C. 852, 965; Rex *v.* Parkes, 2 Leach, 785.

either a making a written instrument or the alteration of or addition to, a truly written instrument so as to bring the act within the definition of forgery."

§ 414. —— **Instrument Must Purport to be the Act of Another.** — The instrument must purport to be the act of another.[1] A false assumption of authority is not forgery.[2]

§ 415. —— **False Making Necessary — False Assumption of Authority.** — In *R.* v. *White*,[3] the prisoner was indicted for forging a certain indorsement on a certain bill of exchange for £18 12s with intent to defraud Thomas Tomlinson; and in another court the intent was laid to be, to defraud Francis Sharp and another. It was proved by Mr. Thomas Tomlinson that the prisoner had been in his employ and had left him about two years ago; that while the prisoner was in his employ, he had sent him with checks to Messrs. Hart's bank to get the money for them, but he was not sure whether he had ever sent him with a bill of exchange; that he never authorized the prisoner to indorse bills for him, or to accept bills, or to sign his name, or to use his name; and that, if he ever did send him to get the money on any bill of exchange, it was ready indorsed. This witness also proved that he was in Nottingham on the 1st of September, 1846; that the prisoner was not then in his employ; that he did not send the prisoner to Hart's bank on that day; and that he never saw or heard of the bill in question until it was presented to him for payment.

The bill was dated on the 19th of August, 1846, and payable three months after date. It professed to be drawn by Matthew Clarkson on William Nicholson, payable to his own order, and to be accepted by William Nicholson and indorsed by Matthew Clarkson on them "per procuration.

"THOMAS TOMLINSON,
"EMANUEL WHITE."

Mr. Alfred Thomas Fallowes was called. He said: "I am a partner with Mr. Francis Hart in a bank at Nottingham. On the 1st of September, 1846, the prisoner came to our bank with this bill, which he asked me to discount. He said he had brought it to be discounted; that he came from Mr. Tomlinson. I called in a clerk named Newton, who said he knew him; that he sometimes came from Mr. Tomlinson, who was very good; so I discounted the bill. I told the prisoner that Mr. Tomlinson had not indorsed it. He said Mr. Tomlinson was from home, but that he could indorse it for him. I asked if he could, and he said 'Yes.' I asked him Mr. Tomlinson's Christian name, he said, 'Thomas;' and I wrote on the bill, 'per procuration, Thomas Tomlinson.' He said he would sign his name. He did sign his name and I gave him the money." In his cross-examination, this witness said: I said I did not know him, and sent for my clerk Newton. He said that Newton knew him. I asked him if he could indorse it for Mr. Tomlinson; he said if I would prepare it he would indorse it. It was not till after the dishonor I was called on to recollect what had passed. When the bill was dishonored I sent for the prisoner; I asked him to pay the bill; I found him at his own house. If he had paid there would have been no more said about it. I did not think of a felony. He said he had not the money by him. He asked me to go to Mr. Malpas in order to ascertain whether he had shown him the bill before he brought it to me. I went and

1 Com. *v.* Baldwin, 11 Gray, 197 (1850); State *v.* Young, 46 N. H. 261 (1865); People *v.* Mann, 75 N. Y. 484 (1878).

2 State *v.* Willson, 28 Minn. 52 (1881).

3 2 C. & K. 404.

found that he had. Five or six days elapsed before we proceeded against the prisoner. We had applied to other parties when we found the acceptance was forged. We directed our attorney to proceed against the prisoner. I thought the prisoner might have done it ignorantly."

PATTESON, J. (in summing up), told the jury, that if they were of opinion that the prisoner, at the time when he signed this indorsement, had willfully misrepresented that he came from Mr. Tomlinson with intent to defraud him or the bankers, and had no authority from Mr. Tomlinson they ought to find him guilty.

*Verdict, guilty.*

PATTESON, J., reserved the case for the consideration of the fifteen judges, on the question whether the facts proved amounted to the crime of forgery.

Before LORD DENMAN, C. J.; WILDE, C. J., POLLOCK, C. B.; PARKE, B.; COLTMAN, J.; ROLFE, J.; WIGHTMAN, J.; CRESSWELL, J.; ERLE, J.; PLATT, J. and WILLIAMS, J.

*Willmore,* for the prisoner. What I must take to have been proved is, that the prisoner with intent to defraud, and without any authority from Mr. Tomlinson to indorse their bill, wrote by the hand of the banker the words, "Per procuration, Thomas Tomlinson," and wrote with his own hand his own name, "Emanuel White." The statute 1 William IV.[1] does not alter the meaning of the term forgery, and, from the first appearance of that term in our law, it appears to consist of the counterfeiting of the writing of another; and there is no instance of a person being held to be guilty of forgery by merely assuming to have authority which he really had not. In Fleta, who is cited by Lord Coke,[2] forgeries are described as the falsifying of seals, instruments then being usually sealed; and Lord Coke,[3] in treating of obligations forged, takes a distinction between the acknowledgment of a statute staple, which is under the seal of the party, and of a statute merchant which is not; and from this it is to be inferred, that no false representation would constitute the crime of forgery. Mr. Serjeant Hawkins, in his Pleas of the Crown, in treating of forgeries by alteration, says that there "a man's hand and seal are falsely made use of to testify his assent to an instrument which, after such alteration, is no more his deed than a stranger's." In the present case the prisoner does not counterfeit or imitate any thing; he merely says, "I have an authority," and that is false. If he had so really, it would only have been a false pretense; and I do not see why it is anything more because the false pretense is in writing. He merely makes an assertion which is not true. Mr. Serjeant Hawkins says: "The notion of forgery doth not seem so much to consist in the counterfeiting a man's hand and seal, and which may often be done innocently, but in the endeavoring to give the appearance of truth to a mere deceit and falsity, and either to impose that upon the world as the solemn act of another, which he is in no way privy to, or at least to make a man's own act appear to have been done at a time when it was not done, and by force of such a falsity to give it an operation which in truth and justice it ought not to have." In the present case there are neither the counterfeiting the writing of another, nor attempt to offer what the prisoner wrote as being the act of another. So Mr. Serjeant Hawkins says, that "it hath been resolved that a man shall not be adjudged guilty of forgery for writing a will for another without any directions from him who becomes *non compos* before it is brought to him; for it is not the

[1] ch. 66. [2] 3 Inst. 169 [3] 3 Inst. 171.

bare writing in another's name without his privity, but the giving it a false appearance of having been executed by him, which makes a man guilty of forgery." It therefore seems essential to the crime of forgery that a person should put forth the forgery as the writing of another, it being either false entirely, or made false by adding or taking away, and it must either be a false instrument to a true signature or a true instrument with a false signature. Sir Edward Hyde East in his Pleas of the Crown merely confines the definition of forgery as given by the earlier authorities.

WILDE, C. J. You say that this indorsement was all that it purported to be.

*Willmore.* The signature was the prisoner's own writing, and it purports to be so, — it is only a false pretense. If a man were to write a paper, in which he stated, "John Stiles has given me authority to take up so many sacks of wheat of you," — that would be no forgery if John Stiles had given no authority, because the prisoner writes it as his own act.

WILDE, C. J. If a man write in his own name, "I have authority to obtain such and such goods from you;" that would not be a forgery even if he had no such authority. Here the prisoner said he had authority to indorse a bill. In the action for deceit for accepting a bill, void in whosoever hands it came, it never occurred to any of the judges that the deceit was merged in the felony.

*Willmore.* It would be no counterfeiting of the coin, if the person put a legend on his counterfeits, stating that he had authority to coin, and yet that would be asserting that he had an authority which in fact he had not.

POLLOCK, C. B. You say that this indorsement is everything that it purports to be. I can not quite acceed to that, because it purports to be an authorized signature, and it is not an authorized signature.

PLATT, B. You put it that the indorsement itself is true, but accompanied by a false representation.

*Willmore.* In *Harvey's Case*,[1] the indorsement alleged to be forged was written by the person whose handwriting it purported to be, and the prisoner personated him, and so obtained credit on the bill, and this was held to be not a case of forgery.

Lord DENMAN, C. J. No one can pretend that there was a forgery if there is nothing done to the writing or the seal.

PATTESON, J. A man, whose name was Henry Davis, wrote his own name on a bill, and put it off as the bill of another Henry Davis, and this was held to be forgery.

*Willmore.* There was an attempt to pass his own signature as that of another.

PARKE, B. The case put by my brother PATTESON, was put by Mr. Justice BULLER in the Term Reports.

*Willmore.* The precise point in the present case has arisen once before, but no decision was ever pronounced: but in the case of *Rex* v. *Arscott*,[2] it was held, that if a person write on the back of a bill of exchange, "Received for R. Aickman," and sign his own name to it, this is not a forgery of a receipt; and Mr. Justice Littledale then said: "I take it, to forge a receipt for money, is writing the name of the person for whom it is received. But, in this case the acts done by the prisoner were receiving for another person, and signing his own name."

PATTESON, J. The case I referred to is *Mead* v. *Young*,[3] and there the person put his own name as that of another.

[1] 2 East's P. C. 856. [2] 6 C. & P. 408. [3] 4 T. R. 28.

Pollock, C. B. The accident of the person having the same name makes no difference. Suppose that the person whose indorsement was put on the bill had really nominated an attorney to indorse bills for him, and the forger had signed the name of the attorney, would that be forgery?

*Willmore.* I think it would; because the indorsement is put off as the writing of another. Indeed, it would be so, even if it were a name of a fictitious person.

Pollock, C. B. If a man said he had authority when he had not, and signed a false name "per procuration" would that be forgery?

*Willmore.* I apprehend that it would, as it would purport to be what it is not.

*S. C. Denison*, for the prosecution. I submit that this indorsement is forgery. The definition of forgery in Fleta is, "Crimen falsi dicitur cum quis accusatus fuerit vel appellatus quad sigillum Regis, vel domini sui de cujus familia fuerat, falsaverit, et brevia inde consignaverit; vel cartam aliquam vel literam ad exhaeredationem domini, etc., sigillaverit, in quibus causis si quis convictus fuerit, detractari merui et suspendi. Et quod de hujusmodi falsariis dicitur, de sigilla adulterina cartis et literas apponentibus dicatur id idem;" but Lord Coke says that "one may make a false writing within this act,[1] though it be not forged in the name of another, nor his seal nor hand counterfeited." So Mr. Serjeant Hawkins says, that "the notion of forgery doth not seem so much to consist in the counterfeiting a man's hand and seal, but in endeavoring to give an appearance of truth to mere deceit and falsity;" and Sir E. H. East, in his Pleas of the Crown, likewise defines forgery to be "a false making (which includes every alteration of, or addition to, a true instrument), a making *malo animo*, of any written instrument for the purpose of fraud and deceit;" and he adds, that "this definition results from all the authorities, ancient and modern taken together." The criminal law commissioners define forgery to be "the false and fraudulent making of an instrument, with intent to prejudice any public or private right;" and in the present case, there certainly was a making of an indorsement *malo animo*, for the purpose of fraud and deceit, and a counterfeiting of a person who had authority to indorse bills for Mr. Tomlinson. With respect to the case of *Pollhill* v. *Walter*,[2] which is an action against the defendant for falsely representing that he was authorized to accept bills by procuration, it has been remarked by Lord Chief Justice Wilde, that the judges did not advert to the acceptauce of the bill being a forgery, but in that case the jury negatived all fraud, and the judges, therefore, would not suggest an indictment for forgery. The statutes[3] makes it a felony to forge "any" "indorsement on" "any bill of exchange or promissory note for the payment of money," "with intent to defraud any person whatsoever." In forging an indorsement, it may be that forgery is committed by forging the name, or it may be that it is committed by forging the words "per procuration." This case, in its consequences, is very important, as more bills are indorsed "per procuration" than otherwise.

*Willmore*, in reply. The passage cited on the other side from Lord Coke,[4] is founded on the word "make" which is in the statutes,[5] but which does not occur in the statutes;[6] aud Lord Coke, in treating of the words "forge or

[1] 5 Eliz., ch. 14.
[2] 3 B. & Ad. 114.
[3] 1 Wm. IV., ch. 66, sec. 3.
[4] 3 Inst. 167.
[5] 5 Eliz., ch. 14.
[6] 1 Wm. IV., ch. 66.

make" says of the words "or make," "these be longer words than to forge;" and with respect to the definition of forgery, given by the criminal law commissioners, it does not accord with the definitions given by the text writers; and in the cases it frequently happens, that a part of the definition of a crime is left out for convenience, where there is no part of the case that is not affected by that part of the definition. Thus, to define that a fraudulent writing to the predjudice of another, is a forgery, is too large, as a person might write a false account of the price of corn to leave the market, and make the holders of it sell for less than they ought, and yet this would not be forgery. In the case of *Rex* v. *Webb*,[1] where the name of the acceptor was genuine, but a false description of Baizemaker, Rumford, Essex, was given of him in the address of the bill, this was held to be no forgery. So in the case of *Rex* v. *Jones*,[2] where the prisoner was charged with forging a writing purporting to be a bank-note, but which had no signature to it except the words "For self and Company of my Bank in England," and where the prisoner, when he paid the forgery away, avowed that it was a good bank-note, Lord Mansfield, C. J., said "that the representation of the prisoner afterwards could not vary the purport of the instrument; on the face of it, it did not purport to be a bank-note."

PARKE, B. If the prisoner had said, "I am authorized by Mr. Tomlinson to write his name," and had written it in the presence of the banker, how would that be?

*Willmore*. I should submit no forgery; and I submit that, in the present case, although the prisoner might be guilty of a false pretense, still that is no forgery.

The case was afterwards considered by the fifteen judges, who held the conviction wrong; and that indorsing a bill of exchange under a false assumption of authority to indorse it per procuration is not forgery, there being no false making.

§ 416. —— **Forgery — "Uttering."** — In *R.* v. *Heywood*,[3] A. gave B. a forged certificate of a pretended marriage between himself and B. in order that B. might give it to C. This was held not an "uttering." "If you can show no uttering," said ALDERSON, B., "except to B., who was herself a party to the transaction, I think you will fail to show an uttering within the statute. It is like the case of one accomplice delivering a forged bill of exchange to another with a view to uttering it to the world."

§ 417. **Forgery — Fictitious Name.** — In *R.* v. *Bontien*,[4] it was held that to support a charge of forgery by subscribing a fictitious name, there must be satisfactory evidence on the part of the prosecutor that it is not the party's real name, and that it was assumed for the purpose of fraud in that instance. Assuming and using a fictitious name, though for purposes of concealment and fraud, will not amount to forgery if it were not for that very fraud or system of fraud of which the forgery forms a part.

The prisoner was tried before Mr. Justice Gibbs, at the Old Bailey Sessions, in the year 1813, on an indictment, the first count of which charged, for that he, the said Thomas Bontien, on the 12th day of November, 1810, at Tottenham,

[1] R. & R. 405.
[2] 2 East's P. C. 883.
[3] 2 C. & K. 352 (1847).
[4] R. & R. 259 (1813).

having in his custody and possession a certain bill of exchange, which said bill of exchange is as follows, that is to say: —

"£19, 14. 0 TOTTENHAM, Nov. 12th, 1810.

"Six weeks after date pay to my order, the sum of nineteen pounds, fourteen shillings, value received.

"H. LAWRENCE.

"To
"*Mr. Thomas Scott*
"at *Messrs. Terres & White,*
"No. 4 *Staining Lane,*
"*Wood Street, London.*"

feloniously did falsely make, forge and counterfeit upon the said bill of exchange a certain acceptance of the said bill of exchange, which said false, forged and counterfeited acceptance of the said bill of exchange is as follows, that is to say,

"Accepted,
"*Thomas Scott.*
"payable No. 4, Staining Lane,
"London."

with intention to defraud Hannah Lawrence, spinster, against the statute, etc.

The second count charged the said prisoner with feloniously uttering and publishing, as true, a like false, forged, and counterfeited acceptance of a like bill of exchange, he well knowing the same to be false, forged, and counterfeited, with the like intent, against the statute, etc.

The third count charged the prisoner, with feloniously disposing of and putting away a like false, forged, and counterfeited acceptance of a like bill of exchange, he well knowing the same to be false, forged, and counterfeited with the like intent, against the statute, etc.

There was another indictment against the same prisoner for a like offense of forging an acceptance on another bill of exchange for twenty pounds, with an intent to defraud the said Hannah Lawrence with two other counts similar to those in the former indictment.

It appeared from the evidence of Hannah Lawrence, the drawer of the bills in question, that she occupied a house at Tottenham, in October, 1810, but being desirous of leaving it, she advertised the house to be let. In the same month of October, she saw the prisoner, who was at that time a perfect stranger to her; he said he came to take the house, and said he would take the fixtures of the shop, and what furniture she had to dispose of, if she would take two bills in payment for the furniture; the fixtures of the shop he said he could pay for in ready money, which amounted to twenty-six pounds, fourteen shillings, but instead of doing so he made a payment of twenty pounds, and added the six pounds, fourteen shillings to the bills. He took possession of the house on the 20th of November, and the bills in question were dated on the 12th of November, 1810, being the day they were given. The prisoner sent for stamps and wrote the bills; the body of the bill produced (the one for nineteen pounds, fourteen shillings), was in the prisoner's handwriting, and Hannah Lawrence put her name to it as the drawer; the prisoner wrote across the body of the bill, "Accepted, Thomas Scott, payable No. 4, Staining Lane, London." He also wrote, "To Mr. Thomas Scott, at Messrs. Ferres & White's, No. 4, Staining Lane, Wood Street, London," and called Terres & White, his agents.

Hannah Lawrence understood from the prisoner that Messrs. Terres & White's was the place at which both the bills would be payable in six weeks, but the prisoner said, if she could accommodate him by making one of the bills for two months, it would suit him better than paying both together, which she agreed to do. The prisoner went at that time by the name of Thomas Scott, and said if she inquired at Terres & White's who were his agents, she would find it all satisfactory. On the day the bill for nineteen pounds, fourteen shillings became due, it was presented at Messrs. Terres & White's, No. 4, Staining Lane, for payment, but was dishonored. Terres & White, said they had no property whatever in their hands belonging to any person of the name of Scott, and that they had not known anything of him for some time past. Mrs. Lawrence, on finding the bill was not paid, went down to Tottenham to see after Mr. Scott; she had an interview with him, and he said he was very sorry he could not take up the bill, but that if she would wait, he would take it up in a few days, to which she consented; the three days being expired, the prisoner requested the time to be extended to another week which was granted. The witness heard no more of prisoner until the second bill became due, which at maturity was also presented at the place where it was made payable, and payment refused. She then went to Tottenham again, but did not succeed in finding Mr. Scott. After a period of twelve months had elapsed, the witness went to Union Hall, for the purpose of seeing the prisoner, who was then in custody; he was there addressed by different names, as well as by the name by which he was indicted.

It appeared from the evidence of one of the clerks at Union Hall, that the prisoner was brought there in February, 1813, and upon being asked what his name was, he said Thomas Bontien (the name in which he was indicted). The witness took down the name from the prisoner's own mouth, and that was the only name he gave himself.

It also appeared from the evidence of another witness, who had known the prisoner since the 15th of January, 1813, that about that time he applied to him to take a house of his in Pratt Street, Lambeth, and that the name he gave was Thomas Bontien.

It further appeared from the evidence of one of the officers of Union Hall, that he apprehended the prisoner in the middle of February, 1813, and that he found in his lodgings in the Lambeth Road, a paper which stated the name of Bontien; it was a certificate of discharge under the insolvent act, which paper was afterwards claimed by the prisoner, and that he also found a number of other writings, for rent, and a variety of other things, by which he discovered that the prisoner's assumed name was Bontien, but he did not recollect that any of them contained the name of Scott."

The prisoner in his defence called a witness who was a broker, and who proved that he first knew the prisoner in the latter end of August, 1810, and knew him continually by the name of Scott; that the prisoner had a nickname of Bont. and Bontien at times. This witness also proved that he had transacted business with the prisoner in the name of Thomas Scott, in the year 1810, and he never knew him by any other name; and that his only knowledge of his having gone by other names was from the public newspapers.

Upon this evidence the jury found the prisoner guilty, but the learned judge respited the sentence in order to take the opinion of the judges upon the above case.

On the 14th of December, 1813, all the judges met at Lord Ellenborough's chambers, in Serjeant's Inn. The majority of the judges (Mr. Justice HEATH

appearing of a contrary opinion), thought that it did not sufficiently appear upon the evidence, that the prisoner has not gone by the name of Scott before the time of accepting the bill in that name, or that he had assumed the name for that purpose, and they therefore thought the conviction wrong.

In *R.* v. *Webb*,[1] the indictment charged the prisoner with feloniously forging and counterfeiting a certain bill of exchange, as follows: —

"WILTON, WELTS, December 21, 1818.

"£154, 19s. 0d.

"Two months after date, pay to my order, one hundred and fifty-four pounds, nineteen shillings, for value received, and balance of account.

"JOHN WEBB.

"To *Mr. Thomas Bowden*,
"Baize Manufacturer,
"Romford,
"Essex.

"Accepted, *Thomas Bowden*,
"payable when due at No. 40,
"*Castle Street*, Holborn, London."

With intent to defraud Wadham Locke, William Hughes, and Henry Saunders against the statute, etc.

The second count charged the prisoner with feloniously uttering and publishing as true the said bill of exchange, with the like intent. The third count was for forging an acceptance (setting out the acceptance as before), with the like intent, and the fourth count was for uttering and publishing the said acceptance with the like intent.

It was proved on the part of the prosecutor that no one of the name of Thomas Bowden (the person appearing on the bill to be the acceptor), lived at No. 40, Castle Street, Holborn, and that no such person ever resided, or carried on his business, or was ever heard of at Romford, in Essex, and that there was no baize manufactory in Romford.

On the part of the prisoner, it was proved by a person who stated himself to have been a partner in business with Thomas Bowden (the acceptor), that the acceptance was the handwriting of the said Thomas Bowden. On the cross-examination of this witness it appeared that Bowden never carried on the business of a baize manufacturer at Romford; and that the prisoner had known Bowden many years. It further appeared from the evidence of a person who kept the house No. 40 Castle Street, Holborn, the place where the bill was made payable, that he was well acquainted with the handwriting of the said Thomas Bowden; and that the acceptance was in Bowden's handwriting; he also stated that he was surprised at Bowden's accepting the bill payable at No. 40 Castle Street, Holborn, as he did not reside there, and had no authority from this witness to make any bills payable at that house.

The learned judge desired the jury first to consider whether there was any such person as Thomas Bowden, and if there was, whether the acceptance was his. The learned judge also told them, if there was no such person, or the acceptance was not his, and that the prisoner at the time he offered the bill to the prosecutor, knew either that there was no such person or if there was, that he had not accepted it, they should find him guilty. The learned judge further

[1] R. & R. 405 (1819).

directed the jury, if they thought the acceptance was Bowden's writing, to find whether he ever lived at Romford, or carried on the business of a baize manufacturer there; and that if they thought Bowden never lived at Romford, or carried on any manufactory there, and that the prisoner, who appeared from the evidence to be acquainted with him, knew that, on addressing the bill to Bowden, as baize manufacturer at Romford, he was giving him a false description for the fraudulent purpose of giving credit to the bill, they should find him guilty; and that he would submit the propriety of the conviction, under these circumstances to the judges.

The jury found that there was no such person as Thomas Bowden. But the learned judge being of opinion, from the evidence, that there was such a person, and that the acceptance was his handwriting, he reserved the case to take the opinion of the judges on the point, whether, assuming that the acceptance was the handwriting of Bowden, the prisoner, by giving on the face of the bill a false description of Bowden, and uttering the bill, after it was accepted by Bowden, with this false description with intent to defraud, brought himself within any of the counts of the indictment against him.[1]

In Michaelmas Tern, 1810, the judges met and considered this case. A majority of the judges were of opinion that the adopting a false description and addition, where a false uame was not assumed, and where there was no person answering the description or addition was not a forgery, and they directed a pardon to be applied for.

In *R.* v. *Whyte*,[2] tried before ALDERSON, B., and TALFORD, J., in 1851 where the prisoner had fraudulently used the name of another person for the purposes of his trade, and had afterwards accepted a bill in that name; it was held, that he could not be convicted of forgery, unless, when he first assumed the fictitious name, he contemplated the making of that specific bill.

The prisoner was indicted for forging and uttering an acceptance to a bill of exchange for £20, with intent to defraud one Samuel Morris. It appeared in evidence, that the prosecutor was a warehouseman, and, in October, 1850, the prisoner opened an account with him for lace goods. He represented that he was in partnership with Joseph Frederick Whiffen, who was his brother-in-law, and resided at Brentwood. The account was a monthly account, and the first and second were paid; but afterwards the prisoner got into arrears, and wanted the prosecutor to draw upon the firm, which at last he consented to do. The bill in question was drawn, and the prisoner accepted it, in the name of J. F. Whiffen & Co. Whiffen was called as a witness, and stated that he had never been in partnership with the prisoner, nor had the latter any authority to use his name in connection with his business or otherwise.

*Parry*, for the prisoner, contended that, upon this evidence, the prisoner could not be convicted of forgery. To support the charge, it was necessary to show that the name had been assumed expressly for the purpose of the forgery in question; but here, long before the bill was accepted, the prisoner had traded under the name of Whiffen & Co. This was like the case of *R.* v. *Bontien.*[3] There it was held not sufficient that the name should be proved to be a false name, but it must appear that it was assumed for the purposes of fraud in the particular transaction. In *R.* v. *Inhabitants of Burton-upon-Trent*,[4] the name by

[1] *Vide* Parker & Brown's Case, 2 East's P. C. 963, *s. c.* 2 Leach C. C. 778.

[2] 5 Cox, 290 (1851).

[3] Russ. & Ry. 260.

[4] 3 Mau. & S. 537.

which a man was married was a false name, but he had assumed it some time before for purposes of concealment, he having deserted from the army; it was held that the marriage was valid, the name not having been taken for the purposes of fraud respecting the marriage itself.

*Robinson*, for the prosecution, submitted that if the prisoner assumed the name of Whiffen for the purposes of fraud, and he fraudulently accepted the bill in his brother-in law's name, he would be guilty of forgery. It was immaterial that he had used that name before, if he had no authority to use it when he accepted the bill.

TALFOURD, J. I think it will scarcely be sufficient to show that the name of Whiffen was assumed for the purposes of fraud generally, it must have been taken for the specific object of passing off this bill. The carrying on business in the false name might be for the purpose of creating a false impression, with a view to obtainiug credit; that might support a charge of obtaining money or goods by false pretenses, but not a charge of forgery.

ALDERSON, B., concurred.

*Robinson* contended that at all events, it was a question for the jury whether, when the prisoner first assumed the name, it was not with the view, amongst other things, of drawing bills, and to supporting a false credit. In *Shepherd's Case*,[1] it was held that, although a man had been previously known by the fictitious name in which he had accepted a bill of exchange, it would not avail him in a defence to charge a forgery.

TALFOURD, J. I propose to leave the case to the jury in this way. First, whether, when the prisoner accepted this bill in his brother-in-law's name, he had reasonable grounds for believing he had authority to do so; and secondly, whether he assumed the name of J. F. Whiffen & Co., with a view of defrauding the parties with whom he dealt, by issuing false bills of exchange, of which this was one. I do not think it would be sufficient that he assumed the name for the purposes of fraud generally. The jury must find that he contemplated issuing this particular bill and, as far as my judgment goes, I do not see that there is sufficient evidence to warrant them in coming to such a conclusion.

*Verdict, not guilty.*

In *R.* v. *Aickles*,[2] it was held that a person who has for many years been known by a name which was not his own, and afterwards assumes his real name, and in that name draws a bill of exchange is not guilty of forgery, though the bill was drawn for the purposes of fraud.

§ 418. —— **Inducing One to Sign Note for Larger Sum than He Intends, Not.** — In *Commonwealth* v. *Sankey*,[3] the court say: "The defendant wrote a note payable to himself, for one hundred and forty-one dollars, and got an illiterate man to sign it, by falsely and fraudulently pretending that it was for forty-one dollars only. On a special verdict finding these facts the court gave judgment in favor of the accused. The act was a forgery according to all the text writers on criminal law, from Coke to Wharton. But their doctrine is not sustained by the ancient English cases, and is opposed by the modern ones. Only three American decisions were cited on the argument; and we take it for granted that there are no others on the point. Two of these, *Putnam* v. *Sullivan*,[4] *Hill* v.

[1] 2 East's P. C. 967

[2] 2 Leach, 492 (1787).

[3] 22 Pa. St. 390 (1853).

[4] 4 Mass. 45; 3 Am. Dec. 206.

*State*,[1] are wholly with the defendant; and the other, *State* v. *Shurtleff*,[2] supports the argument of the Commonwealth's counsel. The weight of the judicial authorities is in favor of the opinion that this is no forgery. We think that the arguments drawn from principle and the reason of the thing, preponderate on the same side. It must be admitted that in morals such an imposture as this stands no better than the making of a false paper. But even a knave must not be punished for one offense because he has been guilty of another. Forgery is the fraudulent making or altering of a writing to the prejudice of another's right. The defendant was guilty of the fraud, but not of the making. The paper was made by the other person himself, in prejudice of his own right. To complete the offense, according to the definition, it requires a fraudulent intent and making both. The latter is innocent without the former, and the former if carried into effect without the latter is merely a cheat. If every trick or false pretense of fraudulent act by which a person is induced to put his name to a paper which he would not otherwise have signed, is to be called a forgery, where shall he stop? and what shall be the rule? Is it forgery to take a note for a debt not known to be due? Or to procure a deed for valuable land by fraudulently representing to the ignorant owner that it is worthless? Or to get a legacy inserted in a will by imposing on a weak man in his illness? All these would be frauds, — frauds perpetrated for the purpose of getting papers signed — as much as that which was committed in this case. But no one thinks they are forgeries.

"For these reasons and the reasons given in the court below, which we fully adopt, the judgment is to be affirmed."

§ 419. —— **Inducing Signer of Paper to Assent to Material Alterations, Not.** — It is not forgery to procure the assent of the signer of a bond to a material alteration made without his authority by representing that the alteration was of no importance to him, though he gave his consent on condition that the representation is true.

In *State* v. *Flanders*,[3] a case of this kind, the court says: "Forgery consists in falsely making or altering a writing, with intent to defraud. The essence of the crime is contained in the union of the two elements — that the instrument is a fiction, and that it is a fiction prepared for a fraudulent purpose. The false character of the instrument, independent of the fraudulent purpose for which it is prepared, may consist in the application of a false signature — that is, one which is not that of the party whose signature it purports to be — to any instrument, whether genuine or false; or, as is claimed in this case, in the application of a genuine signature to an instrument which is false — that is, which is not in fact the instrument to which the party applied his signature. In both cases the falsity in the character of the paper disappears when it is shown that the application of the genuine signature in the one case, and the false one in the other, was made by the consent and authority of the party at the time of making it, or was assented to and ratified by him afterwards; and it can make no difference in the latter case, more than in the former, that the assent was procured by means of false and fraudulent representations. If a party is induced by such representations to authorize another to sign his name to a specific paper, there is no more falsity in the signature, or the application of it to that

[1] 1 Yerg. 762; 4 Am. Dec. 441.
[2] 18 Me. 371.
[3] 38 N. H. 324 (1859).

paper, than if, induced by such representations, he had signed it himself; and it is equally so in the case of a subsequent assent, procured by such means to an unauthorized signature, or to the application of a genuine signature to an instrument to which it was not originally applied. In every such case the assent of the party, voluntarily given, though procured through falsehood and fraud, removes the false character which without it might be imputed to the instrument. The fraud may exonerate the party from liability upon it as a contract, and under some circumstances may, in itself, constitute an offense subjecting the party to indictment; but because false means are employed to procure the consent to the instrument, the instrument itself can not for that reason be deemed false. I have found no authority upon the point except the cases of *Rex* v. *Chadwick*,[1] and *Rex* v. *Collins*.[2] Although they are merely *nisi prius* rulings, they are cited by Roscoe, in his treatise on Criminal Evidence, as establishing the law in accordance with the views here suggested. The rulings were that it is not forgery to induce a party to execute an instrument by a fraudulent misrepresentation of its contents, or to procure the signature by fraud to a document which had been altered without the party's knowledge."

§ 420. —— **Drawing Check on Bank in Prisoner's Own Name, Having no Money in Bank, Not.** — In *R.* v. *Martin*,[3] the prisoner, whose name was Robert Martin, in payment of goods filled up a banker's check and handed it to the seller. He signed it "William Martin" but the seller took it as the prisoner's without noticing the alteration in the Christian name. Upon presentation at the bank where the prisoner had no assets the check was dishonored, on the ground that the signature was not that of any customer of the bank. It was held that he was not guilty of forgery.

§ 421. —— **Passing Counterfeit Money.** — To pass a counterfeit note or check is not forgery.[4]

§ 422. **Falsely Attesting Voting Papers Not.** — In *R.* v. *Hartshorn*,[5] a statute enacted that at election "if any voter can not write, he shall affix his mark at the foot of a voting paper in the presence of a witness, who shall attest and write the name of the voter against the same as well as the initials of such voter against the name of every candidate from whom the voter intends to vote." The defendant who took an active part on behalf of some of the candidates at an election went to the houses of voters who were marksmen, to assist in filling up the voting papers, and having obtained the express or implied consent of voters or members of their families filled up the paper with the proper names and marks of the voters, and put their own names as attesting witnesses without obtaining the actual signatures or marks of the parties themselves. On an indictment for forgery COMPTON, J., said: "This does not amount to forgery, although it is undoubtedly an irregular proceeding. It appears that the voting papers had been filled up by the defendants, either with the express or implied consent of the voters, or with the consent of some person whom the defendants might reasonable believe to have authority. The

[1] 2 Mood. & Rob. 545.
[2] *Id.* 461.
[3] 14 Cox, 375 (1879).
[4] Wade's Case, 2 City H. Rec. 46 (1818).
[5] 6 Cox, 395 (1853).

voters were all called upon. It is possibly that the irregularity committed may be indictable, as it is clear the statute intended that the voter should affix his mark *propria manu*, but the attestation in the mode adopted in this case is not forgery. There is no false statement implied, and the essence of the crime of forgery is making a false entry or signature knowing it to be without authority and with intent to defraud. As I have already stated, I am not at all sure that some proceeding might not have been framed to meet this case, but it is certainly not forgery."

The learned judge then directed the jury to acquit the defendant.

§ 423. —— **Cutting Pieces out of Bank-Note, to Make New One.** — It is not forgery to cut pieces out of bank-notes and pasting them together to make another and new note.[1]

§ 424. —— **What is Not Forgery — Other Illustrations.** — The alteration of an indorsement of money received made on the back of a promissory note and not signed, is not forgery;[2] nor is the severing of an indorsement of payment — by cutting it from the note;[3] nor altering the assessment roll for a township deposited with the clerk.[4] Where the maker of a promissory note obtained it from the holder, and wrote on the back of it, "Received $46, January 21, 1860," this was held not forgery.[5] An order requesting that certain goods mentioned therein shall be delivered to a person named, the drawer having no interest in the goods or no right to their disposal, is not the subject of forgery.[6]

In *R.* v. *Sargent*,[7] the prisoner was a collector of rates for a corporation. While in this service he received cash from the prosecutor on account of a rate for which he gave a receipt. After he left the service he called on the prosecutor for the balance which was paid, and for a receipt the prisoner altered the figures in the former receipt which then appeared as a receipt for the entire rate due. This was held not a forgery.

In *R.* v. *Watts*,[8] the prisoner was indicted for forgery. The first count of the indictment charged the prisoner with forging at East Stonehouse, on the 6th of April, 1820, an acceptance by Messrs. Williams & Co., to a certain bill of exchange as follows, viz.: —

"No. 117. £200.

"March 28th.
"*Swansea* Bank, 1820.

"Two months after date, pay to Mr. John Tipper, or order two hundred pounds.

"For value received.
"Hy. Williams & Co.

"To Messrs. *Williams* & Co.,
*Bankers*, *Birchin Lane*,
"3. London."

with intent to defraud Thomas Bayles, John Routledge and Jonathan Ramsey.

1 Com *v.* Hayward, 10 Mass. 34 (1813); The prisoner's method in this case was to take seven bills of the same bank and value and to cut a strip perpendicularly from each bill, uniting the parts thus separated, and with the seven strips make an eighth bill.

2 State *v.* Davis, 53 Iowa, 252 (1880).

3 State *v.* McLeran, 1 Alk. (Vt.) 311 (1826).

4 R. *v.* Preston, 21 U. C. Q. B. 86.

5 State *v.* Monnier, 8 Minn. 212 (1863).

6 Walton *v.* State, 6 Yerg. 377 (1834).

7 10 Cox, 611 (1865).

8 R. & R. 436 (1821).

The second count charged the prisoner with uttering and publishing as true the said forged acceptance on the said bill of exchange, knowing the same to be forged, with a like intent.

The prisoner was acquitted on the first and convicted on the second count.

It appeared from the evidence, that in April, 1820, the prisoner purchased of the prosecutors wheat to the amount of two hundred and forty pounds. At the time he made the purchase, he agreed to pay the amount by the acceptance of a London banker. Before the wheat was delivered to him, he produced to the prosecutors a bill, as follows: —

"No 117. £200.

"March 28th,
" *Swansea* Bank, 1820.

"Two months after date, pay to Mr. John Tipper, or order two hundred pounds.

"For value received.
"HY. WILLIAMS & CO.

"To Messrs. *Williams* & Co.,
"Bankers, 3, *Birchin Lane*,
"3 London."
"Accepted, Williams & Co."

The prisoner was asked how he proposed to pay the remainder of the money: he said he should draw on the same bankers for the balance, he then drew the following bill in the prosecutors' compting house: —

£40. *South Lawton*, April 6th, 1820.

"Two months after date, pay to our order forty pounds, value received, as advised by

"THOMAS WATTS,
"*For P. Watts & Co.*

"*Swansea* Bank.
"Messrs. Williams & Co.
"Bankers, *Birchin Lane*,
"London."
"Accepted, Williams & Co."

The prisoner said he should send this bill to London to get it accepted, and it was afterwards sent back to the prosecutors with "Accepted, Williams & Co." written across it.

Whilst the prisoner was drawing the bill, one of the prosecutors asked him, if Williams & Co., the acceptors, were Williams, Birch & Co. The prisoner said the acceptors were Williams, Birch & Co. The prosecutor said it was improbable there should be two firms of the same name in the same street; the prisoner answered it was improbable. The figure 3, which stands between the words bankers and Birchin Lane, in the two hundred pound bill, was not then on the bill. The witness did not observe whether the small figure 3, which stands at the corner of the bill, was on the bill at that time.

This small figure 3 at the corner, appeared to a witness acquainted with bills not to be part of the address, but was like a figure that the holders of bills sometimes put on them, before they leave them for acceptance. But the person who presented this bill had not observed whether it was on the bill when he presented it for payment or not. The person to whom the bill was presented at

No. 3, Birchin Lane, took the bill behind a desk, and had an opportunity of writing on it one or both of these figures. But the person who presented it did not observe when he received the bill back whether either of these figures were then on it. At that time there were London bankers at No. 20, Birchin Lane, of the names of Williams, Birch & Co., who usually accepted bills in the firm of Williams & Co. This bill was not accepted by that firm. No other bankers of the names of Williams & Co. were known to carry on business in Birchin Lane, nor were there any other London bankers under that firm. The words "Williams & Co." were on a brass plate on the door of No. 3, Birchin Lane.

There was no evidence to show by whom these bills were accepted.

The prisoner proved, that three bills in the following form had been paid at No. 3, *Birchin Lane*, viz.: —

"No. 345. £30.

"SOUTH LAWTON, March 5th, 1820.

"Two months after date, pay to our order, thirty pounds, for value received.

"THOMAS WATTS, for
"*P. Watts & Co.*

"Messrs. Williams & Co.,
"Bankers,
"*Swansea*."
"Accepted, Messrs. Williams & Co.
"Payable at No. 3, Birchin Lane,
"London."

The learned judge left it to the jury to say, whether the acceptance of the two hundred pound bill was the acceptance of any London bankers, and they found that it was not.

The following questions were reserved for the opinion of the judges, viz.: Whether the prisoner was properly convicted and also whether considering the manner in which the bill was stated in the indictment, it was necessary for the prosecutors to prove that the figure 3 in the corner, was on the bill when it was tendered in payment.

In Hilary Term, 1821, eleven of the judges met (BAYLEY, J., being absent), and considered this case. Ten of the judges held the conviction wrong, being of opinion that the facts proved against the prisoner did not amount to the crime of forgery, and they directed a pardon to be applied for.

§ 425. —— **Partnership.** — A partner is not indictable for forgery of an instrument of writing with intent to defraud the firm.[1]

§ 426. —— **Injury must not be Remote.** — In *People* v. *Cady*,[2] a notice of the execution of a writ of inquiry being served upon an attorney, he altered the date of executing it in order to make it appear irregular. It was held that "the tendency and intent to do the wrong apprehended were too remote and conjectural to constitute the crime of forgery."

§ 427. —— **"Accountable Receipt."** — A railway scrip certificate is not within this phrase.[3]

[1] Com. *v.* Brown, 10 Phila. 184 (1873).
[2] 6 Hill, 490 (1844).
[3] R. *v.* West, 2 C. & K. 496 (1847). And, see, as to the construction of these words, State *v.* Riebe, 27 Minn. 315 (1880); State *v.* Wheeler, 19 Minn. 98 (1872).

§ 428. —— "Acquittance." — A railway ticket is not an "acquittance;"[1] nor a railway scrip certificate.[2]

§ 429. —— "Bank Bills." — Certificates of deposit purporting to be issued by an insurance company, payable on demand to bearer, are not "bank bills."[3]

§ 430. —— "Bill of Exchange." — As to the construction of these words, see *R.* v. *Mopsey.*[4]

§ 431. —— "Deed." — The forging of letters of orders issued by a bishop is not the forgery of a deed under the English statute.[5]

§ 432. —— "Order for the Delivery of Goods." — To be within the statute, it must purport to be the order of the owner of the goods or of some person who has or claims an interest in, or who has or assumes a disposing power over such goods, and takes upon himself to transfer the property or custody of them to the person in whose favor such order is made.[6] The following have been held not within the phrase, viz.: "I hereby authorize my servantman, Abraham Egan, to procure a watch of you."[7] "Mr. McD., let A. have the amount of five dollars in goods, and I will settle with you next week."[8] There must appear to be a drawer, a drawee, who is under an obligation to obey, and a person to whom the goods are to be delivered.[9]

In *Carberry* v. *State*,[10] C. was indicted for forgery in falsely making and passing a forged "order for the delivery of a pistol with a load." The instrument was as follows: —

"*Messrs. Langdon & Bro.* —

"GENTS: Let the bearer have one of your smallest, with load, and charge to me.

"R. CHAMBERS."

This was held not such a writing as alleged — being defective on its face.

In *R.* v. *Newton*,[11] the prisoner was indicted for altering a forged order for the delivery of goods, which was set forth as follows, viz.: —

"JULY 11, 1838.

"MR. LANG: Please send one piece of lead by the bearer, 12 long, 16 wide.

"GEORGE KILBY,

"Queensborough."

With intent to defraud Peter Thomas Lang, and in a second count with an intent to defraud George Kilby.

The prisoner pleaded guilty.

The learned judge postponed passing sentence till the next day, for the purpose of looking into the facts, when it occurred to the learned judge that they

[1] R. *v.* Gooden, 11 Cox, 672 (1871). And, see, as to the construction of this word, R. *v.* French, 11 Cox, 472 (1870); R. *v.* Parker, 2 Cox, 274.
[2] R. *v.* West, 2 C. & K. 496 (1847).
[3] Robinson *v.* State, 6 Wis. 585 (1857).
[4] 11 Cox, 143 (1868).
[5] R. *v.* Morton, 12 Cox, 456; L. R. 1 C. C. R. 22 (1873).
[6] R. *v.* Clinch, 2 Leach, 614 (1791).
[7] R. *v.* Egan, 1 Cox, 29 (1843).
[8] Horton *v.* State, 53 Ala. 487 (1875).
[9] State *v.* Lamb, 65 N. C. 419 (1871).
[10] 11 Ohio St. 410 (1860).
[11] 2 Moody, 89 (1838).

did not show any right in Kilby to make an order on Lang for the delivery of lead; and that the instrument set forth in the indictment did not import anything more than a request which Lang might or might not comply with, as he might see fit.

Under these circumstances, the learned judge thought it right to respite the sentence till the next assizes, and to bring the case under the consideration of the judges in order that judgment might be given upon the prisoner's confession, if the present indictment should be held good; and if not, that an indictment might be preferred at the next assizes for uttering a forged request for the delivery of goods under the statutes of 11 George IV.[1] and William IV.[2]

This case was considered at a meeting of the judges in Michaelmas Term, 1838, and they held the conviction wrong, and ordered a fresh indictment to be preferred for forging, etc., a request.

§ 433. —— **"Order For the Payment of Money" — The Order Must Appear to be a Valid One.** — In *Regina* v. *Rushworth*,[3] it was held that a forged order for the purpose of obtaining a reward for the apprehension of a vagrant which showed on its face that it was made by one not having authority, was not the subject of forgery. And such an order must be addressed to some one.[4]

The following have been held not within the phrase, viz.: —

"SIR: The bearer Mr. Richardson, being our particular friend, who has occasion to proceed from New York to Philadelphia, we have requested him to call on you, desiring you to accept his draft on us, on demand for fifteen dollars; your compliance will much oblige, sir,

"Your obedient servant,

"J. W. CHANNING."[5]

A forged paper in this form: "*Per* Bearer two 11-4 counterpanes" not addressed to any one.[6]

In *Regina* v. *Roberts*,[7] D. was in the habit of buying bones for F. and of drawing on F. for the price before he delivered the bones. The prisoner forged D.'s name to a letter to F., asking for £3, and stating that he had bought a large quantity of bones. F. at the time did not owe any money to D. It was held that this was not an "order for the payment of money," within the statute.[8]

In *Regina* v. *Curry*,[9] the prisoner was charged with uttering a forged bill of exchange or order for the payment of money with intent to defraud, etc.

It was objected, in arrest of judgment, that the counts on which he was convicted were insufficient, inasmuch as the instrument set out in them neither appeared by its terms nor was shown by averment, to be a bill of exchange or an order for the payment of money.

[1] ch. 1.

[2] ch. 6, sec. 10. See East's P. C. 936; Ravenscroft's Case, Russ. & Ry. 161; Carney's Case, Moo. 351.

[3] 1 Stark. 397 (1816).

[4] R. *v.* Denny, 1 Cox, 178 (1845).

[5] People *v.* Thompson, 2 Johns. Cas. 342, (1801).

[6] R. *v.* Cullen, 5 C. & P. 116 (1831). "Please to pay £10 by bearer, as I am so ill I can not wait for you." R. *v.* Ellor, 1 Leach, 363, (1784).

[7] C. & M. 652 (1842).

[8] And see R. *v.* Williams, 1 Leach, 134 (1775); R. *v.* Rouse, 4 Cox, 7 (1849); R. *v.* Ellis, 4 Cox, 258 (1850); R. *v.* Reopelle, 20 U. C. Q. B. 260; R. *v.* Baker, 1 Moody, 231 (1829); R. *v.* Ravenscroft, R. & R. 160 (1809); R. *v.* Richards, R. & R. 192 (1811;) R. *v.* Howie, 11 Cox, 32 (1869).

[9] 2 Moody, 281 (1841).

One of the counts charged "that the prisoner on, etc., at, etc., feloniously did offer and put off a certain bill of exchange, which bill of exchange is as follows: —

"'HYTTON, February 17, 1841.

"'Please to pay on demand to the bearer the sum of twenty pounds for value received, as witness our hand, Messrs. Thomas Gally & Co.,' with intent to defraud Matthew Hulton, Chayter and others, against the form of the statute," etc.

The other count differed from that stated, only in substituting the words order for payment, or money for the words, "bill of exchange."

The learned judge respited the judgment till the next assizes in order that the opinion of the judges might be obtained on this question, whether the counts or either of them could be sustained.

This case was considered at a meeting of the judges in Easter Term, 1841, and they were unanimously of opinion that the conviction was bad. This case was distinguished from *Regina* v. *Hawkes*,[1] in this, that there the act of putting the acceptance was a sort of estoppel to say it was not a bill of exchange.

§ 434. —— **Promissory Note.** — As to what is not a "promissory note," see cases below.[2]

§ 435. —— **"Receipt For Money" — "Receipt."** — A scrip receipt not filled up with the name of the subscriber, is not within these terms,[3] nor a railway scrip certificate,[4] nor a railroad ticket.[5]

In *R.* v. *Cooper*,[6] it was the practice of a county treasurer, when an order had been made on him for the payment of the expenses of a prosecution, to pay the whole amount to the attorney for the prosecution or his clerk, and to require the signature of every person named in the order, to be written on the back of it, and opposite to each name the sum ordered to be paid to each respectively. It was held that such a signature was not a "receipt."

§ 436. —— **Record.** — A tax duplicate is not a "record" within the Ohio statute.[7]

§ 437. —— **"Shares" — Scrip Receipts Not.** — In *R.* v. *Mott*,[8] several defendants were indicted for conspiring to fabricate shares of a company. It appeared that the company had not been legally established, and that the papers which the defendants were charged with conspiring to fabricate were scrip receipts given by the bankers of the company to the holders of certain letters, in return for the payment of deposits. "I should say," said ABBOTT, C. J., "that these receipts had not become shares, but were only things which might be made shares." The defendants were acquitted.

1 2 Moody, 60.

2 R. *v.* Burke, R. R. 495 (1822); Conner's Case, 3 City Hall Rec. 59 (1818); R. *v.* Howic, 11 Cox, 320, (1869).

3 R. *v.* Lyon, 2 Leach, 681 (1793).

4 R. *v.* West, 2 C. & K. 496 (1847). And as to the construction of these words, see R. *v.* Harvey, R. & R. 227 (1812); R. *v.* Parker, 2 Cox, 274; R. *v.* French, 11 Cox, 472 (1870); R. *v.* Barton, 1 Moody, 141 (1826); R. *v.* Russell, 1 Leach, 10 (1837).

5 R. *v.* Gooden, 11 Cox, 672 (1871).

6 2 C. & K. 586 (1847).

7 Smith *v.* State, 18 Ohio St. 420 (1868).

8 2 C. & P. 521 (1827).

§ 438. —— **"Undertaking" — "Warrant."** — In *R.* v. *Thorn*,[1] a customer in the country had an open account with a wholesale house in London. The prisoner sent a letter to them in the customer's name in these terms: "I shall feel obliged by your paying Mr. B. the sum of £2, 7s, 8d and debiting me with the same. You will please have a receipt, and add the amount to invoice of order on hand." It was the practice of the house to pay country customers on similar requests. It was held that this letter was not an "undertaking," a "warrant" or an "order" within the statute.

A warrant signed by a foreman and paid by a cashier is not a "warrant for the payment of money."[2]

§ 439. —— **No Presumption of Guilt from Uttering.** — The uttering and publishing a forged instrument does not raise a presumption of law that the person so doing forged it.[3]

§ 440. —— **Evidence Held Insufficient.** — In several cases in the appellate courts the evidence was held insufficient to convict.[4]

In *Dovalina* v. *State*,[5] HURT, J., said: "An order for ten dollars upon one Dario Gonzalez is charged to have been forged by the defendant. This order, though identified by the witnesses, was not put in evidence. The record upon this subject recites as follows: P. S. Babcock being on the stand, stated: 'I know the defendant. I paid the defendant the order referred to. I would know it again if I saw it. I obtaiued the order from Pablo Dovalina about two years ago, and paid him ten dollars on it. This was in Webb County, Texas. Do not remember that any one else was present.' The order being shown the witness, he identified it. Was it necessary to introduce the order in evidence? We are of opinion that it was. A conviction was sought alone upon circumstantial evidence. The law applicable to such a case was not charged. However, as there was no charge requested, nor objection made because of the omission of a proper charge on the subject, and as such error is not relied upon in the motion for a new trial, we do not feel called upon to reverse upon this ground. This conviction is for forgery. The evidence proves these facts and none others, viz.: 1. That the order was forged by some person. 2. That the defendant uttered or passed the order. 3. That the defendant could not write. 4. There was no proof as to who did write the order, the State relying alone upon the above facts to show that the defendant procured some one to write the order, he having some sort of claim on Gonzalez. Do these facts render it reasonably certain that the defendant forged the order? This is very questionable; hence we would suggest that a count for uttering, in all such cases, be inserted in the indictment. Because the order was not introduced in evidence, the verdict is not supported by the evidence; wherefore the judgment must be reversed and the cause remanded. *Reversed and remanded.*"

[1] C. & M. 206 (1841); 2 Moody, 271.
[2] R. *v.* Pilling, 1 F. & F. 325 (1858).
[3] Miller *v.* State, 51 Ind. 405.
[4] Dovalina *v.* State, 14 Tex. (App.) 312 (1883); Montgomery *v.* State, 13 Tex. (App.) 75 (1882).
[5] *Id.*

# PART II.

# FRAUD AND FALSE PRETENSES.

---

## FRAUD — PRIVATE INJURY — AT COMMON LAW TO BE INDICTABLE MUST BE PUBLIC.

## R. *v.* WHEATLY.

[2 Burr. 1125; 1 W. Bl. 273.]

*In the English Court of King's Bench, 1761.*

**An Offense to be Indictable, must be** one that tends to injure the public. Defrauding one person only, without the use of false weights, measures, or tokens, and without any conspiracy, is, at common law, only a civil injury, and not indictable.

*Mr. Norton*, for the prosecutor, showed cause why judgment should not be arrested; a rule for that purpose having been obtained, upon a motion made by *Mr. Morton* on Monday, 26th January last, in arrest of judgment upon this indictment for knowingly selling amber beer short of the due and just measure (whereof the defendant had been convicted). The charge in the indictment was, "That Thomas Wheatly, late of the parish of St. Luke, in the county of Middlesex, brewer, being a person of evil name and fame, and of dishonest conversation, and devising and intending to deceive and defraud one Richard Webb of his moneys, on, etc., at, etc., falsely, fraudulently, and deceitfully did sell and deliver, and cause to be sold and delivered, to the said Richard Webb, sixteen gallons, and no more, of a certain malt liquor commonly called amber, for and as eighteen gallons of the same liquor; which said liquor, so as aforesaid sold and delivered, did then and there want two gallons of the due and just measure of eighteen gallons, for which the same was sold and delivered as aforesaid (the said Thomas Wheatly then and there, well knowing the same liquor so by him sold and delivered to want two gallons of the due and just measure as aforesaid); and he, the said Thomas Wheatly, did receive of the said Richard Webb the sum of fifteen shillings, etc., for eighteen gallons, etc., pretended to have been sold and delivered, etc., although there was only sixteen gallons so as aforesaid delivered; and he, the said Thomas Wheatly, him, the said Richard Webb, of two gallons of, etc., fraudulently and unlawfully did deceive and defraud; to the great damage and fraud of the said Richard Webb, to the evil example of others in the like case

offending, and against the peace of our sovereign lord the king, his crown and dignity."

*Mr. Morton* and *Mr. Yates*, who were of counsel for the defendant (to arrest the judgment), objected that the fact charged was nothing more than a mere breach of a civil contract; not an indictable offense. To prove this, they cited *Rex* v. *Combrun*,[1] which was exactly and punctually the same case as the present, only *mutatis mutandis*. And *Rex* v. *Driffield*,[2] an indictment for cheat, in selling coals as and for two bushels, whereas it was a peck short of that measure. There the indictment was quashed on motion. *Rex* v. *Hannah Heath*, — an indictment for selling and delivering seventeen gallons, three quarts, and one-half pint of geneva (and the like of brandy), as and for a greater quantity, was quashed on motion. In 1 Salkeld,[3] a *certiorari* was granted to remove the indictment from the Old Bailey, because it was not a matter criminal, — it was "borrowing £6,000 and promising to send a pledge of fine cloth and gold dust, and sending only some coarse cloth and no gold dust." In Tremaine,[4] indictment for cheats, all of them either lay a conspiracy, or show something amounting to a false token. A mere civil wrong will not support an indictment. And here is no criminal charge; it is not alleged, "that he used false measures." The prosecutor should have examined and seen that it was the right and just quantity.

*Mr. Norton*, *pro rege*, offered the following reasons why the judgment should not be arrested. The defendant has been convicted of the fact. He may bring a writ of error, if the indictment is erroneous. This is an indictable offense; it is a cheat, a public fraud, in the course of his trade; he is stated to be a brewer. There is a distinction between private frauds, and frauds in the course of trade. The same fact may be a ground for a private action, and for an indictment too. None of the cited cases were after verdict. It might here (for aught that appears to the contrary) have been proved "that he sold this less quantity by false measure;" and everything shall be presumed in favor of a verdict. And here is a false pretense, at the least, and it appeared upon the trial to be a very foul case.

The counsel for the defendant, in reply, said that nothing can be intended or presumed, in a criminal case, but *secundum allegata et probata;* it might happen without his own personal knowledge. And they denied any distinction between this being done privately, and its being done in the course of trade.

[1] P. 1751, 24 Geo. II., B. R.

[2] Tr. 1756, 27, 28 Geo. II., B. R. S. P.

[3] p. 151, Nehuff's Case, P. 4 Ann. B. R.

[4] 1 Tremaine's Pleas Cr. 85-111.

Lord MANSFIELD. The question is, whether the fact here alleged be an indictable crime or not. The fact alleged is, —

(Then his lordship stated the charge *verbatim.*)

The argument that has been urged by the prosecutor's counsel, from the present cases coming before the court after a verdict, and the cases cited being only of quashing upon motion, before any verdict, really turns the other way; because the court may use a discretion, "whether it be right to quash upon motion, or put the defendant to demurer;" but after verdict, they are obliged to arrest the judment if they see the charge to be insufficient. And in a criminal charge, there is no latitude of intention, to include anything more than is charged; the charge must be explicit enough to support itself. Here, the fact is allowed, but the consequence is denied; the objection is, that the fact is not an offense indictable, though acknowledged to be true as charged. And that the fact here charged should not be considered as an indictable offense, but left to a civil remedy by an action, is reasonable and right in the nature of the thing; because it is only an inconvenience and injury to a private person, arising from that private person's own negligence and carelessness in not measuring the liquor upon receiving it, to see whether it held out the just measure or not.

The offense that is indictable must be such a one as affects the public. As if a man uses false weights and measures, and sells by them to all or to many of his customers, or uses them in the general course of his dealing; so, if a man defrauds another, under false tokens. For these are deceptions that common care and prudence are not sufficient to guard against. So, if there be a common conspiracy to cheat; for ordinary care and caution is no guard against this. Those cases are much more than mere private injuries; they are public offenses. But here, it is a mere private imposition or deception; no false weights or measures are used, no false tokens given, no conspiracy; only an imposition upon the person he was dealing with, in delivering a less quantity instead of a greater; which the other carelessly accepted. It is only a non-performance of his contract, for which non-performance he may bring his action. The selling an unsound horse as and for a sound one, is not indictable; the buyer should be more upon his guard.

The several cases cited are alone sufficient to prove, that the offense here charged is not an indictable offense. But, besides these, my brother DENISON informs me of another case, that has not been mentioned at the bar. It was M. 6 George I., B. R. *Rex* v. *Wilders*, a brewer; he was indicted for a cheat, in sending in to Mr. Hicks, an alehouse keeper, so many vessels of ale marked as containing such a measure, and writing a letter to Mr. Hicks assuring him that they did

contain that measure; when in fact they did not contain such measure; but so much less, etc. The indictment was quashed on argument, upon a motion; which is a stronger case than the present. Therefore, the law is clearly established and settled, — and I think on right grounds; but on whatever grounds it might have been originally established, yet it ought to be adhered to, after it is established and settled. Therefore (though I may be sorry for it in the present case, as circumstanced), the judgment must be arrested.

Mr. Justice DENISON concurred with his lordship.

This is nothing more than an action upon the case turned into an indictment. It is a private breach of contract. And if this were to be allowed of, it would alter the course of the law, by making the injured person a witness upon the indictment, which he could not (for himself) in an action. Here are no false weights, nor false measures; or any false token at all; nor any conspiracy. In the case of *Queen* v. *Maccarty*,[1] there were false tokens, or what was considered as such. In the case of *Queen* v. *Jones*,[2] the defendant had received £20, pretending to be sent by one who did not send him. *Et per Cur.* "It is not indictable, unless he came with false tokens; we are not to indict one man for making a fool of another; let him bring his action." If there be false tokens, or a conspiracy, it is another case. *Queen* v. *Maccarty*,[3] was a conspiracy, as well as false tokens. *Rex* v. *Wilders* was a much stronger case than this, and was well considered. That was an imposition in the course of his trade; and the man had marked the vessels as containing more gallons than they did really contain, and had written a letter to Mr. Hicks attesting that they did so. But the present case is no more than a mere breach of contract; he has not delivered the quantity which he undertook to deliver. The courts use a discretion in quashing indictments on motion; but they are obliged to arrest judgment when the matter is not indictable. And this matter is not indictable; therefore the judgment ought to be arrested.

Mr. Justice FOSTER. We are obliged to follow settled and established rules already fixed by former determinations in cases of the same kind. The case of *Rex* v. *Wilders* was a strong case (too strong, perhaps, for there were false tokens; the vessels were marked as containing a greater quantity than they really did).

Mr. Justice WILMOT concurred. This matter has been fully settled and established, and upon a reasonable foot. The true distinction that ought to be attended to in all cases of this kind, and which will solve them all, is this, — that in such impositions or deceits, where common

1 6 Mod. 301; 2 Ld. Raym. 1179.

2 1 Salk. 379; 2 Ld. Raym. 1013, and 6 Mod. 105.

3 6 Mod. 302.

prudence may guard persons against the suffering from them, the offense is not indictable, but the party is left to his civil remedy for the redress of the injury that has been done him; but where false weights and measures are used, or false tokens produced, or such methods taken to cheat and deceive, as people can not, by any ordinary care or prudence, be guarded against, there it is an offense indictable. In the case of *Rex* v. *Pinkney*,[1] upon an indictment "for selling a sack of corn (at Rippon market) which he falsely affirmed to contain a Winchester bushel, *ubi revera et in facto plurimum deficiebat*," etc. the indictment was quashed upon motion.

In the case now before us, the prosecutor might have measured the liquor before he accepted it; and it was his own indolence and negligence that he did not. Therefore common prudence might have guarded him against suffering any inconvenience by the defendant's offering him less than he had contracted for. This was in the case of *Rex* v. *Pinkney;* and it was there said, that if a shop keeper who deals in cloth, pretends to sell ten yards of cloth, but instead of ten yards bought of him, delivers only six, yet the buyer can not indict him for delivering him only six; because he might have measured it, and seen whether it held out as it ought to do or not. In this case of *Rex* v. *Pinkney*, and also in that case of *Rex* v. *Combrune*, a case of *Rex* v. *Nicholson*, at the sittings before Lord Raymond after Michaelmas term,[2] was mentioned; which was an indictment for selling six chaldron of coals, which ought to contain thirty-six bushels each, and delivering six bushels short; Lord Raymond was so clear in it, that he ordered the defendant to be acquitted.

*Per Curiam* unanimously, the judgment must be arrested.

---

## FRAUDULENT DISPOSITION OF MORTGAGED PROPERTY MOVABLE PROPERTY.

## HARDEMAN *v.* STATE.

[16 Tex. (App.) 1.]

*In the Court of Appeals of Texas, 1884.*

1. **Fraudulent Disposition of Mortgaged Property.** — To constitute the offense denounced by article 797 of the Penal Code, the property upon which the lien was given must have been "personal or movable property" at the time the lien was executed. The sale or other disposition of real property on which the owner had executed a written lien is no offense against the laws of this State.

[1] P. 6 Geo. II., B. R.

[2] 4 Geo. II.

2. **Movable Property** is such as attends the person of the owner wherever he goes, in contradistinction to things immovable. Under this rule it is *held* that a growing crop is immovable property.

3. **An Ungathered Crop** still appendant to the ground can, under no circumstances, be held movable property, and can not partake of the character of personal property until ready for harvest.

4. **Indictment.** — The indictment charged in substance that, having executed a valid mortgage lien in writing upon "eighteen acres of cotton, then and there being movable property," the defendant subsequently sold the same with intent to defraud his mortgagee. *Held*, insufficient to charge any offense against the laws of this State.

APPEAL from the District Court of Ellis. Tried below before the Hon. G. N. ALDREDGE.

The offense attempted to be charged against the appellant was the fraudulent disposition of mortgaged property, the count against him in the indictment being in substance that, having on the third day of June, 1882, executed to one J. E. Wilson a valid mortgage lien in writing "upon eighteen acres of cotton, then and there being movable property," he subsequently, on the first day of October, 1882, sold the said cotton to divers persons with intent to defraud the said Wilson. The jury rendered a verdict of guilty against the appellant and assessed his punishment at confinement in the penitentiary for the term of two years.

The State first introduced in evidence the mortgage described in the indictment, and, by the witness J. E. Wilson, proved its execution by the appellant. Wilson further testified that the mortgage had never been satisfied. He had never consented to the sale of cotton by the appellant to any one. Subsequent to the execution of the mortgage, the appellant had avoided the witness. The witness however encountered the appellant in Waxahachie, in September, 1883, and asked him about the debt. Appellant replied that witness could not make it out of him. He then asked the witness if Felix Hardeman had not paid the debt for him. Witness replied that he had not. The appellant then said that a man living on Chambers Creek owed him twenty-five dollars, which he would collect and pay over to the witness. Witness never saw the appellant afterwards until his arrest.

The substance of the testimony of Richard Cunningham, a witness for the State, was that in the fall of 1882, through a third party, he purchased of the appellant the cotton crop grown by him that year.

Felix Hardeman, introduced by the defendant, denied that he ever promised to pay the defendant's debt to Wilson, that he had ever paid, or that he had ever told Sims, John Hardeman or other person that he had paid or had ever agreed to pay it. Witness owed the defendant nothing; the balance of ten dollars which he once owed the defendant for work having been boarded out with him by defendant after he quit work for him. Defendant told the witness of the mortgage just after its

execution, and cautioned witness in the event he should encounter Wilson, to make his statement of the mortgage transaction harmonize with the defendant's statement to him, the witness, regarding the mortgage. The defendant's witnesses had attempted to prevail upon the witness to testify that he, the witness, was in the defendant's debt, and had promised to pay Wilson the amount of claim he held against the defendant.

W. D. Sims, for the defendant, testified that the defendant worked two months for Felix Hardeman in the spring of 1882. Witness asked Felix if he had not promised to pay the defendant's debt to Wilson. Felix replied that he had so promised, and the witness communicated the fact to the defendant.

John Hardeman, the defendant's brother, testified in his behalf that in the summer of 1883 Felix Hardeman told him that pursuant to a promise he had previously made the defendant, he had paid the defendant's debt to Wilson. Witness asked to see the receipt. Felix replied that he did not have it at hand. Not satisfied, the witness went to Wilson and asked him of the truth of his statement. Wilson said that Felix was a liar, and that if he faced him with such a statement he, Wilson, would "jug" him. Witness repeated this to Felix in presence of the defendant, and Felix said that Wilson was a d—n liar, and that he would face him.

The motion for a new trial assailed the competency of the mortgage as evidence because not properly acknowledged, and not of record, and denounced the verdict as unauthorized by the evidence.

*Amzi Bradshaw*, for appellant.

*J. H. Burts*, Assistant Attorney-General, for the State.

WILSON, J. In substance the indictment charges that the defendant, on the third day of June, 1882, executed to J. E. Wilson a valid mortgage lien, in writing, upon "eighteen acres of cotton, then and there being movable property," "and that he thereafter, on the first day of October, 1882, sold said cotton to divers persons with intent to defraud said Wilson," etc.

To constitute the offense attempted to be charged in this indictment, the property upon which the lien was given must have been "personal or movable property" at the time such lien was executed.[1] It is no offense against the law of this State to sell or otherwise dispose of real property upon which the owner has given a written lien.

Before proceeding further we should determine what meaning should be given to the words "eighteen acres of cotton," used in the indictment in describing the property mortgaged. We think that but one

[1] Penal Code, art. 797.

reasonable signification can be placed upon them, and that is that the property consisted of a cotton crop growing upon eighteen acres of land. This would be the ordinary signification of the words, and they must be thus understood.[1]

What character of property is a crop of growing cotton, considered with reference to the offense of which defendant stands convicted? Is it "movable property" within the meaning of article 797 of the Penal Code? If not, then it is unnecessary to consider this case further, because it is to that character of property alone that this indictment applies.

It is true that the indictment alleges that the eighteen acres of cotton were movable property. Such allegation, however, is but a conclusion of the pleader's and is not sufficient unless the other statements show that it was that kind of property. Thus, suppose the allegation had been that the property consisted in eighteen acres of land, followed by another allegation that the land was movable property; it would not be contended that the latter controlled the former allegation, and that therefore the indictment charged the offense known to the law. The two allegations would be repugnant to and contradictory of each other, and the indictment would unquestionably be bad. But suppose in the case before us the allegation had been that the property consisted in so many pounds of cotton, and that the same was personal property, or was movable property, these allegations would have been consistent with each other, and the latter would have determined the character of the property. In this case the allegation that the property was movable can add nothing to the sufficiency of the indictment, unless the description of the property, "eighteen acres of cotton," may mean cotton in that state or conditon which would render it movable property.

We now recur to the question, is cotton growing movable property, as alleged in the indictment? "Movable" property is such as attends a man's person wherever he goes, in contradistinction to things immovable.[2] Thus money, jewelry, clothing, household furniture, boats and carriages are said to follow the person of the owner wherever he goes; they need not be enjoyed in any particular place; and hence they are movable.[3] Certainly a crop of cotton growing upon land can not by any stretch of the rules of construction be brought within this definition of movable property. It is most clearly a thing immovable. It may, however, become movable. Says the author last quoted: "Fruits, so long as they are hanging on the trees, the crops until they gathered, and timber trees while they are standing, are things immovable, or real

[1] Rev. Stats., art. 3138; Penal Code, art. 10.

[2] 2 Bouv. L. Dic., word "Movables."

[3] 1 Schoul. Per. Prop. 25.

estate, because they are attached and appendant to the ground, But when the fruits or crops are gathered, or the trees cut down, as they then cease to be attached to the soil, they become movables."[1] We think it too plain to be controverted, or to require a further investigation of authorities, that a crop of growing cotton is immovable property, and is not within the meaning of "movable property," as used in the article of the Penal Code under which this conviction was obtained.

But it may be said that the cotton was personal, if not movable property, and if so that the offense attempted to be charged could be committed in relation to it. This position is correct. If the property be either personal or movable, it is the subject of the offense denounced by the Code. It is to be observed, however, that this indictment does not allege, or in any manner show, that the property was personal property. It characterizes the same as movable property, and the two words are by no means synonymous in their legal signification, and do not mean the same thing in the code. There may be personal property which is not movable. Personal property not only includes movable property, but more. It is a more comprehensive word. Thus, crops growing upon land are held to be personal property, so far as not to be considered an interest in land, under the statute of frauds.[2] So, annual crops, if fit for harvest, may acquire the character and incidents of personal property, so far as to be subject to execution as personal chattels.[3] But it has never been held that an ungathered crop, still appendant to the ground, is, under any circumstances, movable property. Whilst the question as to whether or not cotton growing is personal property within the meaning of the article of the Code referred to, is not presented directly for our determination, we deem it not improper for us to say that, in our opinion, crops do not become personal property, as a general rule, until they are ready to be harvested. Until that time they are regarded as partaking of the realty.[4] In this case it appears from the indictment that the lien upon the cotton was given in the month of June, at which time the crop could not have been ready for gathering, and it was not, therefore, personal property.

In our opinion, the indictment charges no offense against the law of this State, and the court erred in overruling the defendant's motion in arrest of judgment, based upon its insufficiency; wherefore the judgment is reversed and the prosecution is dismissed.

*Reversed and dismissed.*

1 1 Schoul. Per. Prop. 124.

2 2 Bouv. L. Dic., "Personal Property."

3 Horne *v.* Gambrell, W. & W. Con. Rep., sec. 997.

4 1 Schoul. Per. Prop. 123, *et seq.;* Freem. on Exe., sec. 113.

## FRAUDULENTLY DISPOSING OF MORTGAGED PROPERTY.

## ROBERTSON v. STATE.

[3 Tex. (App.) 503.]

*In the Court of Appeals of Texas, 1878.*

1. **Fraudulent Disposition of Property Subject to Lien.**—The statute making it a penal offense (1) to remove out of the State any personal property on which the accused has given any written lien; (2) to sell such property; or (3) to "otherwise dispose of" such property—requires an intent to defraud the holder of the lien as an essential ingredient of each offense.

2. **A Removal of such Property,** with such intent, from one county in the State to another is not an offense under said article. The expression "otherwise dispose of" does not include a removal or sale, but does include any other mode of placing the property beyond the reach of the holder of the lien, with such intent.

APPEAL from the District Court of Matagorda. Tried below before the Hon. W. H. BURKHART.

The material facts will be found in the opinion. The jury found the appellant guilty, and assessed his punishment at two years in the penitentiary.

WINKLER, J. The appellant was indicted under article 773 of the Penal Code,[1] for fraudulently disposing of a certain bale of cotton, alleged to have been mortgaged to one Galen Hodges, as security for the payment of $50 due from Robberson to Hodges, with intent to defraud the mortgagee.

The indictment charges that the offense was committed in Matagorda County. This prosecution was commenced, the trial had, and the appellant convicted in Matagorda County. The proof shows that the cotton was removed from Matagorda County and sold in Bazoria County.

On the trial below the defendant requested the court to charge the jury that if the bale of cotton was sold in Brazoria County, and not in Matagordo County they must acquit the defendant. This charge was refused, and the defendant took a bill of exceptions to the ruling, and sets it out as one of the grounds in his motion for a new trial, and assigns it as error.

The question here raised is this: Does the proof sustain the charge set out in the indictment?

It will readily be seen, from an examination of the article of the Penal Code under which this prosecution is attempted, that its provisions may be violated in several ways. First, by removing the mort-

1 Pasc. Dig., art 2425.

gaged property, or any part thereof, out of the State; second, by selling the mortgaged property; and, third, by otherwise disposing of the mortgaged property, with intent, in either case, to defraud the mortgagee, or person holding such lien, whether as the original party or one to whom it may have been transferred. It is also necessary that the lien upon the property be in force, valid and subsisting, and that the debt to secure which the lien was created had not been paid.[1]

The offense of removing the property would only be complete on its removal out of the State. A charge based on a sale of the property would be supported by proof of such sale, and would involve the question of *venue*, or where the selling occurred. What would constitute a disposition of the property otherwise than by removal or sale is not clearly defined in the Code; but it is believed that any other placing of the property beyond the reach of the mortgage creditor, and with the fraudulent intent mentioned in the article, would lay the party liable, under its provisions, to indictment. But the two modes — namely, removing or selling — would not be included in the expression otherwise.

This prosecution is not pretended to be based upon a removal of the property beyond the State, but can only be maintained on the clause making it penal to sell the property; which necessitates the inquiry as to whether, under this clause, the prosecution could be maintained in a county other than the one in which the selling took place.

The Code of Criminal Procedure,[2] prescribes the counties in which offenses may be prosecuted; by reference to which it will be seen that by the provisions of the several articles of this chapter there are numerous offenses which may be prosecuted in more than one county, and by the concluding article it is provided that, "in all cases except those enumerated in previous articles of this chapter, the proper county for the prosecution of offenses is that in which the offense is committed."[3]

The offense charged in the present case does not come within any of the exceptions mentioned in this chapter of the Code, and must be prosecuted in the county in which the offense was committed.

We have already seen that if the appellant is guilty of any offense charged in the indictment, it is for selling the mortgaged property. This being the offense made by the indictment and the evidence, we are of the opinion that proof of a sale of mortgaged property in Brazoria County would not support a conviction on a prosecution commenced and had in the county of Matagorda. The court erred in refusing to give the instruction to the jury on this subject; and, for this error, and

1 Satchell *v.* State, 1 Tex. (App.) 438.

2 ch. 2, pt. 8, from art. 190 to art. 208, both inclusive. (Pasc. Dig., arts. 2657-2676.

3 Pasc. Dig., art. 2676.

because there was no sufficient evidence to support the verdict, the court should have granted a new trial.

Other questions are presented in the record which have not been considered, and as to which there is room for controversy; but, as they may not arise on a subsequent trial, we have not deemed it important to consume now the time necessary to a proper understanding of them.

For the reasons above set out the judgnent must be reversed and the case remanded.

*Reversed and remanded.*

---

FRAUD — BANKRUPT ACT — INTENT TO DEFRAUD CREDITORS BY MAKING FALSE ENTRIES — INTENT TO DEFRAUD ESSENTIAL.

## R. v. Ingham.

[Bell, C. C. 181.]

*In the English Court for Crown Cases Reserved, 1859.*

**A Bankrupt was Indicted Under the Bankrupt** act, for making a false entry in a book of account with intent to defraud creditors. The jury found that the entry was made by him to deceive his creditors as to the state of his accounts and to prevent investigation, but not to defraud any of them or to conceal any of his property. *Held*, that he could not be convicted, the intent to defraud being the gist of the offense.

The following case was reserved by Crompton, J.

The prisoner was convicted before me at the June Old Bailey Sessions, 1859, for having made a false and fraudulent entry in a book of account, with intent to defraud his creditors, on an indictment framed upon the two hundred and fifty-second section of the bankrupt act.[1]

It appeared that the prisoner had kept a book in which he entered his receipts and payments, and at the time of his bankruptcy that book showed receipts of money to the amount of £4150 19s 7d, and payments to the amount of £3081 10s, leaving a deficiency of £349 9s 7d to be accounted for. Being uneasy as to accounting for this deficiency he made a false book in which he entered false amounts opposite many of the items of receipts and payments, so as to show receipts by him to the amount of £2,668 5s, and payments to the amount of $3172, 1s 7d. The jury found that this was done by him with intent to deceive his creditors as to the state of his accounts, and to prevent the examination and investigation

[1] 12 and 13 Vict. 106.

of them in the due course of bankruptcy, and to save him from having to account for the deficiency appearing in the genuine account; but they found that it was not done to defraud the creditors of any money or property, or to conceal any money or property, or in any way to prevent them from recovering or receiving any part of his estate, or to conceal any misappropriation or preference by him. On this finding the jury, by my advice, returned a verdict of guilty, subject to a case to be reserved by me as to whether the false entries were, upon the state of facts found by the jury, made "with intent to defraud his creditors," within the meaning of those words in the above mentioned section.

It may be observed that the two hundred and fifty-second section rendered it necessary that, besides the act being done to defraud creditors, it should be done either "after an act of bankruptcy," or "in contemplation of bankruptcy," or "with intent to defeat the object of the law relating to bankrupts," which expression may be argued to show that something more than defeating the operation of the bankrupt laws is intended by the phrase "with intent to defraud his creditors." [1]

The prisoner is at large on bail.

CHARLES CROMPTON.

Section 252 of 12 and 13 Victoria,[2] enacts: "That if any bankrupt shall, after an act of bankruptcy committed, or in contemplation of bankruptcy, or with intent to defeat the object of the law relating to bankrupts, destroy, alter, mutilate or falsify any of his books, papers, writings or securities, or make or be privy to the making of any false or fraudulent entry in any book of account or other document, with intent to defraud his creditors, every such bankrupt shall be deemed guilty of a misdemeanor, and, on conviction, be liable to imprisonment for any term not exceeding three years, with or without hard labor."

This case was argued on the 12th of November, 1859, before POLLOCK, C. B., WILLES, J., CHANNELL, B., BYLES, J., and HILL, J.

*Ballantine*, Serjeant, and *Jacobs*, appeared for the Crown, and *Lawrence*, for the defendant.

*Lawrence*, for the defendant. This conviction is under section 252, of the Bankrupt Law Consolidation Act, and I contend that the defendant had committed no offense within the meaning of that section, the essence of which is, the making false entries with intent to defraud creditors. The offense which the defendant really committed would

1 See Gordon's Case, Dears C. C. p. 586, top of p. 588, bottom of page 600, and top of page 601.

2 ch. 106. The Bankrupt Law Consolidation Act, 1849.

be included in the class of cases referred to in section 256, which enacts "that if at the sitting appointed for the last examination of any bankrupt or at any adjournment thereof, it shall appear to the court, that the bankrupt has committed any of the offenses hereinafter enumerated, the court shall refuse to grant the bankrupt any further protection from arrest; and if at any sitting or adjourned sitting for the allowance of the certificate of any bankrupt it shall appear that he has committed any of such offenses, the court shall refuse to grant such certificate, or shall suspend the same for such time as it shall think fit, and shall in like manner refuse to grant the bankrupt any further protection." One of the offenses referred to, for which the bankrupt may have his protection refused and his certificate refused or suspended, is if the bankrupt shall, with intent to conceal the state of his affairs, or to defeat the objects of the law of bankruptcy," have kept or caused to be kept, false books, or have made false entries, or withheld entries in, or willfully altered or falsified any book, paper, deed, writing, or other document relating to his trade, dealings, or estate." This is precisely what the bankrupt in this case has done. He has falsified his books as the jury have found, to deceive his creditors as to the state of his accounts, and to prevent the examination and investigation of them in the due course of bankruptcy, and that is one of the offenses a punishment for which is provided by section 256, but certainly is not a criminal offense contemplated by section 252, the jury having expressly found that there was no intent on the part of the bankrupt to defraud his creditors.

The defrauding contemplated by section 252 is not simply deceiving the creditors, but defrauding them of money or property; and here the intention of the bankrupt could not have been to defraud them of the money in question which had long before been spent. The decision of Lord Abinger, in *Regina* v. *Marner*,[1] is very much in point. That was an indictment under the ninety-ninth section of 1 and 2 Victoria,[2] which enacts that in case any prisoner, with intent to defraud his creditors, willfully and fraudulently omit in his schedule any property, or except out of his schedule as necessaries any property of greater value than twenty pounds he shall be adjudged guilty of a misdemeanor; and it was held by Lord Abinger that an insolvent, willfully or fraudulently omitting sums of money from his special balance sheet is not guilty of a misdemeanor under this section as it only applies to cases where the omission would affect the interest of creditors, and not where it is an omission of money received and subsequently expended by the insolvent.

[1] Car. & M. 628. [2] ch. 110.

The learned counsel was here stopped by the court who called upon *Ballantine*, Serjeant, for the Crown. The jury find that the bankrupt's intent was to deceive his creditors as to the state of his accounts. It is true that they also find that there was no intent to defraud them of any money or property; but section 252 does not mean to limit the offense to an intent by fraud to deprive the creditors of the property of the bankrupt.

POLLOCK, C. B. The finding of the jury is, in effect, that the man meant to do himself some good, but to do his creditors no harm.

HILL, J. Two intents are contemplated in the section: there must be the intent on the part of the bankrupt to defeat the object of the law relating to bankrupts; and, *plus* that, the intent to defraud his creditors — to deprive them of something to which they are entitled.

*Ballantine.* In statutes in which the intent is so to limit the signification, the language is "with intent to defraud of money or goods;" but here the expression is used in its most general sense. To defraud means to deceive, to deprive a person of any right by deceit. The creditors of the bankrupt had a right to have a true statement of the bankrupt's accounts; and the jury have found that these false entries were made with the view of depriving them of their right.

CHANNELL, B. The intent to deceive merely will not do.

POLLOCK, C. B. Is there any decision or *dictum* that "deceive" in law means to defraud? If a man wears an apron to conceal his worn-out clothes he deceives, but he does not defraud. On some occasions both words mean to cheat, but to defraud means to cheat a person out of something.

BYLES, J. The two hundred and fifty sixth section expressly provides for the offense mentioned in the first part of the two hundred and fifty second section.

POLLOCK, C. B. You can hardly contend that if a man falsified his books, in order to conceal from his creditors certain matters on which he had spent his money, not with the object of defrauding the creditors, but simply because he did not like such matters to be known, he would be guilty of an offense within this section.

*Ballantine.* It is true that when money is gone a knowledge of the mode in which it has been expended may not affect the position of the creditors; but it may have a great bearing upon the sort of certificate that the bankrupt would get. In *Regina* v. *Gordon*,[1] the indictment alleged the intent to be to defraud the creditors by depriving them of their right to examine the bankrupt.

*Lawrence* was not called upon to reply.

[1] Dears. 586.

POLLOCK, C. B. We are all of opinion that this conviction can not be sustained. The jury have expressly found that this was done by the defendant with intent to deceive his creditors, as to the state of his accounts and to prevent the examination and investigation of them in the due course of bankruptcy, and to save him from having to account for the deficiency appearing in the genuine account; but they also found that it was not done to defraud the creditors of any money or property, or to conceal any money or property, or in any way to prevent the creditors from recovering or receiving any part of his estate, or to conceal any misappropriation or preference by him. Now it may be that in doing this the bankrupt intended to defeat the object of the bankrupt laws; but that alone is not sufficient to constitute an indictable offense under this section. It must also appear that the intent was to defraud the creditors, and the jury have expressly negatived any intention to defraud them; and upon the whole finding of the jury, therefore, it is impossible that this conviction can be sustained. If it could be supported, the consequences to which it would lead would be that the enactment in question would apply to a case where a man who had become bankrupt from a sudden pressure, but who was able when his resources were got in to pay, and who had paid twenty shillings on the pound, might afterwards be indicted under this section on its being discovered that there was an item of expenditure in his accounts, entered under a false head to prevent its being known in what manner he had expended his money, a circumstance which from motives that may readily be imagined, he wished to conceal without having the slightest wish or intention to defraud.

The other learned judges concurred.

*Conviction quashed.*

---

## FALSE PRETENSES — MATTERS OF OPINION.

## PEOPLE *v.* JACOBS.

[35 Mich. 36.]

*In the Supreme Court of Michigan.*

**Statements as to the Value of lots, or that they are "nicely located," are matters of opinion, and not facts, and therefore not within the statute as to false pretenses.**

GRAVES, J. Jacobs was convicted on a charge of having obtained money of one Barts by false pretenses, and the case comes here on exceptions before judgment.

Many exceptions seem to have been taken, but much the larger portion are properly abandoned. There are some others it would be desirable to consider if the record was in better shape. Jacobs called on Barts to borrow five hundred dollars, and proposed to secure him by mortgage on land owned by his wife, Mrs. Jacobs. After some talk, the loan was made, but Barts retained ten dollars, by understanding, to pay his expenses in going subsequently to view the land. Mrs. Jacobs gave her mortgage, together with her note, to Barts for the money. In this negotiation, as charged in the information, Jacobs made the false representations concerning the land mortgaged. It alleges that he falsely and feloniously pretended to Barts that Mrs. Jacobs was owner of lots thirty-six, thirty-eight, forty and forty-two, in block three, in Harriet M. Clement's subdivision of the south one-third of fifteen acres lying in a square form in the northwest corner of the northeast quarter of section twelve, in town six south, of range twelve west, according to the recorded plat; that the lots were situated within the city limits of the city of Grand Rapids; were on the street running directly from the business part of the city to the fair grounds, near the city limits; were between such fair grounds and the business portion of the city; that the lots were nicely located; were quarter-acre lots and constituting one square acre; that they would sell at any time at from twelve hundred dollars to fifteen hundred dollars cash; were worth much more than that, and were entirely free from all incumbrance. These pretenses are afterwards alleged to have been severally false. On the opening of the trial it was objected that the information set up no offense. The ground of the objection was not explained. But at a latter stage of the trial, the reason for the objection was stated to be, that the information did not state in words that Barts relied on the representations. The objection is not much insisted on, and is not tenable.

The allegations in this particular are formally sufficient. It was not essential to charge in express terms that Barts gave credit to the false pretenses. That he did so was a necessary implication from the allegation that he was induced by the representations to part with his money.[1]

The court charged that if the jury believed, from the evidence, that any of the pretenses charged were proved to be false and fraudulent, and were part of the moving cause which induced Barts to part with his money, and that he would not have parted with it had not such false pretenses been made, they would be justified in finding him guilty.

The instruction must have been understood as assuming that each

[1] State *v.* Penley, 27 Conn. 587.

distinct pretense set up was a valid ground of charge, and on which a conviction might rest if found false and fraudulent and operative in any degree on Barts to cause him to make the loan.

No instruction was given that any representation laid as a false pretense could not legally be so laid, nor any instruction that any representation laid as a pretense was unproved, or any instruction to preclude the jury from resorting to the whole evidence and finding from it that all the representations laid as pretenses were in fact made. Hence, if any representation laid as a false pretense could not be lawfully impressed with that character, the jury were, in effect, permitted to convict upon it.

Now, the alleged pretense that the lots were "nicely located," was a distinct pretense in the information. But it was not such a representation as could be made the subject of criminal prosecution as a false pretense. It could not convey or be understood as conveying any definite idea at all. There is no standard for trying the accuracy of such a statement. What is a nice location to one may be far otherwise to another, and even to the mind of one using it the expression is vague and indeterminate. No one can be supposed to accept such a representation as an assertion of the existence of some fact or circumstance sufficient to cause him to change his situation in reliance on it, and the law can not measure or weigh people's fancies.

The alleged representation concerning the value of the lots to be mortgaged can not be construed as anything beyond a matter of opinion, and it is not to be supposed the expression was understood in a sense more absolute. There is no reason for implying that Barts relied upon it, or was in any way or to any extent duped by it.[1] These allegations were accordingly not sufficient as grounds of charge, and it was error to allow the jury to regard them as though they were. There are several topics which would require discussion and explanation before a jury, but are hardly proper for consideration here.

The conviction must be set aside and in case another trial is deemed expedient, no doubt the prosecution will see to it that the proceeding is quite differently shaped.

The other justices concurred.

[1] Bishop v. Small, 63 Me. 12; Mooney v. Miller, 102 Mass. 217; Long v. Worceman, 38 Me. 49, and cases cited.

## OBTAINING GOODS WITH INTENT TO DEFRAUD – BANKRUPT ACT.

## UNITED STATES *v.* PRESCOTT.

[2 Biss. 325.]

*In the United States District Court, District of Wisconsin, June Term, 1870.*

1. **In an Indictment** under section 44 of the Bankrupt Act, for obtaining goods on credit, with intent to defraud, the proceedings in the bankrupt court must be pleaded and proved with such particularity as to show affirmatively that an adjudication of bankruptcy was made upon a case in which the court had jurisdiction.
2. **The Indictment, therefore, should** set out the filing of the petition, the name of the petitioning creditor, the amount of his debt, the alleged act of bankruptcy, and the adjudication of the bankrupt court.
3. **The Description of the Goods** obtained, as "a large quantity of boots and shoes," is too uncertain. It should be as definite as would be required in a declaration in trover.
4. **Offenses Under Section 44** are misdemeanors, and the word "feloniously" should not be used.
5. **Dates should** not be specified by figures in an indictment.

This was a motion to quash an indictment under section 44 of the Bankrupt Act, for fraudulently obtaining goods on credit.

The first count of the indictment charged that on a certain day mentioned, in the District Court of the United States for the District of Wisconsin, under and pursuant to an act of Congress entitled "An Act to establish a uniform system of bankruptcy throughout the United States," approved March 2, 1867, proceedings in bankruptcy were duly commenced against Alphonso Prescott, Leander F. Snyder and R. H. Lovell, as insolvent debtors, and partners under the name of Prescott, Snyder & Lovell, who thereupon afterwards, to wit, on a certain day mentioned were adjudged bankrupts; that prior to the dates last aforesaid, and within three months before the commencement of said proceedings in bankruptcy, to wit, on the 16th day of August, 1869, within the jurisdiction of this court, and at and in the district of Wisconsin, the said Alphonso Prescott, Leander F. Snyder, and R. H. Lovell, then and there representing themselves to be associated together as co-partners, under the firm of Prescott, Snyder & Lovell, and holding themselves out as wholesale merchants and jobbers of boots and shoes, under the false color and pretense of carrying on business and dealing in the ordinary course of trade of wholesale boot and shoe merchants and jobbers, did then and there wrongfully, unlawfully and feloniously obtain on credit, from one Lyman Dike, certain goods and chattels, to wit, a large quantity of boots and shoes, of the value of five thousand dollars, with the intent then and there by the obtaining of said goods and chattels, to defraud the said Lyman Dike, contrary to the statute

of the United States in such case made and provided, and against the peace and dignity of the United States of America.

There are other like counts of the indictment, except as to the name of persons from whom goods had been obtained by defendants.

*James G. Jenkins*, for bankrupt.

*G. C. Hazleton*, United States District Attorney, *contra.*

MILLER, J. It is alleged in the motion to quash the indictment that it is defective in not setting forth the manner in which the proceedings in bankruptcy were commenced, and also in the description of the goods, etc.

The court exercises jurisdiction in bankruptcy as limited by the act; and proceedings must be commenced and prosecuted substantially as the act directs. Neither as to the proceedings, nor the jurisdiction of the court in bankruptcy, is it sufficient in an indictment under the act to rely merely upon a general averment. All matters necessary to constitute the offense must be pleaded. It is not sufficient, as in this indictment, to aver that proceedings in bankruptcy were duly commenced. It must be pleaded and proven, in order to convict, that a petition in bankruptcy was presented to the District Court by a certain creditor, naming him, and also the amount of the debt of such petitioning creditor, and the alleged cause of bankruptcy, and the adjudication of bankruptcy. It must appear affirmatively that the creditor had a right under the law to commence and prosecute proceedings in bankruptcy. The amount of his debt must appear, otherwise the court would have no jurisdiction.

Of the Bankrupt Consolidated Act of 12 and 13 Victoria, section 44 of the act under which the indictment in question was framed, is almost a literal copy. Several decisions of courts in England, as to requirements in the prosecution and trial of indictments under their act, were made and published before the passage by Congress of our Bankrupt Act, and to which I refer as proper for consideration.[1]

It must appear that the bankrupt obtained goods within three months of the bankruptcy, by means of a representation which he knew to be false; that he was carrying on business and dealing in the ordinary course of trade, and such represention must be actually made by him.[2]

The description of the goods obtained by defendants is too uncertain; instead of a large quantity of boots and shoes, a certain number of pair of boots, and also of shoes, a certain number of packages in boxes of boots, and also of shoes, should be described. This could be as-

[1] Reg. *v.* Lands, 33 Eng. L. & Eq. 636; Reg. *v.* Ewingtin, 41 Eng. C. L. 178; King *v.* Jones, 24 *Id.* 156.

[2] Reg. *v.* Boyd, 5 Cox, 502.

certained from the bills of sale. The description of the goods in an indictment should be as definite as in a declaration of trover.

The word "feloniously" should be omitted in indictments under the act. The offenses made indictable are misdemeanors. And in drawing indictments, figures for dates should not be used.

This being the first indictment in this court under the Bankpupt Act, I have prepared this opinion as a guide to the district-attorney in future.

*The indictment will be quashed.*

---

## FRAUD — MEANS OF EFFECTING FRAUD MUST BE SHOWN.

## UNITED STATES *v.* GOGGIN.

[9 Biss. 769.]

*In the United States District Court, Wisconsin, 1880.*

1. **An Indictment Charging Fraud of any Sort** ought to aver wherein the fraud consisted and by what means it was effected.
2. **The General Rule that an Indictment** for an offense created by statute is sufficient if it follows the language of the statute is subject to the qualification that the accused must be apprised by the indictment with reasonable certainty of the nature of the accusation against him, to the end that he may prepare his defence and plead the judgment as a bar in a subsequent prosecution for the same offense.

DYER, J. This is an indictment for presenting for payment to the pension agent in Milwaukee, a false and fraudulent claim for pension moneys. The defendant was tried and convicted at the last term of the court, and the case is again up for consideration upon a motion in arrest of judgment. It is not without reluctance that I have come to the conclusion which I am constrained to announce, since the evidence adduced on the trial tended strongly to show the perpetration of a gross fraud upon the government; but it is the duty of the court to administer the law according to its best understanding, regardless of consequences.

The defendant was indicted under section 5438,[1] which provides that every person who presents for payment, to or by any person or officer in the civil service of the United States, any claim upon or against the government or any department thereof, knowing such claim to be false, fictitious or fraudulent, shall be punished as the statute directs.

The indictment contains three counts, but as they are equivalent in

[1] Rev. Stats. U. S.

form, reference to one shall be sufficient. The first count charges that on the 4th day of December, 1879, the defendant did present and cause to be presented for payment to and by a person in the civil service of the United States, to wit, Edward Ferguson, a pension agent of the United States, at the city of Milwaukee, a claim against the government of the United States, to wit, a claim for the sum of $24, then and there claimed and represented by the defendant to be due to him from the said government of the United States, as a pensioner, under and by virtue of a certain instrument known as a pension certificate, which said pension certificate had been theretofore procured and obtained by the said Richard Goggin upon false and fraudulent proofs, and by criminal and fraudulent devices, and without the authority of law, and in fraud of the law governing pensions and pension certificates; he, the said Richard Goggin, well knowing at the time and place of making said claim, and of presenting the same for payment, that it was then and there false, fictitious and fraudulent. Objection is made to this indictment, as not stating any offense, or, in other words, that no offense is described with such certainty as the law of criminal pleading requires. The reply of the learned district-attorney, is that it states the offense substantially in the language of the statute, and that this is sufficient. It will be observed that the gist of the offense, as it is defined in the statute, is the presentation of payment of a false or fraudulent claim. The indictment alleges no facts which constitute the fraud; it is not shown how the fraud was perpetrated, nor wherein the claim was false, except that the defendant presented a claim which he represented to be due to him by virtue of a pension certificate which had been theretofore procured upon false and fraudulent proof, and by unlawful and fraudulent devices, and without authority of law. What the false and fraudulent proofs, and unlawful and fraudulent devices were is not stated. The question is, are these allegations sufficiently certain, and do they contain statements of fact which will support a conviction? My impression upon the argument was that the objection urged by counsel for defendant was not one which reached the substance of the indictment, and that as he had not moved to quash, his objection was not good in arrest of judgment; but the rule is that any objection to an indictment which would be good upon demurrer is fatal on motion in arrest, and this being so, the objection to the indictment, if well grounded in law, may be as well taken at the present stage of the proceedings as by motion to quash. In the case of *United States* v. *Watkins*,[1] the court had occasion to state the rule with reference to certainty in alleging fraud in a case of false pretenses, and it was there

[1] 3 Cranch, C. C. 441.

held that an indictment charging fraud, should aver the means by which the fraud was effected; that fraud is an inference of law from certain facts, and the indictment must aver all the facts which constituted the fraud; that whether an act has been fraudulently done is a question of law, so far as the moral character of the act is involved; to aver that an act was fraudulently done, is therefore to aver a matter of law and not a matter of fact.

It is true that this was a case of false pretenses, and there may be a well grounded distinction, as urged by the learned counsel for the United States, between such a case and the case in hand; because, in a case of false pretenses, it is, undoubtedly, essential that the facts and circumstances should be alleged with such certainty that the court may see upon the face of the pleading that the pretenses were false, and that they were of such character and were made under such circumstances as constituted false pretenses, within the meaning of the criminal law; that they were relied upon — acted upon, and that the party defrauded had a right to rely upon them; and herein, and perhaps in some other respects, such a case is distinguishable from the case at bar. But it is, undoubtedly, a sound principle that an indictment charging fraud of any sort ought to aver with requisite particularity wherein the fraud consisted, and the means by which it was effected, and I have been unable to find any cases which dispense with the application of this rule. It is true that many of the niceties and technicalities with reference to form in criminal pleadings which once existed are not allowed now to prevail, but I do not understand that there has been any relaxation of the rule with reference to certainty and clearness as to the matter charged. It is also a general rule that in an indictment for an offense created by statute, it is sufficient to describe the offense in the words of the statute. In the case of *United States* v. *Simmons*,[1] the Supreme Court had occasion to point out the precise scope and limitation of this rule, and after stating the rule, Mr. Justice Harlan says in the opinion: "But to this general rule there is the qualification, fundamental in the law of criminal procedure, that the accused must be apprised by the indictment, with reasonable certainty, of the nature of the accusation against him, to the end that he may prepare his defence and plead the judgment as a bar to any subsequent prosecution for the same offense;" and here, I think, we strike the fatal point in this indictment. For, after consideration, I am unable to see how the defendant could plead his present conviction under this indictment, and a judgment thereon, in bar of a second prosecution for the same offense. It is alleged only that he presented to the pension agent a claim for pension moneys under a

1 96 U. S. 360 (secs. 2410-14, *infra*).

pension certificate, which was procured by false and fraudulent proofs, and unlawful and fraudulent devices. The fraud should have been, by apt allegation, more particularly identified; it should have been alleged what the proofs and devices were, and wherein they were fraudulent; and it is, in my judgment, immaterial when the proofs were made or devices resorted to whether at the time of presenting the claim, or at a time anterior, if they were made as the basis for obtaining the pension certificate. If the fraudulent devices had consisted of an act done when payment was damanded, it would, I think, be clear that the nature of the devices or particular fraud practiced at the time should be alleged, and if this is so, it seems also essential that they should be alleged, though they were, in fact, practiced at and before the time of obtaining the pension certificate. The offense, it is true, was one committed, not in 1867, when the pension certificate was obtained, but in 1877 and in 1878, when payment of an installment was demanded; that is, a claim was presented for payment at those times; but, going back to the origin of the alleged fraud, I do not understand why it is not as necessary to allege wherein the fraud consisted at its inception and when made the basis for obtaining the pension certificate, as it would be if it consisted of some device practiced at the very time the claim was presented for payment.

It was necessary to show the alleged fraud and the acts which constituted it, on the trial, and it was therefore necessary that the same facts should be alleged, at least with sufficient particularity to enable the defendant to plead any judgment which might follow, as a bar to a subsequent prosecution for the same offense. The allegation is that a claim was presented by the defendant, as a pensioner, under and by virtue of a certain instrument known as a pension certificate; but this certificate is not described so that it can be identified, as I think it should have been, as, by date, the names of the persons who purported to sign it, and the like, so as to satisfy the requirements of the rule as laid down by the Supreme Court in *United States* v. *Simmons*.[1] If we adopt as authoritative upon the question under consideration the case of *United States* v. *Bettilini*,[2] which is a case somewhat in opposition to *United States* v. *Ballard*,[3] it is very clear that we should have to hold this indictment insufficient; and I incline to the opinion that the correct rule is stated in the former case.

It was urged upon the argument that what is alleged in the indictment in regard to fraud in obtaining the pension certificate relates to the evidence of the offense, and not the offense itself; but it is not the presentation of the claim for payment which makes the offense, it is

1 *supra*.

2 15 Int. Rev. Rec. 32.

3 13 Int. Rev. Rec. 195.

the presentation for payment of a false or fraudulent claim; and as no fraud can be committed but by deceitful practices, the particular practices by which the fraud was here committed, or which made the claim fraudulent, should have been so set forth as to make the fraud appear upon the face of the indictment. This may be in a certain sense alleging the evidence of the offense, but it is rather the statement of essential facts which constitute the fraud, and therefore make the presentation for payment of the claim a criminal offense. The point is one that can not be made clearer by elaboration. I rest my judgment upon the fact that the allegations of the pleading are not sufficient, within the rule stated by the Supreme Court, to apprise the defendant with that certainty which the law requires of the nature of the accusation against him, to the end that he may prepare his defense and plead the judgment as a bar to any subsequent prosecution for the same offense. Judgment must be arrested.

---

## FRAUD — CHARGE THAT ACT WAS DONE "BY FRAUDULENT MEANS" INSUFFICIENT.

## UNITED STATES v. BETTILINI.

[1 Woods, 654.]

*In the United States Circuit Court, Florida, 1871.*

**An Indictment Under the Act of March 3, 1863,[1] charging the commission of the offense "by fraudulent means," and not specifying the means, is bad for want of certainty.**

The indictment in this case is found for the offense of knowingly effecting an entry of goods contrary to the provisions of the third section of the act of March 4, 1863, entitled "An act to prevent and punish frauds upon the revenue; to provide for the more certain and speedy collection of claims in favor of the United States, and for other purposes." [2] The said section reads as follows: "If any person shall, by the exhibition of any false sample, or by means of any false representation or device, or by collusion with any officer of the revenue or otherwise, knowingly effect, or aid in effecting, an entry of goods, wares or merchandise at less than the true weight or measure thereof, or upon a false classification thereof, as to quality or value, or by the payment of less than the amount of duty legally due thereon, such person shall,

1 12 Stats. 739. 2 12 Stats. 739.

upon conviction thereof, be fined in any sum not exceeding $5,000, or be imprisoned not exceeding two years, or both, at the discretion of the court." The first ground of objection is that every count in the indictment is double, and that the duplicity consists in this, that the prisoner is charged with both knowingly effecting an entry, and knowingly aiding in effecting an entry, of the goods at the custom-house.

The offense created by the act is a misdemeanor where all are principals. The offense of effecting an entry, and of aiding in effecting an entry, may be committed by different persons, yet they are different stages of the same offense, and may be charged conjunctively in one count against the same person, and the proof of either will sustain the charge. This has been the uniform ruling of this court, and this case is no exception to those already determined. In this respect the indictment is not defective.[1]

The next objection is that the offense is not set out in the indictment with sufficient certainty; that the facts or circumstances which constitute the definition of the offense in the act are not set forth, and that, therefore, the indictment is not bad. Mr. Chitty, in his Criminal Law,[2] says: "It is a general rule that all indictments upon statutes, especially the most penal, must state all the circumstances which constitute the definition of the offense in the act, so as to bring the defendant precisely within it.

It is argued that this rule is relaxed by the decision of the Supreme Court in *United States* v. *Mills*,[3] cited above, and that, in consequence of that decision, it is not necessary, in practice, to set out in an indictment any circumstances or facts to apprise the accused of the crime with which he is charged. The court say, in that case: "The general rule is, that in indictment for misdemeanors created by statute, it is sufficient to charge the offense in the words of the statute. There is not that technical nicety required as to form which seems to have been adopted and sanctioned by long practice in cases of felony; and with respect to some crimes, when particular words must be used, and no other words, however synonymous they may seem, can be substituted." Thus far the court simply say that the pleader need not resort to technical words in describing the offense, but that the words of the statute shall be sufficient. "But that in all cases the offense must be set forth with clearness, and all necessary certainty to apprise the accused of the crime with which he stands charged." The Supreme Court, in this, makes a distinction between the technical words necessary to be used in describing an offense, and the circumstances necessary to show that

[1] United States *v.* Mills, 7 Pet. 140; Whart. Cr. L., sec. 390 and note.

[2] vol. 1, p. 281.

[3] 7 Pet.

an offense has been committed. Mr. Chitty makes the same distinction. In his work on Criminal Law,[1] he says: "It is, in general, necessary only to set forth on the record all the circumstances which make up the statutable definition of the offense, but also to pursue the precise and technical language in which they are expressed." "The certainty essential to the charge consists of two parts, the matter to be charged, and the manner of charging it."[2] The technical niceties, called by Lord Hale unseemly niceties, which were allowed to prevail in the early English cases, were regretted by many eminent and learned judges in England — Lord Hale, Lord Kenyon, Lord Ellenborough and Lord Mansfield being among the number; but these regrets related to mere formal objections based upon the manner of charging the offense in the use of words, or even in the omission of a letter.[3]

But none of the judges have gone so far as to admit that it would be safe in practice to relax the rule which requires clearness and certainty as to the matter charged. This embraces "a certain description of the crime of which the defendant is accused, and a statement of the facts by which it is constituted, that the accused may know what crime he is called upon to answer; that the jury may be warranted in finding a verdict; and that the court may see such a definite offense upon the record; that the judgment and punishment which the law prescribes may be applied; that the defendant may plead the conviction or acquittal, should he be again called to answer a charge for the same offense; and, I may add, that it may be impossible to convict an innocent person by dispensing with proof of the facts and circumstances which constitute the crime."[4] "Therefore an indictment charging the defendant with obtaining money by false pretenses, without stating what were the particular pretenses, is insufficient."[5] For the defendant must be advised, not only of what he has to answer, but the court must be advised what the pretenses are; for it is not every false pretense which will bring the case within the meaning of the law.[6]

But it is urged on the part of the prosecution, that in this country the courts have modified this rule, and dispensed with the degree of certainty, formerly required in setting out an offense in an indictment and that it is now necessary only to charge the offense in the words of the act creating it; that in this case the facts and circumstances could not be set out, because unknown to the attorney of the United States; and that this case is governed by rules and principles entirely different from a case arising under the law for obtaining goods by false pre-

1 vol. 1, p. 283.

2 1 Chit. Cr. L. 169, 170.

3 Chit. Cr. L. 170 *et seq.*; 2 Hale's P. C. 193.

4 1 Chit. Cr. L. 172.

5 1 Chit. Cr. L. 171.

6 Rex *v.* Goodhall, Russ. & Ry. 461; Whart. Cr. L., secs. 2086, 2087.

tenses; that the false representation, or device, or collusion, with an officer of the revenue, or the exhibition of any false sample, is not a material part or element of the offense, and therefore need not be set forth in describing it, and that the words "or otherwise" employed in the statute, so far enlarge the definition of the offense, as to make what precedes them entirely immaterial, and do in effect obliterate it altogether, and bring within the meaning of the act any entry made by the payment of less than the amonnt of duty legally due thereon, though such entry was made through ignorance or mistake, and with no intention to defraud the revenue. To sustain this view, the attorney of the United States adduces a decision of the district court of the United States, for the Eastern District of Michigan, in a case arising under the same act of Congress, and the same section of the act as the case here under consideration.[1]

Before referring to this decision, it may be well to dispose of some of the positions asserted in the argument as just stated. It is clear that the Supreme Court, in the case of *United States* v. *Mills*, above cited, and which is relied upon to sustain the position that certainty and particularity are no lónger necessary in charging the matter of the offense, does not sustain that position, but quite the contrary, as has been shown above; that it changed in no respect the rule laid down by Chitty, as the exponent of the most learned, wise, and just tribunals of England, making a distinction between formal and technical niceties in words, and the statement of substantial matters — and that is certainly substantial matter which is descriptive of the offense, and which must be proved as laid — and nothing can be proved to sustain the indictment which is not charged therein.

The reason given for not having set out the circumstances of the offense, that it was impossible, because they could not be known, is untenable, because the grand jury could find no bill without proof of such facts, and they must be within the knowledge of the prosecuting officer before he can conclude that such offense has been committed, and before he will consent to lay a bill before the grand jury, unless the position be true that the words "or otherwise," in the statute, must be construed to create an offense under the act in which there is neither intent or ingredient of fraud. If such be the correct construction of those words, then the indictment need not charge that the entry was effected by false sample, false representation or device, or by collusion but simply that the entry was effected at less than the true weight or measure thereof, for that would be otherwise than by false representation or device. But the rule that effect must be given to all the words

[1] 13 Int. Rev. Rec. 195, 196.

of an act, and that none of the provisions of an act must fail, unless so repugnant that they can not be reconciled, must not be overlooked. Congress surely meant something by the words, "by the exhibition of any false sample, or by means of any false representation or device, or by collusion with any officer of the revenue;" and also meant something by the words "or otherwise." Congress intended to make any fraudulent means, whether by sample, representation, device, collusion or otherwise, an ingredient of the offense; and if the fraudulent entry were effected by any other means than by false sample, false representation or device, or collusion with an officer of the revenue, such fraudulent means would be included in the words "or otherwise" in the act. There is no reasonable construction by which all the provisions of the act can stand together. The words "or otherwise" must be interpreted to mean or by any other fraudulent means whatsoever, or they mean nothing and are mere surplusage. The construction which gives them effect, and does not destroy the effect of the other provisions of this section of the act, is clearly correct. The means used in effecting the entry is made by the act the very gist of the offense, and without which no offense can be committed, and if so, the means by which it was effected must be set out and clearly stated in the indictment. Such facts and circumstances as will show that a false sample was exhibited, in what false and to whom exhibited, what false representations were made, and to whom, what false device was used and how, with what officer of the revenue the collusion was had, or how, or by what other fraudulent means, if any, the entry was effected. It is admitted by the learned judge, in the case of *United States* v. *Ballard*,[1] that the means adopted to commit the offense would inevitably constitute one of its elements, but for the concluding clause "or otherwise;" that "these words render that unlimited and general, which, by the preceding clauses, without these words, would be limited and specific," and that the clause does not, like what precedes it, relate simply to the means by which the offense is committed, but also to the manner in which the entry is made, and that, therefore, "the facts answering to the preliminary clauses of the section may or may not be alleged in the indictment at the option of the pleader;" and as a consequence, if not alleged, they need none of them to be proved in order to convict the defendant. With this view I can not agree, as it would seem entirely to change the rule above stated for the construction of statutes, and introduce into the criminal practice a laxity and uncertainty always carefully avoided by the purest and wisest tribunals in the administration of criminal justice.

1 *supra*.

It is evident, by reference to and comparison of some of the decisions of the ablest judges both in England and this country, that the rule as to certainty of the matter charged has not been changed or modified.[1] All the counts in the indictment which profess to charge an offense to have been committed under the section and act above referred to are defective in not having set out the circumstances required, as I have shown above. And this is in accordance with the ruling of this court in the the case of *United States* v. *Conant*, and has been the uniform ruling in all similar cases. Upon a thorough re-examination of the authorities, I see no reason for changing or reversing those decisions or for adopting a different rule. Other defects have been pointed out in this indictment, but I do not deem it necessary to examine it further, as the question discussed disposes of the case.

*The indictment must be quashed.*

---

## ATTEMPT TO DEFRAUD NOT INDICTABLE WHEN.

## UNITED STATES v. HENNING.

[4 Cranch, C. C. 608.]

*In the United States Circuit Court, District of Columbia, 1835.*

**An Attempt** to commit a statutory fraud is not indictable.[2]

The court (CRANCH, C. J., *contra*), arrested the judgment.

MORSELL, J., was of opinion that an attempt to commit an offense, created by statute, which was not an offense at common law, is not indictable.

THURSTON, J. The following remarks are rather an answer to the point made and attempted to be sustained by the attorney for the United States, than an opinion on the indictment itself. I came into court after the indictment was read, and did not hear it; but the two positions stated at the head of the following opinion, were taken by Mr. Key, and as they involved considerations of great importance, I wrote (with little time for deliberation, and without the means of consulting books), the suggestions which are stated below.

The *United States* v. *Haney Hedley* (otherwise Washington Henning). Indictment at common law for attempting or offering to sell a free colored boy as a slave.

[1] Rex v. Holland, 5 T. R. 623; Com. v. McAfee, 8 Dana (Ky.), 29; People v. Taylor, 3 Denio, 91; Biggs v. People 8 Barb. 547.

[2] See *ante*, Vol. III., pp. 640–748.

The attorney for the United States endeavored to support this indictment, on a motion to arrest the judgment by the traverser's counsel, on two grounds.

1. That every attempt or offer to commit any crime or misdemeanor at common law, or by statute, is an indictable offense.

2. That the act itself was, *per se*, an indictable offense, because it amounted to a common-law cheat or fraud.

As to the first position: Its universality, if carried out, would lead to great absurdities, such as neither the law nor common sense can tolerate, and, therefore, I can not agree to it; but am of opinion that there is a rational limit to it, beyond which we ought not to go; and this limit is well defined by certain rules and principles, which, if attended to, will direct us into the path to be pursued; this limit embraces only those attempts, or offers, to violate laws which, if the attempt be carried into effect, would invade the very safeguards of social order, or lead to the utter subversion or corruption of our political institutions; among the most considerable of those violations, perhaps, we may class mere breaches of the peace. I mean actual breaches of the peace. Such is the tenderness of the law, from the earliest legal records, and its sensibility to any thing like breaches of the peace, that it has been cherished with uncommon solicitude, as far back as the history of our institutions goes; so that it is kept alive, and is universally inserted, or ingrafted, in every indictment, even where it would require great ingenuity to discover where the force and arms could be found in the setting out of the offense. Therefore, if this peace, this great and long-nourished panoply of our social happiness, be not only assailed, but attempted to be, by any overt acts, it may be, probably, an indictable offense. So attempts to bribe a judge, or a member of Congress, or an executive officer, to betray his duty and trust, might lead, if carried into effect, to the utter corruption of the fountain of justice, of legislation, and of the due administration of the laws; and, therefore, the danger attending such an act, its ruinous consequences to society, are of such vital importance, that an attempt, even, to perpetrate such a crime, may reasonably afford just ground for an indictment; so of murder, robbery, arson, and, in short, every offense (to say nothing of their enormity), where the perpetration must necessarily be attended with a breach of the peace. I will not say that an attempt to commit some other offenses denominated *mala in se*, might not be indictable; but I will take the converse of the rule, and boldly say, that there are infinite acts of moral fraud, of *mala in se*, which are not indictable, but remediable only by civil process. For my present argument, and as at present advised, I will take my stand on this tangible, visible, well defined ground that an attempt to commit any crime or misdemeanor, which, if car-

ried into effect, would involve a breach of the peace, may be indictable. I mean an actual, not a mere technical breach of the peace; therefore the actual selling an unsound horse, or merchandise, under false representations, or any other private fraud, are not indictable offenses; why? they are unattended with a breach of the peace, are to no public detriment, and, therefore, to be redressed *civiliter* only. But these are *mala in se*, and morally criminal. But it occurs to me that there are cases where the rule that I have laid down would find an exception, namely, "that an attempt to commit a crime, which if carried into effect must necessarily involve a breach of the peace, might be indictable." To constitute a breach of the peace, there can be only two things necessary; either an actual battery, or an assault. Now we see every day indictments for both; but I have never read of, heard of, or known an indictment for an attempt to commit an assault. Suppose a man were to threaten another that he would beat him, and make demonstrations to that effect, and is held back by others, so as to prevent an assault even, would this be indictable? If so out of the million of cases of assault and battery in the books, and in this court, we should have heard of, read of, or actually witnessed such a prosecution. These considerations are applicable so far to common-law offenses only. Next, as to an attempt, or offer, to violate a penal statute.

I endeavored to show to what absurdities this position would lead, if carried to the fullest extent. Instanced the case of attempting to sell a gill of whisky without license; who can imagine such an attempt only, not carried into effect, would be indictable? So in a multitude of parallel cases. There are laws to prevent the hunting of deer, or fishing at certain seasons. Suppose a man proposes to another, to go to hunt or fish in such seasons, and actually provides arms or nets, and they go part of the way and turn back, would this be indictable? My reason and common sense forbid an affirmative reply.

The first position, then, of the attorney of the United States, does not amount to a universal rule; it is too broad. Show me an universal rule of law, holding in all possible cases, and you will show me a phenomenon that my Lord Coke never dreamed of. I can not see any distinction between an attempt to violate a penal statute, or to commit a common law offense; if there be any, my reason is too obtuse to discover it. I can not discern what gives this dignity to a statutory penalty, or prohibition, which can not be equally claimed by the good old common law. In fact, there is no difference; and the line of demarcation which I have drawn as to common-law offenses, ought to be the fixed boundary between punishable and dispunishable attempts to violate penal statutes. Without repeating the class of cases which are indictable, and those which are not, I refer to the numerous specifica-

tions of those cases which I have set out in my consideration of them under the common law. The indictment before us, was for a fraud in attempting to sell a free negro as a slave, contrary to the provisions of the penitentiary law. The argument first started on the broad ground, that an attempt to violate any penal statute was an indictable offense; this, I think, I have answered sufficiently; such a broad assumption can not be sustained.

Secondly, it was urged that the attempt to sell a free man for a slave, was a fraud at common law, and therefore indictable; but the multitude of cases, never yet contradicted, that a mere overreaching or misrepresentation, in a private sale, is not an offense at common law, seems to me to furnish a clear refutation of this argument. It was then contended in the case in question, that false tokens were used, or false pretenses. I heard of none, of nothing more than false representations, or assertions that the negro was free; it was precisely like all those offenses, which, though morally wrong, were left entirely, for redress, to civil tribunals, and were not indictable; such as false warranty of a horse which proves unsound; selling wine of inferior quality, for wine of better quality; asserting a right to sell a horse, or other commodity, which turned out to be the property of another, *et omne id genus;* but it was also urged, with much earnestness, that the case in question was one of great moral turpitude; this goes only to the degree of moral guilt, but does not vary the case from others just enumerated, and alluded to, as civil injuries only, but can not be distinguished from them, as to its legal characteristics. But the transaction was said to be gross and flagrant turpitude and injustice, and deserved punishment; so it does, but it can not be punished here. Our sympathies were appealed to in behalf of the poor negro; but we can have none to bestow; and if we had, perhaps a few drops might have fallen to the poor ignorant traverser who probably did not know his danger, and who, if the opinion of the court had been against him, would have been doomed to a lot worse than slavery. Therefore it behooved us to reflect well before we decided.

It seems to me from this, and some other cases which I have remarked, during this court, that the sword of criminal justice is longer than it used to be; it sweeps over a larger space. Offenders have either multiplied astonishingly, or the scale of offenses is unusually extended; our grand juries are wielding it with a liberal hand. I did not hear the charge of the chief judge at the opening of the court, and therefore can not say whether they are acting within the scope of his instructions or not; but I must say, from the number of presentments, and the character of some of them, that there is scarcely a hole or a corner of the county, where offenders might skulk, that their inquisitorial eyes

have not inspected, and dragged out the offenders to light. This is as it should be, provided due regard be had, not to involve the innocent (innocent, I mean, in the eyes of the law), with the guilty, which I confess it is not easy for gentlemen not skilled in the law, always to avoid. If all, or any large proportion of presentments and indictments made, and which probably will be made during this court, be sustained, they display a woful amount and increase of crime.

But to return to my subject. I am willing to lay down this rule, and without some rule we are afloat in an ocean of uncertainty: "That all attempts to commit an offense, which, if carried into execution, would go to corrupt the fountains of justice, of legislation, or the executive administration of the law; or, if perpetrated, would involve actual violence or breach of the peace, whether statutory or common-law offenses, are indictable, otherwise not."

We have adjudged that to incite another to commit an assault and battery, is indictable; this is the only case of the kind that I am aware of; and there I think we have gone to the utmost limit; but I look upon the inciting another to commit a breach of the peace, of more aggravated criminality than an attempt to break the peace of one's self, I hardly know how such a case can well be manifested; a man might, in a passion, say and threaten, that he would beat another, but is held back by friends and others present; or he might approach another in a threatening manner, and that other might have the heels of him, and run away. I should question much whether either of these demonstrations of hostility are indictable. We have not gone that far yet, and I shall think more of it when the case occurs.

Finally, the penitentiary law has provided for the case of attempting to sell a free man for a slave, and declared under what circumstances it shall be punishable; here we have all that is wanted, or deemed by the sovereign authority to be wanted; and shall we legislate too on the same subject; and declare that an act or acts, not coming up to the statutory description of the offense, are punishable? I can not, for it does not fall within my rule as I have before laid it down; nor, in my opinion, within the sound principles of law; nay, I reserve to myself the privilege of considering even this rule a little further, and when a case occurs within it, shall deem myself at liberty to narrow it, if, after more reflection, I shall think it right to do so. I have suggested it for the present, as safe to steer by, so far as it touches the case before us.

## FALSE PRETENSES — MATTER OF OPINION — UNTRUE PUFFING OF QUALITY OF GOODS.

## R. *v.* BRYAN.

[Dears. & B. 265.]

*In the English Court for Crown Cases Reserved, 1857.*

1. **It is not a False Pretense** to obtain money for a thing by falsely puffing and exaggerating its quality.
2. **Case in Judgment.** — B. falsely represented to a pawnbroker that certain spoons were of the best quality and were equal to Elkington's A brand, and the pawnbroker advanced money on them on this representation. *Held*, that B. was not guilty of a false pretense.

The following case was reserved and stated for the consideration and decision of the Court of Criminal Appeal by the Recorder of London.

At a Session of Gaol Delivery holden for the jurisdiction of the Central Criminal Court on the 2d day of February, A. D. 1857, John Bryan was tried before me for obtaining money by false pretenses.

There were several false pretenses charged in the different counts of the indictment, to which, as he was not found guilty of them by the jury, it is not necessary to refer. But the following pretenses were among others charged: That certain spoons produced by the prisoner were of the best quality, that they were equal to Elkington's A, (meaning spoons and forks made by Messrs. Elkington, and stamped by them with the letter A); that the foundation was of the best material, and that they had as much silver upon them as Elkington's A. The prosecutors were pawnbrokers, and the false pretenses were made use of by the prisoner for the purpose of procuring advances of money on the spoons in question, offered by the prisoner by way of pledge, and he thereby obtained the moneys mentioned in the indictment by way of such advances. The goods were of inferior quality to that represented by the prisoner, and the prosecutors said that had they known the real quality they would not have advanced money upon the goods at any price. They moreover admitted that it was the declaration of the prisoner, as to the quality of the goods, and nothing else, which induced them to make the said advances. The moneys advanced exceeded the value of the spoons. The jury found the prisoner guilty of fraudulently representing that the goods had as much silver on them as Elkington's A, and that the foundations were of the best material, knowing that to be untrue; and that in consequence of that he obtained the moneys mentioned in the indictment. The prisoner's counsel claimed to have the verdict entered as a verdict of not guilty which was resisted by the counsel for the prosecution; and entertaining doubts upon the question I directed a verdict of guilty to be entered in

order that the judgment of the court for the consideration of Crown Cases might be taken in the matter; and the foregoing is the case on which that judgment is requested.

RUSSELL GURNEY.

This case was argued, on 2d of May, 1857, before COCKBURN, C. J., COLERIDGE, J., CROWDER, J., WILLES, J., and BRAMWELL, B.

*Hardinge Giffard* appeared for the Crown, and *B. C. Robinson*, (*F. H. Lewis* with him), for the prisoner.

*B. C. Robinson*, for the prisoner. This is a mere representation as to quality. If a man fraudulently represents a thing to be in specie what it is not, it is a false pretense; but if the misrepresentation is merely of the quality of the article, it is not.

The court here intimated that the case had better be argued before the fifteen judges at the same time as *Regina* v. *Sherwood*.[1]

The case was accordingly argued on the 11th of May, 1857, before Lord CAMPBELL, C. J., COCKBURN, C. J, POLLOCK, C. B., COLERIDGE, J., ERLE, J., CROMPTON, J., CROWDER, J., WILLES, J., BRAMWELL, B., WATSON, B., and CHANNELL, B.

The case was argued immediately after *Regina* v. *Sherwood*.[2]

*G. Francis* (with him *Metcalfe*) appeared for the Crown; and *B. C. Robinson* (with him *F. H. Lewis*), for the prisoner.

*B. C. Robinson*, for the prisoner. This is simply a misrepresentation of quality and is not within the statute. A representation that a thing is in specie, that which it is not, has been held to be within the statute, but there is no authority to show that a mere misrepresentation of the quality of an article is.

Lord CAMPBELL, C. J. With regard to quality it has been said that it is lawful to lie. The seller exaggerates, and the buyer depreciates the quality. The only specific fact here is that the spoons were equal to Elkington's A.

*B. C. Robinson*. All the representations are mere puffing or vaunting of goods. I can not contend that the prisoner did not tell a willful lie; no doubt he did; but the articles he proposed to pledge were plated spoons; and they were plated spoons although of an inferior quality to that which he represented them to be. In *Regina* v. *Roebuck*,[3] the chain was represented to be silver, when it was not silver but base metal. In *Regina* v. *Abbott*,[4] the cheese was not of the kind it was represented to be, the bulk of the cheese was said to be the same as the taster, when it was not. To make this case analogous to those, the representation must have been that the spoons were actually Elkington's A, and not equal to Elkington's A.

[1] Dears. & B. C. C. 251.
[2] Dears. & B. C. C. 251.
[3] Dears. & B. C. C. 24.
[4] 1 Den. C. C. 273.

POLLOCK, C. B. Would it be indictable to say that a cheese came from a particular dairy, when it did not?

*B. C. Robinson.* That would be a much stronger case than this, and would resemble *Regina* v. *Abbott;* but if this conviction is good a man selling beer as treble X, when it was double X., would be indictable, and who is to decide between buyer and seller in such cases?

COLERIDGE, J. If mere puffing by the seller would be indictable, depreciation by the buyer would be equally so. "It is nought, it is nought, saith the buyer, but when he goeth his way he boasteth."

*B. C. Robinson.* If the representation had been that the spoons were in fact Elkington's, this case would have resembled *Regina* v. *Dundas*,[1] where a spurious blacking was sold as the blacking of Everett's manufacture, and *Regina* v. *Ball*,[2] in which articles were represented to be silver, which was not silver. In both those cases the misrepesentation was as to the species, not as to the mere quality of the article. If such representations were to be held to be within the statute, trade could not be carried on with safety. The jury would in such case be made the judges of the offense; quality being in most cases a matter of opinion only.

*G. Francis*, for the Crown. This is in fact a misrepresentation of quantity and substantially the same as *Regina* v. *Sherwood.*

Lord CAMPBELL, C. J. Of the quantity of the silver?

*G. Francis.* Yes. Elkington's A is an article of ascertained manufacture, and by representing the spoons to be equal to Elkington's A, the prisoner represented that they were covered with the same quantity of silver as Elkington's spoons would be covered with. The money was therefore obtained by a false representation that there was a greater weight of silver than there really was, and, therefore, there was a false pretense of an existing fact within the statute. Secondly, if the representation was of quality merely it is within the statute; the money was obtained by the representation, and the jury have found the representation was made with the intent to defraud.

*B. C. Robinson*, in reply. The articles were of the species represented.

POLLOCK, C. B. Supposing a publican represents that his beer is not really Guinness's beer, but equal to Guinness's?

Lord CAMPBELL, C. J. The goods were the goods bargained for, but of inferior quality.

BRAMWELL, B. What would you say to the sale of a paste pin, for a diamond pin?

*B. C. Robinson.* There the species would not be the same; but it

[1] 6 Cox, C. C. 380.

[2] Car. & M. 249.

would not do if the representation was that the diamond was "of the first water," when it was not.

Lord CAMPBELL, C. J. I am of opinion that this conviction can not be supported. It seems to me to proceed upon a mere representation, during the bargaining for the purchase of a commodity, of the quality of that commodity. In the last case which we disposed of,[1] after the purchase had been completed, there was a distinct averment which was known to be false respecting the quantity of the goods delivered, and in respect of that misrepresentation a larger sum of money (the amount of which could be easily calculated) was received by the person who sold them than he was entitled to ask and, therefore, I thought, and I think now, that there was clearly a case within the Act of Parliament; but here, if you look at what is stated upon the face of the case, it resolves itself into a mere representation of the quality of the article; and bearing in mind that the article was of the species that it was represented to be to the purchaser, because they were spoons with silver upon them, though not of the same quality as was represented, the pawnbroker received these spoons, and they were valuable, although the quality was not equal to what had been represented. Now, it seems to me it never could have been the intention of the Legislature to make it an indictable offense for the seller to exaggerate the quality of that which he was selling, any more than it would be an indictable offense for the purchaser, during the bargain, to depreciate the quality of the goods, and to say that they were not equal to that which they really were. Such an extension of the criminal law is most alarming, for not only would sellers be liable to be indicted for exaggerating the good qualities of the goods, but purchasers would be liable to be indicted, if they depreciated the quality of the goods, and induced the seller by that depreciation, to sell the goods at a lower price than would have been paid for them had it not been for that representation. As yet I find no case in which a mere misrepresentation at the time of sale of the quality of the goods, has been held to be an indictable offense. In *Regina* v. *Roebuck*,[2] the article delivered was not of the species bargained for; there the bargain was for a silver chain, and the chain was not of silver, but was of some base metal, and was of no value. But here the spoons were spoons of the species that was bargained for, although the quality was inferior. It seems to me, therefore, that this is not a case within the act of Parliament, and that the conviction can not be supported.

COCKBURN, C. J. I am of the same opinion, and for the same reasons as those which have been just pronounced by my Lord. It seems to me to make all the difference whether the man who is selling merely

[1] Reg. v. Sherwood, D. & B. 251.

[2] D. & B. 4.

represents, as in this instance it appears he did, the articles to be better in point of quality than they really are, or whether, as in the case of *Regina* v. *Roebuck*, he represents them to be entirely different from what they really are. There the representation was that the things were silver, when in point of fact they were of base metal, and entirely different from what they were represented to be. Here, if the person had represented these articles as being of Elkington's manufacture, when in point of fact they were not, and he knew it, that would be an entirely different thing; but the representation here made was only a vaunting and exaggerating of the value of the article in which he was dealing, by representing it to be in quality equal to a particular manufacture. I think that makes an essential difference between this case and the cases referred to, and I concur with my Lord in opinion that the conviction can not be supported.

POLLOCK, C. B. There may be considerable difficulty in laying down any general rule which shall be applicable to each particular case, but I continue to think that the statute was not meant to apply to the ordinary commercial dealings between buyer and seller; still I am not prepared to law down the doctrine in an abstract form, because I am clearly of opinion that there might be many cases of buying and selling to which the statute would apply — cases which are not substantially the ordinary commercial dealings between man and man. I think if a tradesman or a merchant were to concoct an article of merchandise expressly for the purpose of deceit, and were to sell it as and for something very different even in quality from what it was, the statute would apply. So, if a mart were opened, or a shop, in a public street, with a view of defrauding the public, and puffing away articles calculated to catch the eye, but which really possessed no value, there, I think, the statute would apply; but I think the statute does not apply to the ordinary commercial transactions between man and man, and certainly, as has been observed by the Lord Chief Justice, if it applies to the seller it equally applies to the purchaser, although it is not very likely that cases of that sort would arise. It would be very inconvenient to lay down a principle that would prevent a man from endeavoring to get the article cheap, which he was bargaining for, and that if he was endeavoring to get it under the value he might be indicted for obtaining it for less than its value; and there is this to be observed, that if the successfully obtaining your object, either in getting goods or money, is an indictable offense, any offense or step towards it is an indictable offense, as a misdemeanor, because any attempt or any progress towards the completion of the offense would be the subject of an indictment, and then it would follow from that, that a man could not go into a broker's shop and cheapen an article but he would subject him-

self to an indictment for misdemeanor in endeavoring to get the article under false pretenses. For these reasons, I think it may be fairly laid down that any exaggeration or depreciation in the ordinary course of dealings between buyer and seller during the progress of a bargain is not the subject of a criminal prosecution. I think this case falls within that proposition, and I, therefore, think this conviction can not be supported.

Coleridge, J. I am of the same opinion, and, as far as disposing of this particular case, I should like to do it very much upon the grounds stated by Lord Campbell and the Lord Chief Justice. I am glad, however, to have the opportunity of saying also that I agree with the proposition laid down by my Lord Chief Baron in the latter part of his observations, as it seems to me that it would be a dangerous thing to say that there could be no fraudulent misrepresentation within the statute in the course of an ordinary transaction of buying and selling. I think it may as often occur in the course of a real transaction of buying and selling as in any other way; but in order to determine whether a fraudulent misrepresentation is or is not within the statute, I think you must look, among other things, to the extent to which it goes and the subject-matter to which it is applied. It seems to me to be a safe rule to say, where it applies simply to the quality, and is only in the nature of an exaggeration on the one hand or a depreciation on the other, which too frequently takes place even in tolerably honest transactions between parties, this is not the subject of a criminal proceeding. If you were to make such a representation the subject of a criminal prosecution under the statute or at common law, you would be not only multiplying prosecutions to a most inconvenient extent, but in a number of instances do great injustice, and would be making a party answer criminally where in truth he had no criminal intent in his mind.

Cresswell, J. I agree that this conviction is not to be sustained. I am afraid that the law upon this subject of false pretenses is in a state which is well calculated to embarrass those who have to administer it. This case is distinguishable from *Regina* v. *Abbott*,[1] and *Regina* v. *Roebuck*,[2] but if I may refer to what I said on a former occasion I then said I feel bound by authority and I act upon it. I therefore think those cases ought to be binding, unless a time should arrive when they are overruled by an unanimous decision of the whole of the judges. In this instance the case is distinguishable, and we are not bound by them, and I think this conviction can not be supported.

Erle, J. I am also of opinion that this conviction can not be sustained, not on the ground that the falsehood took place in the course

[1] 1 Den. C. C. 273.

[2] Dears. & B. C. C. 24.

of a contract of sale or pawning, but on the ground that the falsehood is not of that description which was intended by the Legislature. It is a misrepresentation of what is more a matter of opinion than a definite matter of fact. Whether these spoons in their manufacture, and in the electrotype, were equal to Elkington's A or not, can not be as far as I know, decidedly affirmed or denied in the same way as a past fact can be affirmed or denied, but it is in the nature of a matter of opinion. I fully concur in what has been said, that the statute never intended in the course of commercial transactions, to allow a party who is dissatisfied with his bargain to resort to a complaint of any exaggerated praise of the article which has been purchased, and call the seller before a jury to be indicted for that; and on this ground I am of the opinion that the present case is not within the statute; but as to the other ground, it seems to me not only are contracts for sale not intended to be excluded by the statute, but on the contrary, the statute was precisely intended to make falsehoods in respect of contracts of sale indictable. The statute recites that there had been a failure of justice by reason of cheats not amounting to larceny, and it therefore makes the obtaining of goods by false pretenses an indictable misdemeanor. Now what were the cheats which were not amounting to larceny in respect of the prosecution, of which there had been a failure of justice? I think that those cheats were the cases either where a person intending to defraud another of his goods by a false pretense in purchase obtained from him a transfer of the property in the goods, he intending not to give the value of them, or where by a false pretense in sale, a man put off upon another a counterfeit article, which he knew was not truly the article intended, and so got money paid for the specific thing shown, that being apparently what the buyer intended, but being in reality a totally different thing; the property was under those circumstances held to have been passed, and the matter was held to have amounted to a cheat; at the same time, where a party intended to part with the possession only and a fraudulent person obtained the article *animo furandi*, and took it off, although the possession was so passed to him, still it was held to be no transfer of the property in law, but the property remained in the owner notwithstanding, as in the ordinary case of a man coming up to the seller of a horse at a fair, and saying, "Allow me to try that horse;" if he rode it away and sold it, and the jury was of opinion that he got this possession *animo furandi* it was a larceny; but if he professed to the seller of the horse, "I buy your horse," and paid by a false check, or deceived by a false pretense of future payment, and the seller said, "I agree to that," although the jury found that he did this *animo furandi*, he was held to be not guilty of larceny before the statute, which seems to make persons responsible

criminally, when there was a contract of sale falling within the same category of criminal intention as the cases I have adverted to, where the possession only had been obtained *animo furandi.* Now, looking at all the cases that have been decided upon the statuté, those that have been the subject of the greatest comment appear to me to fall within the principle relating to putting off counterfeit articles in sales where the substance of the contract is falsely represented and by reason thereof the money is obtained. In *Regina* v. *Roebuck*,[1] the thing sold was not the thing which it was sold for — a silver chain. Here, silver, though in form of an adjective, is in reality the substance of the contract. The silversmith had no intention of buying a chain, but he intended to buy silver, and what was represented to him to be silver was not silver, though it was a chain; the property in the chain passed and the money was paid, still clearly there was a false pretense as to the silver; and so in the case of *Regina* v. *Ball*,[2] so also in the case of *Regina* v. *Abbott*,[3] the substance of the contract was not a mere cheese, a thing in the shape of a cheese, of any quality, but the substance of the the purchase was a Chedder cheese (or some other species of cheese), and the taster which a fraudulent person had inserted in the cheese sold was of that species, and it was sold with a false affirmation that the article was Chedder cheese, which would be a totally different article from the Gloucester cheese or whatever the substance was said to be of the cheese that was sold. In the case of Everett's blacking,[4] it is the same thing. We have it in evidence, in that case that a new blacking, salable in the neighborhood under the name of Everett's blacking, was a vendible article; the prosecutor purchased it for the purpose of retailing it, and unless it had been Everett's blacking, he would have had no demand for it. The question whether it was Everett's blacking was as to the substance of the article; it was not a blacking he wanted, it was Everett's, and though it is in form an adjective, it is in reality the substance of the bargain. These are cases of putting off counterfeit articles. As to the case of *Regina* v. *Kenrick*,[5] although in the case of *Rex* v. *Pywell*,[6] it had been held not indictable to praise the quality of a horse, knowing him not to be worthy of the praise put upon him, yet in *Regina* v. *Kenrick*, so far as I understand it, and I was counsel for the man, the fact which brought the case within the definition of the crime was the fact that Kenrick averred that the horses had been the property of a lady deceased, were now the property of her sister, had never been the property of a horse-dealer, and were quiet and proper for a lady to drive. The purchaser

1 Dears. & B. C. C. 24.
2 Car. & M. 249.
3 1 Den. C. C. 273.
4 Reg. *v.* Dundas, 6 Cox, C. C. 380.
5 5 Q. B. 49
6 1 Stark. 402.

wanted those horses for a woman of his family. The substance of the contract in his mind was that they were the property of a lady who had driven the horses, and it was a false assertion of a definite existing fact to say, "They are the property of her sister now," when they were in fact the property of a horse-dealer, and had run away and produced a fatal accident. The case of *Regina* v. *Kenrick*, was not the warranting a horse sound, as in the case of *Rex* v. *Pywell*, but it was the affirming a false fact which the party knew to be false, and on that ground the conviction proceeded. It seems to me that these cases which have given rise to a great deal of observation, fail to bear out the principle contended for by the prosecution. No donbt it is difficult to draw the line between the substance of the contract and the praise of an article in respect of a matter of opinion; still it must be done, and the present case appears to me not to support a conviction, upon the ground that there is no affirmation of a definite triable fact in saying the goods were equal to Elkington's A, but the affirmation is of what is mere matter of opinion, and falls within the category of untrue praise in the course of a contract of sale; where the vendee has in substance the article contracted for, namely, plated spoons.

Crompton, J. I also think that this conviction can not be supported. I think that the statute of false pretenses ought not to be construed to extend to transactions where, in the course of a bargain for a specific chattel, the supposed misrepresentation consists in mere praise or exaggeration or puffing of a specific article to be sold, where the purchaser gets some value for his money; where the thing sold is of an entirely different description from what it is represented to be and of no value whatever, as where a man passes off a chain of base metal for gold or silver, and the buyer really gets nothing for his money, the case is different. This was the ground of the opinion of some of the judges in *Queen* v. *Roebuck*. So where money is obtained for notes of the Bank of Elegance by the pretense that they are notes of the Bank of England, the cases show that there is false pretense. I do not however think that the statute was intended to apply to every case of a warranty where there is a real sale and where, in the coarse of bargaining for a specific chattel, one party praises and exaggerates, or the other party depreciates, the description and quality of the thing to be sold and where something is got by the bargain; in such cases the party gets a worse bargain for his money, and what he really loses is the difference between the good and the bad thing. No specific money or chattel is obtained by the false pretense or lost by the buyer, but the real loss is for damage by having a worse bargain, and from the difference in value between the thing sold and what it would have been worth if the representation were true, which sounds only in damages.

I think that it would be dangerous to construe the statute as extending to every case of a false warranty, and I think that the conviction should be quashed.

CROWDER, J. I am of opinion that the conviction is bad. I think this case goes further than any of the cases that have yet been decided, and I am clearly of opinion that they have gone quite far enough and ought not to be extended. I think the distinction that has been taken in this case ought to exclude it from the category of those decisions; the distinction being that the false statement is with respect to the quality only of a known specific article, viz., plated spoons. It was true that they were plated spoons, but it was false that the plating was of a quality equal to that which was then known as Elkington's A. Now the cases that have already been decided in respect to contracts of sale and other dealings between parties have not gone beyond this, that where the subject-matter about which the parties have been dealing is of a specific denomination, and that denomination is falsely given, it has been held to be a false pretense; but the present case is a step beyond that; and, as I am very doubtful whether the statute was ever intended to go the length to which the decisions have carried it, I am of opinion it ought not to be extended further, and that it could not be so extended without confounding the distinction between civil and criminal cases. I have, therefore, come to the conclusion that this conviction can not be supported.

WILLES, J. My opinion is of little value after those which have been expressed; but such as my opinion is I am bound to pronounce it, and I do so with the less diffidence because it was the considered opinion of the late Chief Justice Jervis, than whom no man who ever lived was more competent to form an opinion upon the subject. I am of opinion that the conviction was right and that it ought to be affirmed. It appears to me that a great number of observations have been brought to bear upon the construction of the statute which would not have been attended to if the words of the statute had been looked at, and I can not help thinking that in many of the cases to which reference might be made, and they are very numerous upon this subject, the judgments would have commanded more attention in after times, if the words of the statute had been attended to, and those who delivered those judgments had not permitted themselves to consider, instead, whether a particular view would or would not be convenient to trade, either in its present state or in the state to which it might be reduced, by a proper administration of the law. I think that the words of the statute should be implicitly followed, and the Legislature obeyed according to the terms in which it has expressed its will in the fifty-third section of the 7

and 8 George IV.[1] I am looking to the words of that section, and I am unable to bring myself to think that the Legislature was at all dealing with anything in the nature of a distinction between the case of property fraudulently obtained by a fraudulently obtained contract and goods obtained without any contract, but fraudulently obtained. I can not help thinking that if the attention of the framers of the statute had been directed to any such possible operation of it, they would, in the spirit in which the section is framed have enacted, in terms even more clear than those of the fifty-third section, that that which is obtained by fraud shall not benefit the fraudulent person, and that the interposition of a contract also obtained by fraud ought not to make any difference in favor of the cheat. The section commences with the recital that "a failure of justice frequently arises from the subtle distinction between larceny and fraud." That is the recital, and I had on my mind an impression that the recital of a statute may have the effect of enlarging, but not of restraining the operation of the subsequent enactment. The enacting part of the section is, "If any person shall by any false pretense obtain from any other person any chattel, money, or valuable security with intent to cheat or defraud any person of the same, every such offender shall be guilty of a misdemeanor." And it appears to me that the only proper test to apply to any case is, whether it was a false pretense by which the property was obtained, and whether it was obtained with the intention to cheat and defraud the person from whom it was obtained.

Now in this case it should seem that there was a false pretense, there was a pretense that the goods had as much silver upon them as Elkington's A, and there was also the pretense that the foundations were of the best material. If I could bring myself to take the view which my brother Erle has taken, that this was mere matter of opinion, and not matter of fact, which could be ascertained by inspection or calculation, possibly I might take the same view of the case; but it appears to me that, on the face of the case, it should seem that Elkington's A, must have been, for practical purposes, a fixed quantity; the quantity of silver on it must have been fixed, and the proper material, the best material, for the foundations of such plated articles, must have been a well known quality in the trade, because it appears that the prisoner made a statement with respect to the quantity of the silver, and the quality of the foundation with the intent to defraud. It appears that persons who made the advances were thereby defrauded and thereby induced to make the advances, and the jury have found that the statements were known by the prisoner to be untrue, and that in consequence

[1] ch. 29.

of those statements he obtained the money mentioned in the indictment. It appears to me that for all practical purposes that ought to be taken to be a sufficient fact, coming within the region of assertion and calculation, and not mere opinion, and that it should be considered as a false pretense. Well, then the statute says, "obtain from any other person any chattel, money or valuable security." It is found in this case that the money was obtained. If the matter was a simple commendation of the goods, without any specific falsehood as to what they were; if it was entirely a case of one person dealing with another in the way of business, who might expect to pay the price of the articles, which were offered for the purpose of pledge or sale, and knew what they were, I apprehend it would have been easily disposed of by the jury, who were to pass an opinion upon the subject, acting as persons of common sense and knowledge of the world, and abstaining from coming to any such conclusion as that praise of that kind should have the effect of making the party resorting to it guilty of obtaining money on a false pretense. I say nothing, on the effect of a simple exaggeration, except that it appears to me it would be a question for the jury in each case whether the matter was such ordinary praise of the goods (*dolus bonus*) as that a person ought not to be taken in by it, or whether it was a misrepresentation of a specific fact material to the contract and intended to defraud, and did defrand, and by which the money in question was obtained. Well, then, there is the latter part of the section — "with intent to cheat and defraud the person of the same." It must be with the intent to cheat and defraud the person of the same. I am unable to bring my mind to any anxiety to protect persons who make false pretenses "with intent to cheat and defraud." It was stated in the evidence by the prosecutor, "I would have advanced nothing but for the misrepresentation," and it was found by the jury that the money was obtained by the misrepresentation. But it is said that the effect of establishing such a rule as that for which I contend would be to interfere with trade; no doubt it would, and I think ought to, prevent trade being carried on in the way in which it is said to be carried on. I can not help expressing my regret if trade is carried on, and I do not believe it is generally carried on, by persons making false pretenses with the intention to cheat or defraud persons of their money. I am far from wishing to interfere with the rule as to simple commendation or praise of the articles which are sold on the one hand, or to fair cheapening on the other; those are things persons may expect to meet with in the ordinary and usual course of trade; but I can not help thinking that people ought to be protected from any such acts as those I have referred to being resorted to, for the purpose and with the intent to cheat or defraud purchasers of their money or trades-

men of their goods. If the result of it would be to multiply prosecutions, that must be because we live in an age in which fraud is multiplied to a great extent and, amongst others, in this form. I agree in what the late Chief Justice Jervis said as peculiarly applicable to such a supposed state, though I hope not to ordinary trade, that if there be such a commerce as requires to be protected, by the statute being limited in the mode suggested, it ought to be made honest and conform to the law, and not the law bent for the purpose of allowing fraudulent commerce to go on. I can not help thinking, therefore, upon the plain construction of the fifty-third section of the 7 and 8 George IV.,[1] that the prisoner in this case, having fraudulently represented that there was a greater amount of silver in the articles pledged, and that there was a superior foundation of metal, that being untrue to his knowledge, for the purpose of defrauding the prosecutors of their money, which he accordingly obtained, he was, therefore, indictable, and that the conviction ought to be affirmed.

Bramwell, B. I regret being called on to give judgment in this case without an opportunity of further considering it; but the inclination of my opinion is, that this conviction ought to be sustained. I can understand the statute in two ways, one that it only applies to those cases where there is no contract, and the chattel or money is got by false pretenses either with or independently of any contract, as in the last case,[2] where, though had there been no fraud in the making of the contract, there was in the assertion that the things delivered were of a certain amount; the other, that the statute was intended never to apply to cases where the fraud was not the immediate cause, or sole cause, of obtaining the money; but the contract was obtained by fraud, and the money or the article handed over to the person in pursuance of that, or of that and something given by the fraudulent person. The first case is clearly within the statute, and the inclination of my opinion is, the statute does extend to cases such as last mentioned, but with great doubt, for it may well be that the statute does not apply except when the money or chattel is obtained immediately by the fraud, and does not apply where the chattel or money is obtained by a contract, which contract is obtained by fraud; so, also, it may be that the contract does not apply to cases where the fraud is not the sole cause of the delivery or giving of the chattel or money, or where something is delivered or given, as well as fraud used by the fraudulent person, as it may be said that the money or chattel is not obtained by fraud, which means fraud alone, since, but for the delivery or giving of something by the fraudulent person, he would have obtained nothing. I can understand the

[1] ch. 29.

[2] Reg. v. Sherwood, Dears. & B. C. C. 251.

statute, being limited to the first class of cases or extended to both; but I declare I can not understand the medium course suggested to-day, namely that the statute does apply to some of the cases in the second class, but does not apply when the person defrauded gets in specie the thing contracted for, though with a difference in the quality.

Take the present case. I do not know that I am influenced by the fact, but we were told last time that in truth there was no silver on these things, and that as compared with Elkington's they were valueless. Now, it seems to be supposed that the misrepresentations were no more than a kind of praise, exaggeration or puffing. I confess I can not comprehend that, and as well as I can understand the opinions that have been expressed, this result would follow, that, suppose Elkington's plated articles had got half an ounce of silver on them and the prisoner's articles had got none, he would have been indictable; but if Elkington's had got one ounce of silver and the prisoner's only a quarter of an ounce he would not, because it would have been only the superior quality that was exaggerated. I own I can not understand that. I can not help looking at the statute and I find nothing about exaggeration of quality. I find the statute express — "if any person shall by any false pretense obtain from any other person any chattel or valuable security" — that means, to my mind, whether he obtains it by fraud directly or indirectly and wholly by fraud, or by that and something else. Therefore it seems to me the only true exposition of the statute is, to hold it either to apply or not apply to all contracts and cases where the fraudulent person gives something in return, either to say that whenever there is a contract or something is so given, it is not within the statute, or to say it is, though there is a contract, if that contract was brought about by fraud, though something may have been delivered to the person defrauded, if, but for the fraud, the contract would not have been entered into. As at present advised, I think that the true meaning of the statute is, that it shall extend to people who make these bargains by fraud, and so by the fraud get possession of the chattels or property of others; and I incline to hold the conviction right.

Watson, B. I am of opinion that the conviction is wrong. I think that the cases which have been decided upon this subject have gone quite far enough, and I believe much further than the framers of the statute ever intended it should go. I agree with my brother Crowder in this point, that this case does not fall within any of those decisions referred to that are now to be considered authorities. In my opinion, the conviction is wrong. The question is this, whether this representation, false as it may be, merely of the quality of the article which is pawned as it would be upon a sale, is a false pretense within the meaning of the statute. In my opinion it is not. All that is represented

here is, that it was of the first quality, equal to Elkington's A, and the foundation of the best material, and had as much silver as Elkington's — in ordinary language merely puffing the article, which may be untrue. In an ordinary case if a party wishes to protect himself, he ought to take a warranty of the quality of the article offered for pawn or sale. The result of holding this conviction right would be, that on every sale, where any exaggeration has taken place, the tradesman might be convicted of obtaining money on false pretenses. For these reasons I think it is not a false pretense within the statute, and therefore the conviction was wrong.

CHANNELL, B. I am of opinion that the conviction can not be sustained. But for the doubt expressed by my brother BRAMWELL, and the more decided opinion expressed by my brother WILLES, I should have contented myself with saying that I concurred in the judgment of the other members of the court; but I think it right, under the circumstances, to state the grounds of my opinion. A certain number of spoons were produced to the prosecutor; those spoons were represented not as silver spoons, but as having silver upon them; there was then the further representation that they had as much silver as Elkington's A, and further, that the foundations were of the best material. I consider the spoons were the same in species as they were represented to be. It is not as if the purchaser had been induced by the representations made to buy them for silver, and then had found that the spoons had no silver upon them. The representation is that the quantity of silver on them was equal to the quantity on Elkington's. I consider that is, in substance, the same as if he had said the quality of the silver upon them is the same as on Elkington's, and that the statute does not apply to such a representation made in language which the prosecutor must be taken to know is mere matter of opinion. In that point the case is distinguishable from *Regina* v. *Roebuck*, the ground of that decision being that the representation was that a certain chain was a silver chain when in fact it was not, and therefore did not resemble at all the article intended. In this case the spoons did correspond to that extent with the representation, and they were spoons of some value, supposing value to be an element taken into consideration. The other case of *Regina* v. *Abbott* is plainly distinguishable upon the ground put by *Mr. Robinson*. On these grounds I am clearly of opinion that the conviction can not be supported.

*Conviction quashed.*

FALSE PRETENSES — DELUSIVE PROMISE — FALSE PRETENSE TURNING OUT TRUE — PROMISE AS TO FUTURE EVENT — HABEAS CORPUS.

## Re Snyder.

[17 Kas. 542.]

*In the Supreme Court of Kansas.*

1. **A Pretense which is False when Made,** but true by the act of the person making the same, when the prosecutor relies thereon and parts with his property, is not a false pretense within the statute.

2. **It must Appear that the Pretenses** relied upon relate to a past event or to some present existing fact, and not to something to happen in the future. A mere promise is not sufficient.

Original proceeding in *habeas corpus.*

Petition filed in this court on the 2d day of January, 1877, on behalf of A. J. Snyder, for a writ or *habeas corpus.* The petitioner sets forth the following facts: —

"That A. J. Snyder was illegally restrained of his liberty in the county jail at Mound City, the county seat of Linn County, by D. R. Lamoreau, as sheriff of said county; that said D. R. Lamoreau pretends to restrain said A. J. Snyder of his liberty by virtue of some pretended proof, the precise nature of which is unknown to your petitioner, the justice before whom he was examined not having reduced such testimony to writing. Your petitioner further represents unto your honorable court that such illegal restraint consists in the following: that on the 1st day of December, 1876, said A. J. Snyder was arrested upon the charge of obtaining money under false pretenses, and taken before one A. D. Hyatt, a justice of the peace in and for Linn County, for preliminary examination; that upon such examination there was no evidence offered which showed or tended to show in any manner that an offense had been committed against or under the laws of the State of Kansas, nor was there any evidence offered which showed or in any manner tended to show that there was any probable cause for believing that said A. J. Snyder had been guilty of any offense whatever under the laws of the State of Kansas. Yet, notwithstanding the premises, the said justice of the peace refused to discharge the said A. J. Snyder or to admit him to bail, as under the laws of the State of Kansas he was required to do."

The petition further alleged that the order or warrant of commitment under which Snyder was held in custody was illegal and insufficient in law. It also states that the reason the application was not made to the probate judge of Linn County, was, "that such probate judge is disqualified from hearing the same by reason of being an attorney of

record in a civil suit involving the same transaction." And the petition further alleges "that an application was made to the Hon. W. C. Stewart, judge of the Sixth Judicial District, in which Linn County is, for a writ of *habeas corpus*, and that said application was refused." The usual prayer for the issuance of the writ was also annexed thereto. Upon such petition the writ of *habeas corpus* was issued by the court, and was duly served upon the said Lamoreau, sheriff, to which a return was made by said sheriff, in effect that "he had the body of said Snyder before the court." And for the authority and cause of the restraint of the said Snyder in his custody he stated that —

"On December 1st, 1876, John Hood made, in writing and upon oath, a complainant before A. D. Hyatt, a justice of the peace of Linn County, against the said A. J. Snyder, charging him with having, on November 25th, 1876, procured $1,500 in money and a check drawn by Snyder & Co., on Hood & Kincaids, in favor of Snyder & Co., for the sum of $1,500, upon which check the said John Hood wrote across the face, 'The First National Bank of Kansas City, Missouri, will please pay, — Hood & Kincaids,' from the firm of Hood & Kincaids by false pretenses and with intend to defraud Hood & Kincaids; that on said December 1st, said justice of the peace issued a warrant, reciting fully the alleged offense; that Snyder was arrested; that upon the preliminary examination numerous witnesses (giving their names), testified; that the evidence taken at the examination was not reduced to writing; that upon the conclusion of the examination the justice decided an offense had been committed, and that there was probable cause to believe said Snyder guilty as charged in the complaint and warrant, and ordered that he give bail in the sum of $5,000 for his appearance at the District Court of said Linn County, at the next term thereof, to answer said charge, and in default of such bail to be committed to the jail of the county of Linn; that no bail whatever was offered; that said justice of the peace then made out a written order of commitment, and gave the same to the respondent to execute; that said respondent was and is the sheriff of said Linn County, and held said Snyder in his custody as such sheriff by virtue of said order of commitment."

Copies of the complaint, warrant, and decision of the justice are attached to the return. The original order of commitment was also produced by the sheriff on the hearing. A reply was filed to the return of the officer, stating that the testimony mentioned in the return, and the evidence given by the witnesses named, were not sufficient to authorize the magistrate to find Snyder probably guilty of the offense charged. Afterwards, under the requirements of the court, an amended reply was filed, setting forth in detail the evidence of the prosecution before the justice.

The case was set for hearing, and was heard, on the 30th of January, 1877. On the hearing, the question as to bail and the illegality and insufficiency of the warrant of commitment were waived, and the only allegation relied on by Snyder was the one contained in the petition concerning the "alleged want of probable cause." The counsel for the respondent admitted that the testimony contained in the reply set forth all the evidence admitted before the justice, excepting that purporting to have been given by John Hood, one of the witnesses for the prosecution and a member of the firm of Hood & Kincaids. The court summoned John Hood as a witness and received his evidence orally.

Upon an investigation of the criminal charge preferred against Snyder before the justice, the facts of the case were found to be substantially as follows: —

During the fall of 1876, A. J. Snyder was engaged in buying and shipping stock under the name of Snyder & Co., and had made several shipments of stock from points along the Missouri River, Fort Scott and Gulf Railroad, to D. A. Painter & Son, who were live stock brokers and commission merchants at Kansas City, Missouri. One J. M. Shores was connected with Snyder in business. Hood & Kincaids were brokers, having a banking house at Pleasanton, Linn County, Kansas, of which Mr. Hood was cashier and general manager. The firm of D. A. Painter & Son was composed of D. A. Painter and Charles Painter. On the 22d day of November, 1876, Snyder went to Charles Painter, the bookkeeper of Painter & Son, for a letter of credit, took it the Martin bank, had it indorsed by the teller, returned to his office, and delivered the letter of credit to Snyder. Snyder looked it over and remarked that he thought there would be bother about it on account of the words "bill of lading attached." At his request, Charles Painter wrote out another letter of credit, of which the following is a copy: —

"KANSAS CITY, MO., Nov. 22, 1876.

"*Messrs. Hood & Kincaids, Pleasanton, Kansas:* —

"DEAR SIRS: We will honor Messrs. A. J. Snyder & Co.'s draft on us to the amount of four thousand dollars ($4,000), to pay on live stock consigned to us.

"Very truly yours,

"D. A. PAINTER & SON."

Snyder took this letter also, remarking that if he couldn't use the one he would the other. Snyder then went to Pleasanton, and on the 23d he called at the banking house of Hood & Kincaids, and presented the above letter of credit and said he wanted to get money to buy stock with. Hood asked him what amount of currency he wanted; he answered about $2,000. Hood told him they were short in currency, but

should send up to Kansas City and have some shipped down, but that they could not see to the shipping of stock. In this conversation Snyder told Hood the cattle would be shipped to Painter & Son. Snyder then telegraphed to Painter & Son, that —

"Your letter of credit says, on stock consigned to us. Hood & Kincaids can't go and see how consigned. Telegraph to H. & K. to erase that part. We will want some money to-morrow.

"SNYDER & Co."

On the same day Painter & Son, in answer to the said dispatch, telegraped to Hood & Kincaids: "We will honor Snyder & Co.'s drafts, to pay on stock, to the amount of four thousand dollars." On the 23d, or the 24th (the witness Hood fixes the 24th as the date), Snyder again called at the bank and asked Hood what was the matter with the telegram — and then stated he had been to Fort Scott to get money on his draft on Painter & Son, and that the bank there had telegraphed to H. & K., and H. & K. had answered they would honor the draft on certain conditions, that he had bought the pick of a large lot of cattle, and wanted money to pay for them. Hood thinks he said about one hundred head. Snyder then stated he would send to Painter & Son and have the letter of credit modified. After this conversation, Snyder took the cars and went to Fort Scott. On the 24th, late in the afternoon, he drove out to D. G. Glasscock's, in Vernon County, Mo., nine miles northeast from Fort Scott and sixteen miles from Prescott (Prescott is on the railroad, six miles south of Pleasanton). On the morning of the 25th Snyder and Glasscock went out and looked at the cattle Glasscock was fattening, and Snyder made a bargain for the cattle, by the terms of which he was to take eighty head of steers at three and one-fourth cents per pound, thirty-seven or thirty-eight of them to be delivered on the next Monday, the 27th, and the balance about the middle of February. Snyder paid Glasscock $25 on the cattle and took his receipt therefor. Glasscock also sold him his hogs, twelve or fifteen in number, and agreed to try and get up a car load. Snyder then retured to Pleasanton, and on the same day telegraphed to Painter & Son: —

"The words, to pay on stock in the way Say to Hood you will, or will not pay. Answer quick.

"SNYDER & Co."

Painter & Son telegraphed back to Hood & Kincaids, "We will honor Snyder & Co.'s drafts to the amount of four thousand dollars." This telegram was received by Hood before Snyder called at the bank on the 25th. About noon on the 25th Snyder went to the bank and asked Hood how it was "in regard to that money to-day." Hood told him he thought everything was right now, and asked him how much

money he would need. He said he thought that $3,000 would do. Snyder made draft for the amount on D. A. Painter & Son, and Hood paid him $1,500 in currency, and a certified check on the First National Bank at Kansas City for $1,500. Hood said to him at the time that he supposed the cattle would be shipped on Monday night. Snyder said no, that it would take a couple of days to get them to the station, that they were about nine miles northeast of Fort Scott and sixteen miles from Prescott. Hood remarked to him that he ought to get them to Fort Scott in less time than that; Snyder said the cattle were to be delivered and paid for at Young's scales, that Young's scales were nearer on the road to Prescott, and that the cattle were fat and would have to be driven slow. This conversation between Hood and Snyder occurred while Hood was certifying to the check. Snyder first drew a draft for $3,000, but its terms being unsatisfactory to Hood in not being payable at sight, Hood made one out, inserting therein, "Pay to the order, at sight, of Hood & Kincaids," etc., and Snyder signed the firm name of "Snyder & Co.," thereto. Hood testified he believed all the representations made to him by Snyder to be true, and that he was induced to deliver to Snyder the $1,500, in currency, and the certified check of $1,500, on November 25th, upon Snyder's statement that he had enough cattle bought, and that he would ship them to Painter & Son, and believing that Painter & Son would pay this draft when the cattle were disposed of, if not before; and further, that he would pay H. & K. twenty-five cents on the $100 for exchange. Hood also testified that, at the time he delivered the money and certified check to Snyder, he did not know the financial condition of D. A. Painter & Son, and that he did not have at the time such confidence in Painter & Son as to have advanced the money obtained on their credit alone; that he had confidence in their integrity, not in their financial ability, and his confidence in their integrity was based upon representations that had been made to him by different parties that they were respectable dealers. Snyder returned to Fort Scott. On Sunday, Snyder and Shores together went again to Glasscock's house, and called him out to the fence. Shores said, "Mr. Glasscock, we've come to see if we couldn't get you to hold these cattle another day. Our financial matters is so we can't pay for 'em to-morrow, and if it would suit you as well, we'd like for you to hold 'em another day." Glasscock rather objected to this. Then Shores said, in the presence of Snyder, "If you would rather do it, we'll have to get you to ship the cattle in your own name." Glasscock then consented to keep the cattle another day. Snyder then went to Fort Scott and engaged four cars of Ming, the agent of the Missouri River, Ft. Scott and Gulf Railroad, to be used Tuesday night for Glasscock's cattle, and others. On Monday he went to J. V.

Morrison, a cattle shipper who shipped cattle over the Missouri, Kansas & Texas Railway, told him he had bought Glasscock's cattle, and made arrangements with him to have him ship the cattle in his own name to St. Louis; told him to order the cars and attend to the shipping of them, and also made arrangements with him to go out to Glasscock's with him the next day. On Monday night, Snyder and Shores went to Glasscock's house, stayed over night, and Tuesday, the 28th, in the morning, they went to "cut the cattle out." Snyder selected thirty-eight to take, and then turned the rest back. Glasscock examined the cattle turned back, and found Snyder had turned back many of the cattle he had agreed to take then, and in their place had selected cattle which were more profitable to feed. Glasscock then insisted if he took the cattle he had selected, he should secure him that he would take the balance. This Snyder would not do, saying that he wasn't prepared to leave the means. Glasscock still insisted on security, and finally Snyder said: "If you can't do better than what you proposed, I'll have to let the trade fall back," and Snyder and Shores then drove off. The cattle selected would weigh about one thousand one hundred pounds, and the thirty-eight head selected, at three and one-fourth cents would amount to $1,358.50. At the feed-gate they met Morrison, and told him that the trade was "busted up;" wanted him "to go and buy the cattle, if he could — they would have nothing more to do with him." At Fort Scott Snyder saw Ming; "told him he could not ship and withdrew his order for cars." They then got on the freight train of which Charles Sykes was conductor, and left Fort Scott about 1:30 p. m. Snyder paid his fare, first to Prescott and then from Prescott to Pleasanton The train stopped at Pleasanton about fifteen minutes. Snyder and Shores got out of the caboose. Snyder went to Hood & Kincaids' bank, and told Hood that he wanted some more money to finish paying for the stock he had bought; that he was in very much of a hurry; that there was a freight train at the depot ready to pull out, and that he wanted to get back to Prescott on it. Hood asked how much more money he wanted. He said $850, and gave a draft on D. A. Painter & Son for the $850, in form similar to the $3,000 draft, and Hood gave Snyder a certified check for the amount. Snyder then tried to get on the pay car going north (Prescott is south of Pleasanton); could not get on it, and then got on to Sykes' caboose again, showed Sykes a large amount of money, rode with him to Kansas City. At nine o'clock on the 29th he got the $850 check cashed at Wyandotte, at the banking-house of Northrup & Son. The $3,000 draft in favor of Hood & Kincaids was sent to Kansas City, and Painter & Son being unable to pay the same, it was protested. On the 29th, D. A. Painter went to Wyandotte to see Snyder and Shores, and asked them what luck

they had buying cattle. They stated that they had bargained for Glasscock's cattle; that Glasscock had disagreed with them about the selection of the cattle, and would not let them have the cattle. Painter said a $3,000 draft had come on, and they had been forced to let it go to protest. Painter, Snyder and Shores then went to a saloon, where they had further talk about the $3,000 draft. Painter insisted that if they hadn't bought any stook they must have the money; that the money ought to go to pay the draft. Snyder replied that they were not going to commit themselves; that they were awaiting developments. Painter suggested that if they were keeping the money for what his firm were owing them, that he would pay them on Eriday; they replied that they were not going to commit themselves. After Snyder was arrested on this charge, he said to one James Reynolds, "that they had put about $3,000 in Painter's hands last spring, and he didn't like the way things were going lately; he said he hadn't lost anything, only $700 or $800." Reynolds also testified: "I can't say whether Snyder said that he had got even with him, and was going to keep even with him, or whether he had taken this plan to get even with him." While on his way back to Pleasanton, after his arrest, Snyder said to McGlothlin, the deputy sheriff who had him in charge, that Painter & Son owed him $3,900; that he did this to get his money, or that it was the only way he had to get his money, out of Painter & Son. While in the jail at Mound City, he made a similar statement to Robert Fleming. He also said he didn't care who H. & K. looked to for their money; that he was studying his own care. Painter & Son owed Snyder & Shores at this time from $500 to $700, and were able to pay that, but were not able to pay the $3,850, without the cattle. They were persons of limited means. Neither Snyder, nor A. J. Snyder & Co., had any money on deposit with Hood & Kincaids at the time of these transactions, and Hood & Kincaids have never been paid any part of $3,850.

The foregoing statement of facts was prepared by the chief justice. Counsel appearing for Snyder in this court were *J. D. Snoddy*, *A. F. Ely* and *W. J. Buchan*. Counsel for respondent Lamoreaux, were *Stephen H. Allen* and *W. R. Biddle*. The case was argued orally by Messrs. *Snoddy* and *Ely* for petitioner, and Messrs. *Allen* and *Biddle* for respondent. An order for the release of the petitioner was made and issued on the 9th of February.

The opinion of the court was delivered by HORTON, C. J.

* * * * * * * * * * * * *

Upon the hearing of the case on the merits, the petitioner objected to the witness John Hood testifying that he was induced to part with the $1,500, and the certified check, on the statements and representations of Snyder, on the ground that it was incompetent and was calling for

the secret mental emotions of the witness. The objection was not well taken. This was a material fact to be established. It was proper for this court to know what influence the represesentations of Snyder had upon the witness. If they had none at all, the prosecution must have failed. "The fact was sought after, and not the opinion of the witness."[1] Objections were also taken to Hood's testimony that he believed the representations made to him by Snyder on the 23d, 24th, 25th and 28th of November. The objections were overruled, and, for the reasons above stated we think the evidence competent. It is indispensable to the consummation of the crime of obtaining money or property under false pretenses, that the person who has been induced to part with his money or property thereby must believe the pretense is true, and, confiding in its truth, must by reason of such confidence have been cheated and defrauded. We do not mean by this ruling that such evidence is the best, nor the most reliable; nor that it is necessary for the prosecutor to state he believed and relied upon the pretense. All of this may be inferred. We simply hold the evidence admissible.

The material question, however, in this case is, whether on the evidence submitted to us an offense is made out against Snyder for false pretense, within the statute, in his obtaining from Hood & Kincaids, on November 25th, the $1,500 in currency and the certified check of $1,500. The counsel for the petitioner contended that there was no evidence of the procuring of the money or check by any false pretense. *First.* Inasmuch as Hood, at the time he let Snyder have the money and check on the 25th of November, had an absolute order in the form of a telegram from Painter & Son to honor Snyder & Co.'s drafts for four thousand dollars, and had previously refused to pay the money on a letter of credit, which he construed as requiring him to see to the shipping of the stock to Painter & Son, it is conclusively shown that such telegraphic order of Painter & Son was the sole inducement by which the money and check were parted with by Hood. *Second.* That the representation made by Snyder to Hood that he had bought the pick of a large lot of cattle, about one hundred head, was true on the 25th, when the money and check were obtained; and that the statement that the cattle would be shipped to Painter & Son at Kansas City was a representation or assurance in relation to a future transaction, and did not amount to a statutory false pretense. As to the first proposition of counsel of the petitioner for his discharge, we answer that we are not satisfied that Hood parted with the money and check solely on the telegram of credit of the 25th. The testimony tends to show that he was induced to part with the property in controversy partly on that telegram,

[1] People *v.* Herrick, 13 Wend. 87; People *v.* Sully, 5 Park. (N. Y.) Cr. Rep. 142; People *v.* Miller, 2 Park. (N. Y.) Cr. Rep. 197; Thomas *v.* People, 34 N. Y. 351.

partly on the representation of Snyder that he had bought about one hundred head of cattle, and partly on the statement that he would ship the cattle to Painter & Son. In an examination of his character, we are not to pass absolutely on the guilt or innocence of the prisoner; if we shall find an offense has been committed, and there is probable cause to believe the prisoner guilty thereof, the prisoner should be committed for trial. As different motives were assigned by the prosecutor as operative in producing the delivery of the money and check to Snyder, the examining magistrate, and this court, are only to ascertain that there is probable cause to believe that the pretenses proved to have been false and fraudulent, if within the statute, were a part of the moving causes which induced Hood to part with the property, and that Snyder would not have obtained the same if the false pretenses had not been superadded to the telegraphic order of Painter & Son of November 25th, to authorize the holding of Snyder for trial. It is not necessary, to constitute the offense of obtaining goods by false pretenses, that the owner should have been induced to part with his property solely and entirely by pretenses which were false; nor need the pretenses be the paramount cause of the delivery. It is sufficient if they are a part of the moving cause, and without them the prosecutor would not have parted with the property.[1]

This leads us to examine the second proposition upon which the counsel for the petitioner claims his release, and to consider the representations made by Snyder, "that he had bought the pick of a large lot of cattle, about one hundred head," and that "he would ship them to Painter & Son." The first representation was substantially true, when the money and check were obtained on the 25th of November. At that time the cattle had been contracted for by Snyder with Glasscock, and a part of the consideration paid. This representation, when made on the 23d or 24th of November, was false. On the 25th it had become true. Is a pretense which was false when made, within the statute, if true when the property is parted with? We think not. The pretense employed is only the means by which the offense is perpetrated. The substance of the offense consists in the obtaining of the property, and thereby with a fraudulent intent depriving the lawful owner of that which properly belongs to him. If a party by his own acts makes the false representations good, before obtaining the property, there is no consummation of the crime, and there is no criminal attempt, for it follows that, when there is a change of purpose on the part of a person seeking to obtain property by a false pretense, before any other wrongful act is committed than the making of the false pretense, the crime

1 People *v.* Haynes, 14 Wend. 547.

of the attempt is taken away. The fact that, in this case, Snyder never abandoned the scheme to defraud some one, does not militate against the conclusion, that the pretense must be false in fact when the property is parted with. How can it be said that Hood relied upon a false representation as to the purchase of the cattle when he delivered the money and check, if at that time the representation had become true? No property was parted with by Hood on the 23d or 24th. The representation then made by Snyder as to buying the cattle, was true, on the 25th, and before he obtained the money, or check; and if he is to be held for the commission of a crime by obtaining property under false pretenses, it must be upon some other representation than the representation on the 23d or 24th, as to having "bought the pick of a large lot of cattle."

As to the representation of Snyder, "that he would ship the cattle to Painter & Son, at Kansas City," we follow authority in holding such statement is not a statutory false pretense. The false pretenses relied upon to constitute an offense under the statute, must relate to a past event, or to some present existing fact, and not to something to happen in the future. A mere promise is not sufficient.[1] The representation that the cattle would be shipped to Painter & Son, related to an event which was thereafter to happen. It was a promise or assurance of a future transaction. Upon the evidence we are, therefore, compelled to say, that as the only offense charged in the complaint, and in the warrant against Snyder, was the obtaining of the $1,500 in currency and the certified check of $1,500 on November 25th, as therein stated, and as the order of commitment was issued on the finding of the examining magistrate, that there was probable cause to believe Snyder "guilty as charged in the complaint and warrant," there is no legal authority for holding the petitioner in custody, and he must be discharged. It is, perhaps, unnecessary to add, that in point of moral turpitude, Snyder is as guilty in obtaining the property of Hood & Kincaids on the 25th of November on a false promise, if such be the fact, as if such pretense was within the statute. The criminal law, however, can not reach the perpetrator of every fraud. "The statute may not regard mere naked lies as false pretenses." It has been well said: "The operation of the wisest law is imperfect and precarious; they seldom inspire virtue; they can not always restrain vice; their power is insufficient to prohibit all that they condemn, nor can they always punish the actions which they prohibit." We have intentionally abstained from commenting upon the transactions of the 28th of November, when Snyder is

[1] Rex. *v*, Young, 3 T. R. 98; Rex *v.* Lee, L. & C. 309; Commonwealth *v.* Drew, 19 Rich. 179; State *v.* Evers, 49 Mo. 542; Dillingham *v.* State, 5 Ohio St. 280; Burrow *v.* State, 12 Ark. 65; State *v.* Magee, 11 Ind. 154; State *v.* Green, 7 Wis. 676.

alleged to have obtained a certified check of $850, because there is nothing in the proceedings before the magistrate, or in this court, to prevent the petitioner from being arrested, if any complaint is made, therefor. Whether a crime has been committed in that regard, and whether there is probable cause to believe the petitioner guilty thereof, may be a matter of future examination and judicial determination. In this investigation, the testimony of facts, subsequent to the 25th, was received by us only to explain the transactions of the 25th of November, and to shed light upon the intent of Snyder.

That the force of this decision may not be misconstrued, we may properly say, that the evidence shows there was no collusion between the firm of Painter & Son and Snyder, and that the purchase of the cattle by Sydner of Glasscock on the morning of the 25th was made in good faith. It is evident, however, that Snyder never intended to ship any of the cattle to Painter & Son, and all his statements to that effect were in pursuance of his scheme to successfully carry out his fraudulent purpose.

Let the petitioner be discharged. All the justices concurring.

---

FALSE PRETENSES — TRUTH OF PRETENSE — EVIDENCE.

## STATE *v.* LURCH.

[6 West C. Rep. 110].

*In the Supreme Court of California, 1885.*

**In a Criminal Prosecution for Obtaining Money** under false pretenses, where the alleged false pretense consists in representing as genuine a note which had been forged by the defendant, evidence that the defendant signed the names of the parties to the note with their consent is admissible. If the note was so signed it was not a forgery.

APPEAL from Lane County. The opinion states the facts.

*W. R. Willis*, for the appellant.

*J. W. Hamilton*, District Attorney, and *Geo. S. Washburne*, for the respondent.

LORD, J. The defendant was indicted, tried and convicted for obtaining goods under false pretenses. The criminal code provides that "upon a trial for having, by any false pretense, obtained the signature of any person to any written instrument, or obtained from any person any valuable thing, no evidence can be admitted of a false pretense expressed orally and unaccompanied by a false token or writing, but

such pretense, or some note or memorandum thereof, must be in writing, and either subscribed by, or in the handwriting of the defendant.[1]

The substance of the allegation is, that the defendant, intending to cheat and defraud Phœbe B. Kinsey of her money and property, falsely and feloniously did pretend and represent that a certain instrument in writing, purporting to be a promissory note, was the genuine promissory note of Lurch Bros., A. H. Spare, and Samuel Dillard; that the two signatures to the said note purporting to be the signatures of the said Spare and Dillard, were the true and genuine signatures of the said Spare and Dillard and that the said Spare and Dillard had signed the said note as security for the payment of the same, when in truth and fact, the said note, purporting to be the note of Lurch Bros., and signed by the said Spare and Dillard, was not the genuine note of the said Spare and Dillard, or either of them, nor their true or genuine signatures, or either of them, but were forgeries, which fact the said defendant well knew, etc., * * * by means of which said false pretense and pretenses the said defendant did then and there, etc., unlawfully, knowingly and feloniously obtain from the said Phœbe B. Kinsey, nine hundred dollars, etc., with the intent to cheat and defraud the said Phœbe B. Kinsey of her goods and money.

By the bill of exceptions, it appears that the State, to maintain the issue upon its part, called as a witness, Mrs. Phœbe B. Kinsey, who testified that on December 15, 1833, Mr. Washburne, her agent and attorney, came to her house with the defendant, and said that the defendant wanted to borrow nine hundred dollars; that she asked Mr. Washburne what security the defendant could give, and he said he could give the note of Lurch Bros., with Samuel Dillard and A. H. Spare as security. The witness was then asked what the defendant Lurch said to her in regard to getting Dillard and Spare to sign the note, and answered, that he told me that he would take the note to Cottage Grove, and have it signed by Dillard and Spare, and return it next Monday. This was on Saturday. Washburne being called, testified in substance, that the defendant came to his office and wanted to borrow seven hundred dollars to nine hundred; that he told him that Mrs. Kinsey had some money to loan, and that they went to see her, and that she said that she would let the defendant have the money, if I approved of the security. Being asked what security the defendant said he could give, the witness answered that the defendant said he could give Spare and Dillard. He was then asked what did Lurch say at the time in regard to getting Spare and Dillard to sign the note themselves, and answered that the defendant said that he would take the note to Cottage Grove

[1] Code, sec. 173, p. 362.

and get Dillard and Spare to sign it, and return it on Monday. "He came back Monday with the note, and also with some notes as collaterals. I took the note and collaterals, and gave him the money, nine hundred dollars."

A. H. Spare, being called, testified that he did not sign the note described in the indictment, and did not give any person authority to sign it. Samuel Dillard, being called, also testified that he did not sign the note, and never authorized any one to sign the note.

Some exceptions were taken to this evidence, and other evidence offered and received, but the purposes of this case do not require us to note them.

The defense then offered to prove, by the defendant, that the signatures of A. H. Spare and Samuel Dillard, upon the note, were written by the defendant, under the direction and authority of A. H. Spare and Samuel Dillard. This was objected to, and the exception taken involves the ground of error upon this appeal. The evidence shows that the defendant represented that he could give these names as security for the payment of the note, and it was in fact, the reliability of these names, which induced Mrs. Kinsey to purchase the note. It was the security she was concerned about, and these were the names the defendant offered. Subsequently, when the note was presented with their signatures, or what purported to be their signatures, the note was accepted, and the money thus obtained. Dillard and Spare both testified that they did not sign the note, nor give any authority to any one to put their signatures to it.

In the opening of the case, the defendant had admitted that he had written the names of Spare and Dillard upon the note, but by the direction and authority of each of them. This, however, was immaterial, for the record discloses a case had been made against the defendant, unless he could obviate the effect of this evidence. Now, it seems to us, it must be conceded if both Spare and Dillard did direct and authorize the defendant to put their names or signatures to the note, it became their binding obligation, upon which they were liable, and Mrs. Kinsey got what she bought or contracted for. Although the manual or physical act of writing the names was not theirs, it became so by their direction, consent and authority, and was in legal effect, their signatures. Their direction to sign their names was a signing by them, and in such case the signatures would not be forgeries, nor the note spurious. It is not a false writing, but a genuine note. And, if this be true, the defendant gave to Mrs. Kinsey the security which he represented to her that he could procure, and upon which she parted with her money. The State had deemed it material to prove that the defendant had no authority from Spare or Dillard, or either of them, to sign their names, and if

it was, why should not the defendant be allowed to negative and contradict that evidence?

The object of the defendant by the evidence offered, was to show that he had authority from each of them to put their signatures to the note, for the purpose of showing that the note was genuine and that their signatures, although written by him, were authorized by them, and not forgeries, and that the security that he had represented he would give, had been furnished and thus obviate the intent of committing the crime with which he was charged. What effect this evidence might have had upon the result was for the jury to determine, and with which we have nothing to do.

We think the evidence was admissible, and that it was error to exclude it. The judgment must be reversed, and a new trial ordered.

---

## FALSE PRETENSES — REQUISITES OF INDICTMENT — NO INJURY DONE — FUTURE EVENT.

## Keller v. State.

[51 Ind. 111.]

*In the Supreme Court of Indiana.*

1. **An Indictment for False Pretenses** in selling a mortgage, which alleges that the prisoner pretended that he had recently sold the real estate covered by the mortgage, and that said real estate was situated in I., but which does not give the name of the purchaser or describe the property, without alleging that such name and description are unknown, is bad on a motion to quash as being too uncertain and indefinite.
2. **In an Indictment for False Pretenses** in the sale of a $500 mortgage, where the pretense was that the real estate covered by the mortgage was worth $3,500, an allegation that the real estate was not worth $3,500 is insufficient. The indictment should show that the property was not of sufficient value amply to secure the sum of $500. It seems that, in a prosecution for false pretenses in the sale of a mortgage, if the real estate covered by the mortgage is sufficiently valuable amply to secure the sum due on the mortgage, it is immaterial that the respondent represented the real estate to be very much more valuable than it actually was.
3. **In an Indictment for False Pretenses** in the sale of a mortgage, where the pretense is that the property covered by the mortgage is not subject to any prior liens, an allegation that the property was subject to prior liens, but which does not set them out or describe them, is insufficient.
4. **Representations of Future Events** are not false pretenses, which must be as to existing facts.

Buskirk, J. The appellant was indicted in the court below for obtaining property by false pretenses. The indictment contains two counts, which, as to the false pretenses charged, are nearly identical. The appellant moved to quash each count, but this motion was

overruled, and he excepted. He pleaded not guilty, and was tried by a jury and was found guilty. The court overruled the motions in arrest of judgment and for a new trial, to which exceptions were taken. Judgment was rendered on the verdict.

The appellant has assigned for error, the overruling of his motions to quash the indictment, in arrest of judgment, and for a new trial.

The first question for the consideration of the court relates to the sufficiency of the indictment.

The first count, omitting the formal parts, is as follows: "The grand jurors of Tipton County, in the State of Indiana, good and lawful men, duly and legally impaneled, sworn and charged in the Tipton Circuit Court of said State, at the spring term for the year 1875, to inquire into felonies and certain misdemeanors in and for the body of the said county of Tipton, in the name and by the authority of the State of Indiana, on their oath do present that one Robert H. Keller, late of said county, on the 13th day of October, in the year 1874, at and in the county of Tipton, and State of Indiana, did then and there unlawfully, feloniously, designedly and with intent to defraud one George W. Boyer, falsely pretend to the said George W. Boyer, that he, the said Robert H. Keller, had been the owner, and had recently sold to a certain party a certain piece of real estate, to wit, a house and lot of ground, situated in the city of Indianapolis, in the county of Marion, in the State of Indiana, for a large sum, to wit, the sum of thirty-five hundred dollars; that said real estate was of great value, and fully worth the said sum of thirty-five hundred dollars, and that there was still due the said Robert H. Keller, upon the purchase-money of said house and lot of ground so sold as aforesaid, the sum of five hundred dollars, and that there was no lien or incumbrance on said house or lot of ground except the said lien of five hundred dollars, for the purchase-money thereof, due the said Robert H. Keller, as aforesaid, and that if the said George W. Boyer would sell and deliver to the said Robert H. Keller, goods, chattels and property to the amount of five hundred dollars, he, the said Robert H. Keller, would pay the said George W. Boyer therefor, in and with a promissory note given and being for the said sum of five hundred dollars, the purchase-money due the said Robert H. Keller, upon the said house and lot of ground as aforesaid, and to be made payable to the said George W. Boyer, on the 1st day of March, in the year 1875, and secured by a mortgage upon said house and lot of ground, and that the said lien of five hundred dollars, for the purchase-money for the said house and lot of ground, and the said mortgage securing the same, was all and the only lien whatever upon the said house and lot of ground, and that the said house and lot of ground were of the full value of thirty-five hundred dollars, and ample

and sufficient surety for the payment of the said purchase-money as aforesaid, and that the note executed as aforesaid to the said George W. Boyer would be of the full value of and worth the sum of five hundred dollars.

"By means of which said false pretenses then and there made to the said George W. Boyer, by the said Robert H. Keller, as aforesaid, he, the said Robert H. Keller, did then and there, with intent to cheat and defraud him, the said George W. Boyer, unlawfully and feloniously obtain and receive from the said George W. Boyer, the following goods, chattels and property, to wit: one spring wagon, of the value of two hundred and twenty-five dollars; one two-horse wagon of the value of one hundred and fifty dollars; one log wagon of the value of one hundred and twenty-five dollars; all of the said goods, chattels and property, being of the aggregate value of five hundred dollars; and for the goods, chattels and property of the said George W. Boyer, and in payment for the said goods, chattels and property so obtained and received by the said Robert H. Keller, from the said George W. Boyer, as aforesaid, he, the said George W. Boyer, did receive the said five hundred dollar note, fully relying upon and believing said false and fraudulent pretense and representations made to him by the said Robert H. Keller, as aforesaid, and believing them to be true; whereas, in truth and in fact, the said Robert H. Keller had not then recently sold to a certain party a certain piece of real estate, to wit: a house and lot of ground situate in the city of Indianapolis, in the county of Marion, in the State of Indiana, for a large sum, to wit: for the sum of thirty-five hundred dollars, as aforesaid; and that said house and lot of ground were not then of the value or worth thirty-five hundred dollars as aforesaid; and that the said lien and mortgage of five hundred dollars on the said house and lot of ground for the purchase-money thereof as aforesaid, was not the only lien and incumbrance then upon said house and lot of ground, but there were various and numerous other liens thereon, older and prior to the said lien of five hundred dollars, amounting in the aggregate to two thousand dollars, and greatly exceeding the value of said house and lot of ground; and that said house and lot of ground were not then of sufficient value to amply and sufficiently secure the payment of the said five hundred dollar note, as aforesaid; and that said note, executed to the said George W. Boyer, as aforesaid, was not worth or of the value of five hundred dollars, but was in fact entirely worthless, and of no value whatever, contrary to the form of the statute in such case made and provided, and against the peace and dignity of the State of Indiana."

We proceed to the examination of the first error assigned. The first count in the indictment has been set out, and as it is quite lengthy, we will summarize its averments and negations.

1. It is averred that Robert H. Keller falsely pretended that he had been the owner, and had recently sold to a certain party, whose name is not given, nor is it averred that this name was unknown to the jurors, a certain piece of real estate, to wit: a house and lot of ground situate in the city of Indianapolis, county of Marion, and State of Indiana, for a large sum of money, to wit: for the sum of thirty-five hundred dollars. There is no further description of such real estate or any averment that it was unknown to the jurors.

2. That said real estate was of the value of thirty-five hundred dollars.

3. That there was still due the said Robert H. Keller, upon the purchase-money of said house and lot the sum of five hundred dollars.

4. That there were no liens or incumbrances upon the said house and lot except said sum of five hundred dollars for the unpaid purchase-money, and the mortgage securing the same.

5. That the said house and lot of ground were of the full value of thirty-five hundred dollars, and ample and sufficient security for the said sum of five hundred dollars.

6. That the note which was executed by the purchaser of said real estate to George W. Boyer, to whom said representations were made, and in reliance upon which he had sold to said Keller certain personal property, would be of full value, and worth the said sum of five hundred dollars.

The first averment is very vague and indefinite. There is no sufficient description of the real estate alleged to have been owned and sold by the appellant. Nor is the name of the purchaser given. Criminal charges must be preferred with reasonable certainty, so that the court and jury may know what they are to try, of what they are to acquit or convict the defendant, and so that the defendant may know what he is to answer, and that the record may show, as far as may be, of what he has been put in jeopardy. The averments should be so clear and distinct that there could be no difficulty in determining what evidence was admissible under them. It fully appears from the evidence in the record that the appellant had owned and transferred lot No. 46, in Yandes' subdivision of outlot No. 129, in the city of Indianapolis, county of Marion, and State of Indiana. This evidence was admitted over the objection and exception of appellant. Its admission was objected to on the ground that the averments of the indictment were neither specific nor broad enough to render such evidence admissible. If the appellant, in his representations to Boyer, did not describe the property which he had owned and sold, the description of the property could not have been introduced in that portion of the indictment; but the first averment as above set out might have been preceded or fol-

lowed by a statement that the appellant had owned and recently sold lot 46 in Yandes' subdivision of outlot No. 129, in the city, county and State aforesaid, and that the representations relied upon were made in reference to such property. If the name of the purchaser of such lot was known to the grand jury, it should have been stated, but if unknown, that fact should have been averred.

The negation to the first averment is as follows: —

"Whereas, in truth and in fact, the said Robert H. Keller had not then recently sold to a certain party a certain piece of real estate, to wit, a house and lot of ground situate in the city of Indianapolis, in the county of Marion, and State of Indiana, for a large sum of money, to wit, for the sum of thirty-five hundred dollars as aforesaid, and that said house and lot of ground were not then of the value of, or worth thirty-five hundred dollars."

By the above averment and negation, the guilt of the appellant is made to depend upon the question whether the house and lot of ground had been sold to a certain party for the exact sum of thirty-five hundred dollars, and whether they were worth that exact sum, when it should have been made to depend upon whether the appellant had sold said house and lot of ground to any person for said sum, and whether the property was of such value as to amply secure said sum of five hundred dollars alleged to be due.

The second averment is, that appellant represented that said real estate was of the value of thirty-five hundred dollars. It is contended by counsel for appellant that a statement of the value of property is a mere expression of opinion or judgment, about which men may honestly differ, and if there is no fixed market value, an estimate that is too high will not constiute a criminal false pretense.

The question discussed by counsel does not squarely arise upon the averment in the indictment, and hence we do not consider or decide the question, preferring to wait until it arises on the evidence or instruction of the court based upon the evidence.

There is no negation of the third averment, hence, it is admitted to be true, and no evidence would be admissible to prove it to be untrue.

The fourth averment and its negation are insufficient. The negation to the fourth averment does not set out or describe the liens that constituted the prior incumbrances. How was it possible for the appellant to prepare for trial under such an averment and negation? How could he show, on trial, that the liens proved by the State had no valid existence, or had been paid off? He would have no notice of the liens relied upon until the evidence was offered by the State. It would be contrary to well established principle to allow evidence to be given upon a material issue, tending to fasten fraud and falsehood upon the party,

without any averment or notice in the indictment of the fact sought to be proved.[1]

The fifth averment and its negation are sufficient.

The sixth relates to a future event, and can not constitute a criminal false pretense. Bishop, in section 420 of his Criminal Law,[2] says: —

"And both in the nature of things, and in actual adjudication, the doctrine is, that no representation of a future event, whether in the form of a promise or not, can be a pretense, within the statute, for the pretense must relate either to the past or to the present." [3]

Although some of the averments are sufficient, yet, standing alone and disconnected with other averments, they are not sufficient to constitute a good indictment.

There is a direct repugnancy in the averments of the indictment, which renders it fatally defective. It is alleged "that if the said George W. Boyer would sell and deliver to the said Robert H. Keller, goods, chattels and property to the amount of five hundred dollars, he, the said Robert H. Keller, would pay the said George W. Boyer therefor, in a promissory note, given and being for the said sum of five hundred dollars, the purchase-money due the said Robert H. Keller upon the said house and lot of ground, as aforesaid, and to be made payable to the said George W. Boyer on the first day of March, in the year 1875, and secured by mortgage upon said house and lot of ground," etc.

It is alleged that Keller was to pay Boyer in a note given and being for the said purchase-money, and it is then averred that said note is to be made payable to the said Boyer, and secured by a mortgage upon said real estate. In *State* v. *Locke*,[4] the indictment was held bad because it charged that the pretense was made to induce Kiser to become the security of Locke, on a six hundred dollar note, but that, instead of going security, he became a principal, and made a note for six hundred dollars payable to Locke. The indictment was held ambiguous and uncertain, and an indictment must be direct and certain, as it regards the party and the offense charged.[5]

It is a settled rule of criminal pleading, that the offense charged must be proved in substance as charged. This can not be done in the averment under examination. The two averments are directly repugnant. Both can not be true. The facts of the case are not directly stated. It is averred that the note for five hundred dollars had been given to Keller, and was secured by mortgage. It was shown upon the trial that, at the time the representations were made, Keller had

1 People *v.* Miller, 2 Park. C. C. 197.

2 vol. 2, p. 230.

3 See Jones *v.* State, 50 Ind. 473, and authorites there cited.

4 35 Ind. 419.

5 Whitney *v.* State, 10 Ind. 404; Walker *v.* State, 23 *Id.* 61; Bicknell's Cr. Pr. 90, 93, 94; State *v.* Locke, *supra;* Com. *v.* Magowan, 1 Metc. (Ky.) 368; People *v.* Gates, 13 Wend. 311.

agreed upon a sale of his house and lot of ground, in the city of Indianapolis, but the deed had not been made, nor had the notes and mortgages been given, and that these facts were known to Boyer, and it was then agreed that a note for five hundred dollars should be made payable directly to Boyer, and secured by mortgage; and it also appears that this was done. Such proof could not sustain the averments of the indictment.

We are very clearly of the opinion that the indictment can not be sustained. It is ambiguous, uncertain, repugnant, and defective in its averments and negations.

The judgment is reversed, with costs; and the cause is remanded, with directions to the court below to sustain the motion to quash. The clerk will give the proper order for the return of the prisoner.

---

FALSE PRETENSES — REQUISITES OF INDICTMENT — PUBLIC AND PRIVATE FRAUDS — DECEITS — INJURY — INDICTMENT — LIMITATIONS — DEMURRER — LEAVE TO WITHDRAW.

## UNITED STATES *v.* WATKINS.

[3 Cranch, C. C: 441.]

*In the United States Circuit Court, District of Pennsylvania, 1829.*

1. **Private Frauds are not Indictable** at common law; but frauds affecting the public at large or the public revenue are.
2. **In the Case of Private Frauds,** the act to be indictable must be committed by false tokens or forgery or conspiracy. This rule, however, does not apply to direct frauds upon the public.
3. **An Indictment must** be certain to a certain intent in general.
4. **An Indictment Charging Fraud** must aver the means by which the fraud was effected.
5. **An Indictment for Obtaining Money by False Pretenses** must show what the pretense was, that it was false, and in what particular it was false.
6. **An Indictment Charged that the Defendant** ostensibly for the public service, but falsely and without authority caused and procured to be issued from the navy-yard of the United States, a certain requisition. *Held*, that this did not sustain a charge of forgery.
7. **An Indictment which Charges** the obtaining money by false pretenses by erasure of certain public securities does not support a charge of forgery.
8. **An Indictment Charging Fraud** must aver the facts that constitute the fraud.
9. **Deceit is an Essential Element of Fraud**; and the deceitful practices charged must in an indictment for fraud be set out.
10. **An Indictment for forgery is not Good** at common law, unless it use the terms "forge or counterfeit."
11. **The Defendant has the Right upon Demurrer** to avail himself of the statute of limitations.

12. **A Demurrer to an Indictment** may be withdrawn by the defendant, by permission of the court, after the court has intimated an opinion that it ought to be overruled, but before judgment.

The defendant in this case was arrested on the 1st of May, 1829, in Philadelphia, by a warrant issued at the instance of the United States, upon an affidavit made before a justice of the peace in Washington, D. C., by Mr. Amos Kendall, who, on the 23d of March, 1829, was appointed to the office of Fourth Auditor in the place of the defendant, who was sent for trial to Washington, by a warrant issued by Judge Hopkinson, under the thirty-third section of the Judiciary Act of 1789.

In the progress of the cause, a number of indictments were successively found by the grand jury, and were, in some instances, so blended in argument that the whole may be considered as one cause and one prosecution.

It came before the court first upon demurrer to two indictments. The first count in the first indictment stated, "That Tobias Watkins, late of Washington County, gentleman, on the 5th of July, 1827, at Washington County, being then and there the Fourth Auditor of the Treasury of the United States, and being an evil disposed person, and devising and intending fraudulently and unjustly to obtain and acquire for himself and for his own private use divers sums of money of the United States, with force and arms, at, etc., on, etc., falsely and fraudulently wrote and addressed, and caused to be sent to a certain J. K. Paulding, then a navy agent of the United States, at the city of New York, a letter in words and figures following, to wit: —

"Treasury Department, 4th Auditor's Office, July 5, 1827. — SIR: You will receive by the mail of to-morrow, or next day, the Treasurer's draft for $500, five hundred dollars, under the appropriation for 'arrearages,' in order to meet my draft on you of this date for that sum. That time might be given for the remittance of the draft, my order is made payable at three days' sight, and will be charged, when paid, to 'arrearages.' It is in favor of S. and M. Allen & Co. I am, sir, very respectfully, your ob'dt. servant, T. Watkins. J. K. Paulding, Esq., Navy Agent, New York."

"That on the same day the said T. W. made and executed a draft on the said J. K. Paulding, navy agent as aforesaid, according to the advice of the aforesaid letter in favor of S. & M. Allen & Co., for $500, at three days' sight, and sold it to C. S. Fowler, and received of him therefor $500, which he kept and disposed of for his own use."

That the said T. W. did, on the 6th of July, 1827, "ostensibly for the public service, but falsely and without authority, cause and procure to be issued from the Navy Department of the United States a certain requisition to the Secretary of the Treasury of the United States, for

the purpose and intent of placing in the hands of the said J. K. Paulding, navy agent as aforesaid, the sum of $1,000 of the moneys of the United States, which requisition is in the words and figures following, to wit," etc. (being in substance a request by Mr. Southard, the Secretary of the Navy, to the Secretary of the Treasury to issue a warrant to J. K. P., navy agent at New York, for $1,000, to be charged to him, and to be charged to the appropriation for "arrearages prior to 1827," dated July 6, 1827).

"By means of which requisition the said sum of $1,000 of the moneys of the United States was placed in the hands of the said J. K. Paulding.

"That the said T. W., on the 9th of July, 1827, wrote and addressed, and caused to be sent to the said J. K. Paulding, a letter in the words and figures following, namely (in substance, that instead of $500 he would receive $1,000 under the appropriation for the payment of 'arrearages'), and on the 25th of July, 1827, drew again on J. K. P. for $500, and sold the draft to Fowler for $500, which he (T. W.) kept and disposed of for his own use, and wrote another letter of advice of that date to S. K. P., and directed him to charge it to 'arrearages.'

"That the said letters and drafts so as aforesaid written and sent, and drawn and sold as aforesaid, and the said requisition caused and procured to be issued as aforesaid, were, and each of them was so written, drawn and sold, and caused and procured to be issued without any authority therefor, and not for or on account of the public service, but for the private gain and benefit of the said Tobias Watkins, and with intent to defraud the said United States, and as false pretenses to enable him to obtain to his own use and benefit the said two sums of $500 each; and that by means of the said several false pretenses, the said Tobias Watkins did, at the time and times aforesaid, defraud the said United States of the said two sums of $500 each, and dispose of the same to his own use and benefit, to the great damage of the United States, and against the peace and government thereof."

The second count in the same indictment charges a similar transaction to the amount of $750 in January, 1828, and contains an additional averment that the draft on J. K. P., in this count mentioned, was paid by him; and that the requisition was procured by the said T. W. "ostensibly for the public service, but falsely and without authority" for $12,889.12, exceeding the sum for which J. K. P. had asked a requisition by the sum of $750, "which sum of $750 was by the false suggestion and procurement of the said Tobias Watkins, added to the amount required by the said Paulding, for the purpose and intent of placing in the hands of said J. K. Paulding, navy agent as aforesaid, the said sum of $750 of the moneys of the United States, to meet

the payment of the said draft so made and sold as aforesaid to the said C. S. Fowler, which requisition is in the words and figures following, to wit,'' etc.

The averment of false pretences is exactly like that in the former count.

The second indictment charged a similar transaction with Mr. Harris, a navy agent in Boston, to the amount of $2,000, with similar averments, and that the drafts were paid by Mr. Harris. Two of the drafts were in favor of Thomas Pottinger, and there is an averment that the indorsements of the name of Pottinger were either genuine, for the accommodation of the said Tobias Watkins, or were falsely made by the said Watkins.

There is also an averment that Mr. Harris sent his regular quarterly abstract of expenditures (containing three charges of three drafts of Watkins) to the said T. W. as Fourth Auditor, '' who was the proper officer to receive the same; and that the said Watkins, having received the same, the said Watkins, in pursuance of his said fraudulent intent to deceive and defraud the United States, and to consummate his said fraud, and to cover and conceal the same, that he might thereby be enabled to keep to his own use the moneys he had obtained by means of the said drafts, and thereby to defraud the United States, did afterwards, to wit,'' etc., '' falsely and fraudulently alter the said abstract by erasing therefrom the words, 'T. Watkins,' 'Draft,' 'Do. of $500,' 'Do., Do.,' opposite to the dates September 1st, 10th, and 20th, prefixed to the aforesaid three items in the said abstract, under the head of 'arrearages prior to 1827,' hereinbefore set out with intent to defraud the United States.''

''And the said letters and drafts, so as aforesaid written and sent and drawn and sold and paid as aforesaid, and the said requisition caused and procured to be issued as aforesaid, were, and each of them was so written, sent, drawn and sold, and caused and procured to be issued as aforesaid, without any authority therefor, and not for or on account of the public service, but for the private gain and benefit of the said T. W., and that the same were made and done and procured, and also the erasure of the said abstract made and done, with intent to defraud the said United States, and as false pretenses, to enable him to obtain and keep to his own use and benefit,'' etc., as at the conclusion of the first indictment.

Cranch, C. J. The substance of the first indictment is, that Tobias Watkins, being Fourth Auditor of the Treasury of the United States, and intending fraudulently to obtain, for his own use, money of the United States, falsely and faudulently, wrote a letter to J. K. Paulding, a navy agent of the United States, advising him of his (T. W.'s)

draft on him for $500, to be charged to "arrearages," and that he would receive a treasury draft for the same, to meet it. That T. W. drew such a draft and sold it to C. W. Fowler for, and received of him, the same amount and applied it to his own use. That the said T. W. did ostensibly for the public service, but falsely and without authority, procure to be issued from the Navy Department a certain requisition to the Secretary of the Treasury, for the purpose of placing in the hands of the said J. K. P., navy agent, the sum of $1,000; which requisition is set out *in verbis* to be charged to "arrearages prior to 1827;" by means of which requisition the said sum of $1,000 was placed in the hands of the said navy agent. That the said T. W. afterwards wrote another letter to the said navy agent, informing him that the remittance under the appropriation for "arrearages" would be $1,000 instead of $500 as before advised, and afterwards drew another draft on him for $500, which sum he received for it of C. S. Fowler, and applied to his own use; of which draft he also informed the said navy agent by letter. "That the said letters and drafts so as aforesaid written, and sent and drawn, and sold as aforesaid, and the said requisition caused and procured to be issued as aforesaid, were, and each of them was, so written, sent, drawn, and sold, and caused and procured to be issued as aforesaid, without any authority therefor, and not for or on ac-account of the public service, but for the private gain and benefit of the said T. W., and with intent to defraud the said United States, and as false pretenses to enable him to obtain to his own use and benefit the said two sums of $500; and that by means of the said false pretenses, the said T. W. did, at the time and times aforesaid, defraud the said United States of the said two sums of $500 each, and dispose of the same to his own use and benefit, to the great damage of the United States, and against the peace and government thereof."

There is another similar count, upon another similar transaction, for $750, with the like averments.

To this indictment there is a general demurrer and joinder.

By the demurrer the facts are admitted, if they amount to an indictable offense at common law, and are well set forth.

The first ground of demurrer relied on is, that the United States, as a nation, has no common law in relation to crimes and offenses; and, consequently, that there can be no common-law offenses against the United States, in its national character; that this offense, if it be an offense, is against the United States in that character, and not as the local sovereign of this district; and, therefore, it is not an indictable offense.

It is said that this court can only exercise the jurisdiction of Federal courts and of the State courts. That the Federal courts could not hold

jurisdiction of this cause, because it is not a criminal offense against the United States, who have no criminal common law. And that the State courts could not hold jurisdiction of it, because, if it be an offense at all, it is exclusively an offense against the United States.

This argument is certainly, at first view, quite plausible; but to our minds not entirely satisfactory. It is clear that this offense is of such an exclusive character that it could be prosecuted only in a court of the United States?

If it had been committed in one of the States, say in Maryland, is it clear that it would not have been an offense against that State? The offense charged, we will say, for the sake of argument, is in substance a cheat; that is, an act of fraud, done to the injury of the United States.

The State court has jurisdiction of cheats and frauds. Does that jurisdiction depend upon the question, to whose injury the cheat or fraud was committed? Whether it be to the injury of a citizen of Maryland, or of a foreigner, or of another State, or of a foreign sovereign, or of the United States. If a fraud to the injury of the State of Pennsylvania should be committed in Maryland, it could not be tried in Pennsylvania; and shall it be said that it is no crime in Maryland to do an unlawful act to the injury of Pennsylvania? What is there in the circumstances of the transaction to make it a case of exclusive Federal jurisdiction? Is it because the defendant is stated to have been Fourth Auditor of the Treasury of the United States? He is not charged with having done any act in that character, or by color of that office; nor is he charged with the violation of any official duty, nor with having made use of his office, or official character, to perpetrate the fraud. Is it because the person upon whom the drafts were drawn was an officer of the United States? That circumstance is perfectly immaterial, and can not change the nature of the transaction. The foundation and substance of the offense is fraud, — moral fraud, — *crimen falsi;* the turpitude of which is neither increased nor diminished by the circumstances that the draft was drawn by one officer of the United States, and accepted by another, neither of them acting in his official character, nor by virtue of his office. Is it because the fraud was committed by means of a requisition from the Navy Department upon the Treasury of the United States? That circumstance does not alter the nature of the offense; it is still a simple cheat or fraud. Is it because the United States is the sufferer by the fraud? The same answer may be given — the nature of the offense is not thereby altered.

We are, therefore, of opinion that there is nothing in the character of the parties, or in the circumstances of the transaction, which would make it a case of exclusive Federal jurisdiction; but that if it be, in its

nature, a common-law offense, and had been committed in a State, it might have been tried in a State court, as an offense against that State. We think, therefore, that if it be a common-law offense, committed in this county, it is within the jurisdiction of this court, whose common-law jurisdiction is derived from the common law of Maryland, which was, by the cession of Maryland and the acceptance of Congress, under the provision in the Constitution of the United States, transferred from Maryland to the United States, with that remnant of State sovereignty, which, after the adoption of the Federal Constitution, was left to Maryland. All the State prerogative which Maryland enjoyed, under the common law, which she adopted, so far as concerned the ceded territory, passed to the United States. All the power which Maryland had, by virtue of that common-law prerogative, to punish, by indictment, offenders against her sovereignty, and to protect that sovereignty, became vested in the United States; and authorized them to punish offenders against their sovereignty, and to protect that sovereignty by the same means, so far as regarded the territory ceded.

We therefore think that, in regard to offenses committed within this part of the district, the United States have a criminal common law, and that this court has a criminal common-law jurisdiction.

The next ground of demurrer is, that fraud is not an indictable offense at common law, unless it be effected by means of some false public token, such as false weights, or measures, or marks; or by means which effect the public generally, unless it be fraud against the king and the public at large; and, even then, it is not sufficient that the king, or the public at large, is the party injured, but the fraud must be effected by means which are likely to affect the public at large, — means which are generally mischievous, such as adulterating provisions, etc.

But to this it was answered, that frauds affecting the public at large, or the public revenue, constitute a distinct class of cases, punishable by indictment, although the frand be not effected by means of false public tokens, or by forgery, or by conspiracy, or by any particular sort of means; and this position seems to be supported by principle and by precedents.

1. By principle. Why are any acts made punishable by public prosecution? Because they are acts which, in their nature, are injurious to the public interests. The interests to be protected by the government are, the public peace, the public morals, the public property, and the public justice. Why is theft or robbery an offense against the State? Because they lead to a breach of the peace, to violence and bloodshed, in the protection or the recovery of the property stolen. Why are public lewdness and disorderly houses indictable offenses? Because they tend to injure the public morals, they are mischievous to many — to an indefinite number — to the public at large.

Why are violations of the public property offenses against the State? Because they immediately affect the public interest — the interest of an indefinite number, who can not individually complain — whose separate interest is not injured, but who, collectively only, are sufferers; and who, collectively only, have the right to seek redress. Why are acts which tend to obstruct the due administration of justice indictable offenses? Because they are, in their nature, injurious to the public at large; for the due administration of justice is necessary to the protection of all the other great interests of society. To such cases the rule *vigilantibus non dormientibus jura subveniunt*, can not apply. The public can not, like an individual, be always on the watch. If they employ agents, those agents may sleep, or, what may be worse, they may wink; and how can the public watch the winker? The public is continually exposed to imposition; and if they trust, it is because they are obliged to trust. Their confidence is not voluntary, like that of an individual, who may transact his own business. The public can act only by agents, and can not, therefore, be subjected to the rule of watchfulness.

The principle, therefore, which, in transactions between individuals, requires, in order to make the fraud indictable as a public offense, that it should be committed by means of tokens, or false pretenses, or forgery, or conspiracy, does not apply to direct frauds upon the public.

2. This distinction in principle is illustrated by many precedents, which are collected by the elementary writers upon this subject.

East, in his Pleas of the Crown,[1] prefaces his collection of them by this observation: "So all frauds affecting the Crown, and the public at large, are indictable, though arising out of a particular transaction, or contract with the party. This was admitted by the very terms of the objection in the following case." He then proceeds to give the substance of the indictment in *Treves' Case*, from the manuscript notes of Judge Buller, and the other judges. It was for knowingly, willfully, deceitfully, and maliciously furnishing certain French prisoners, whose names were unknown, then being under the king's protection in Eastwood Hospital, five hundred pounds of unwholesome bread, whereby they became injured in their health, to the great damage of the prisoners, the discredit of the king, the evil example, etc., and against the peace. The objection was, that it did not appear that what was done was in breach of any contract with the public, or of any moral or civil duty. This objection was overruled, but it did not appear upon what ground; nor is it material, because the case is cited for the principle

1 p. 821.

admitted in the objection; which principle is, that if it had been in fraud of a contract with the public, the indictment would have been good. It may have been supported upon the principle which we have before assumed, that a fraud, which is to the injury of an indefinite number of persons, who have no separate individual cause of complaint, is indictable at common law. Such was the case in 2 Chitty's Criminal Law,[1] against a baker, for delivering bread short in weight, under a contract with the guardians of the poor of Norwich, "to the great damage and prejudice of the said poor persons, of and belonging to the said city of Norwich and the liberties thereof, for whose use, sustenance, and support the said loaves of bread were so made and delivered, as aforesaid." Here the immediate injury was done to a sort of public — a *quasi* public — the poor of the city; an indefinite number of persons, who, individually, could not prosecute, unless for separate and individual injury actually received, as in the case of a public nuisance. Chitty, in his note to this case, says: "This indictment, for non-delivery of bread of sufficient weight, was settled on the decided opinion of a very experienced barrister, that the offense was indictable, on the ground stated in 2 East's Pleas of the Crown,[2] that all frauds, affecting the public at large, are indictable, though arising out of a particular transaction or contract."

The case of *Dixon*,[3] was for furnishing unwholesome bread for the children at the Royal Military Asylum at Chelsea. This was an indictment at common law, and had three ingredients, either of which was sufficient to support it, namely: (1) that it was a fraud upon the government, the asylum being a royal institution; (2) that it was to the injury of an indefinite number of children, who were supported at the asylum; and (3) that the means used, namely, selling of unwholesome bread, were such as were likely to injure the public at large. No question was made whether it was not an offense at common law.

In *Powell's Case*,[4] the principle is more clearly recognized by the Supreme Court of Pennsylvania. It was an indictment at common law against a baker employed by the army of the United States, for a cheat in baking two hundred and nineteen barrels of bread, and marking them as weighing eighty-eight pounds each, whereas they weighed only sixty-eight pounds. It was objected that such fraud was not indictable at common law. But "the court said that this was clearly an injury to the public; and the fraud the more easily perpetrated, since it was the custom to take the barrels of bread at the marked weight, without weighing them again. The public, indeed, could not, by common pru-

1 pp. 559, 560.
2 p. 281 (821).
3 3 M. & S. 11.
4 1 Dallas, 47.

dence, prevent the fraud; as the defendant himself was the officer of the public, *pro hac vice.* They were, therefore, of opinion that the offense was indictable." Here it is evident, that the ground upon which the indictment was obtained was the injury to the public.

So in the case of *Rex* v. *Bembridge and Powell*,[1] "who were indicted for enabling persons to pass their accounts, at the pay-office, in such a way as to enable them to defraud the government; it was objected, that it was only a private matter of account, and not indictable; but the court held otherwise, as it related to the public revenue."

In *Brown's Case*,[2] the indictment was against an overseer of the poor of the parish of Twickenham, for fraudulently applying to his own use money received by him for the parishioners, and rendering false accounts, to conceal the fraud, "to the damage and impoverishment of the said parishioners." This was a fraud upon an indefinite number of persons, who could not individually obtain redress.[3]

*Robinson's Case*,[4] was an indictment against a surveyor of highways, for a fraud upon the parishioners, by appropriating gravel, labor, etc., to his own emolument.

So in the case of *The Minister of St. Botolph*,[5] the rendering of a false account of moneys collected for the relief of certain sufferers by fire was said to be an indictable offense. This could only be because it was a fraud upon an indefinite number of persons, who had no individual means of redress.

So a fraud upon a parish by procuring the marriage of a pauper, so as to charge the parish, is indictable, upon the same principle.[6]

So also a fraud by an apprentice in obtaining the public money, by falsely enlisting himself as a freeman, is indictable at common law, because it concerns the public revenue.[7]

These cases seem to establish the broad principle stated by East, in his Pleas of the Crown,[8] "That all frauds affecting the Crown and the public at large," or effected "by any deceitful and illegal practice or token (short of felony), which affects, or may affect the public, are indictable offenses at common law; and that under the terms 'public,' and 'public at large,' are included indefinite numbers of persons who have suffered a common or joint damage by reason of the fraud, and who have not individually a right to prosecute the offender."

1 Cited in 6 East, 136.

2 3 Chitty, 701.

3 See, also, Martin's Case, 3 Chit. Cr. L. 707. Other cases of indictments for frauds upon the parish, may be found in Comb. 287; 5 Mod. 179; 2 Camp, 269; 1 Bott. 342; 2 Nolan's Poor Laws, 248, 371.

4 3 Chit. 666.

5 1 W. Bl. 446.

6 Tarrant's Case, 4 Burr. 2106.

7 Jones' Case, 1 Leach, 208.

8 pp. 818, 821.

In regard, however, to the present indictment, it is not necessary to extend the principle beyond fraud upon the public, if such be sufficiently set forth in the indictment.

The question then occurs, Does this indictment sufficiently set forth a fraud upon the public?

By the long established rules of criminal law in this country, every indictment must be "certain to a certain intent in general;" and "nothing material shall be taken by intendment." [1]

In the case of *The King against the Inhabitants of Lyme Regis*,[2] Mr. Justice Buller says: "Certainly, to a certain intent in general means what upon a fair and reasonable construction may be called certain, without recurring to possible facts which do not appear; and is what is required in declarations, replications, and indictments, in the charge or accusation, and in returns to writs of *mandamus*." "The charge must contain such a description of the crime, etc., that without intending anything but what appears, the defendant may know what he is to answer, and what is intended to be proved, in order that the jury may be warranted in their verdict, and the court in the judgment they are to give." [3]

It is true, "that it is a maxim, in pleading, that everything shall be taken most strongly against the party pleading; or rather, that if the words be equivocal they shall be taken most strongly against the party pleading them; for it is to be intended that every person states his case as favorably to himself as possible; but the language of the pleading is to have a reasonable intendment and construction; and where an expression is capable of different meanings, that shall be taken which will support the declaration, etc., and not the other which would defeat it." [4]

The first question upon this point is, whether, if any fraud is sufficiently set forth in the indictment, it is a fraud upon the public.

It has been suggested, in argument, that as the money was charged by the United States to the account of Mr. Paulding, who is responsible for it, it was his money, and not the money of the United States, which was drawn out of his hands by the accused; and that, as Mr. Paulding is liable to the United States, and has given security, they have suffered, and can suffer, no loss; and, therefore, if any fraud was committed, it was a fraud upon Mr. Paulding, and not upon the United States.

But to this objection we think it may be answered, that it is not averred, in the indictment, that the money was charged to Mr. Pauldiug; it is only averred that it was "placed in his hands" "as navy agent;"

1 2 Hawk. P. C., ch. 26, sec. 60; Bayard *v.* Malcom, 2 East, 33.

2 Doug. 158.

3 Rex *v.* Horne, Cowp. 682; 1 Chit. on Pl. 237.

4 Wyat *v.* Aland, 1 Salk. 325; King *v* Stephens and others, 5 East, 257; Amherst *v.* Skinner, 12 East, 270, and Woolroth *v.* Meadows, 5 East, 463.

and there is nothing stated in the indictment to show that it ceased to be public money in his hands.

By the fourth section of the Act of Congress of the 3d of March, 1809,[1] the navy agents are directed, "whenever practicable, to keep the public moneys in their hands in some incorporated bank, to be designated for the purpose by the President of the United States."

This clearly shows that the understanding of the Legislature was, that the money, when it came into the hands of the agent, did not cease to be public money; and that if it should be lost without any negligence or fault of the agent, it would not be his loss, but that of the United States; and if the money should have been charged to him in account, we must suppose that under such circumstances the United States would credit him for the loss.

It has been suggested, on the part of the accused, that he is only liable to the United States in a civil action for the money which he received. But if he is so liable, it must be upon the ground that the money which he received was the money of the United States. If Mr. Paulding was induced to pay these drafts by such artful contrivance, or false pretenses or tokens as could not be guarded against by ordinary care and prudence, the United States might, very justly, allow him credit for the loss; and as the loss in that case would fall on the United States, it would be a fraud on the public; and how would it be less a fraud upon the public if Mr. Paulding was not so deceived and imposed upon, but paid the drafts, knowing that the accused had no right to draw? It could not have been less a fraud upon the United States if others had participated in it.

For these reasons we think that the money drawn by the accused, out of the hands of Mr. Paulding, was the money of the United States; and, therefore, that the fraud, if any, was a fraud upon the public.

The next question is, whether the fraud be sufficiently set forth in the indictment.

An indictment must be at least as certain and precise as a special verdict, in which no material fact can be inferred.

This indictment is undoubtedly intended to be for a fraud, and ought to aver the means by which the fraud was effected. This is admitted by the terms of the indictment; for it avers "that by means of the said several false pretenses, the said Tobias Watkins did, at the time and times aforesaid, defraud the said United States of the said two sums of five hundred dollars each, and dispose of the same to his own use and benefit, to the great damage of the United States, and against the peace and government thereof."

[1] 2 Stats. at Large, 535.

The offense, therefore, which the accused is called upon to answer, is a fraud upon the United States, perpetrated by means of the false pre-pretenses previously set forth in the indictment; yet there is not, in the vious part of the indictment, any direct averment of any pretense, either true or false. It is true that there is a preceding averment "that the said letters and drafts, so as aforesaid written and sent and drawn and sold, and caused and procured to be issued as aforesaid, were and each of them was, so written, sent, drawn, and sold, and caused and procured to be issued as aforesaid, without any authority therefor, and not for or on account of the public service, but for the private gain and benefit of the said Tobias Watkins, and with intent to defraud the United States, and as false pretenses to enable him to obtain to his own use and benefit the said two sums of five hundred dollars each.

But it does not state what the pretense was. It does not state that the accused pretended or affirmed any thing to anybody. If there was no pretense there was no false pretense. Let us analyze this averment, and apply, as was, no doubt, intended, *singula singulis.*

It is, 1st. An averment that the letters were written without authority. 2d. That they were sent without authority. 3d. That the drafts were drawn without authority. 4th. That they were sold without authority. 5th. That the requisition was obtained without authority. 6th. That these things were not done for on account of the public service, but for the private gain and benefit of the accused, and with intent to defraud the United States. But it is not averred that the accused ever pretended to any one, that he had authority to write those letters, or to draw the drafts, or to obtain the requisition, or that they were for the public service, or that they were not for his own use.

It is true, that it is previously averred, in the indictment, that he did "ostensibly for the public service, but falsely and without authority, cause and procure to be issued from the Navy Department a certain requisition," etc. But the words "ostensibly for the public service" do not amount to an averment that the accused pretended or affirmed to the Secretary of the Navy, or to any other officer of the Navy Department, that the requisition was for the public service.

But it is averred that the letters were written and sent, and the drafts were drawn and sold, and the requisition was obtained, as "false pretenses."

The word "as" means like — not the thing itself, but something like it. But if it were to be construed as an averment that the letters, the drafts, and the requisition were false pretenses, and by means of such false pretenses, the accused defrauded the United States, such an averment in an indictment is not sufficiently certain. The averment must state what was pretended; and that what was pretended was false;

and wherein and in what particular it was false. The gist of the crime is the falsehood of the pretense; and it is therefore necessary that it should be made apparent upon the face of the indictment by positive and precise averments.

This rule is supported by many authorities. One only will be cited. It is in the case of *Rex* v. *Perrott.*[1] It is true, that this was an indictment upon the statute of 30 George II;[2] but the statute does not require that the pretenses should be particularly set out, nor specifically negatived, the words of the statute being merely these: "That all persons who knowingly or designedly, by false pretense or pretenses, shall obtain from any person or persons, money, goods, wares, or merchandises, with intent to cheat or defraud any person or persons of the same," "shall be deemed offenders against the law and the public peace," and shall be punished by fine, imprisonment, pillory, whipping, or transportation, etc.

But the judgment of the court was only an application of a general rule in regard to all indictments, whether upon a statute or the common law.

The indictment averred that the defendant, intending "to cheat and defraud one Bullen of his moneys," etc., "unlawfully, wickedly, knowingly, and designedly, did falsely pretend to the said Bullen, that he, the defendant, could obtain a protection for Bullen by favor of the Lords of the Admiralty, by feeing the clerks, as he had an uncle a Lord of the Admiralty, and that it would be no great expense, as he could get it done through favor," etc., "by means of which said several false pretenses," the defendant obtained the money, etc. The cause was brought up from the assizes to the King's Bench by writ of error; and the error assigned was, that there was no averment to falsify the matters of the several pretenses set forth in the indictment, by which it could appear to the court, upon the face of the indictment, that any or either of the pretenses alleged was false and untrue. Lord Ellenborough, in delivering his opinion, said: "Every indictment ought to be so framed as to convey to the party charged a certain knowledge of the crime imputed to him." "To state merely the whole of the false pretense, is to state a matter generally combined of some truth as well as falsehood. It hardly ever happens that it is unaccompanied by some truth. Suppose the offense, instead of being comprised within five or six separate matters of pretense, as here, had branched out into twenty or thirty, of which some might be true, and used only as a vehicle of the falsity; are we to understand from this form of charge, that it indicates the whole to be false, and that the de-

[1] 2 Mau. & Sel. 379.

[2] ch. 24.

fendant is to prepare to defend himself against the whole? That would be contrary to the plain sense of the proceeding, which requires that the fabrication should be applied to the particular thing to be falsified, and not to the whole. And the convenience also of mankind demands, and in furtherance of that convenience, it is part of the duty of those who administer justice to require, that the charge should be specific, in order to give notice to the party of what he is to come prepared to defend, and to prevent his being distracted amidst the confusion of a multifarious and complicated transaction, parts of which only are meant to be impeached of falsehood. It has been argued, that perhaps every one of these charges may be false; but the rule, as it has been derived from cases of a mixed nature, where part is true and part false, has introduced a course of separating, by specific averments, all that which is intended to be relied upon as false. The analogy of the crime of perjury is so strict, and justice also suggests the same, and I think it should be specifically announced to the party, by distinct averments, what the precise charge is. It has always been done in indictments for obtaining money by false pretenses; and whenever a more general form of indictment has come under consideration, it has not met with countenance; but the court as in *Rex* v. *Mason*, have reprobated it. If it were good, every man might be brought into court without any possibility of knowing how to defend himself." Mr. Justice Le Blanc, in the same case said: "The argument is, that alleging that the defendant did falsely pretend, etc., etc., generally, and in a lump is equivalent to averment that each of those pretenses was false. But a number of pretenses may consist of some facts which are true, and some false; and it is a necessary rule in framing indictments, not only that the offense should be truly described, but that it should be described in such a manner as to give the party indicated, notice of the charge. Therefore, when a party is charged with obtaining money under false pretenses, the indictment ought to state in what particular such pretenses are false. Here it is charged in the first count, that the defendant did falsely pretend "that he could obtain a protection from the Lords of the Admiralty, by feeing the clerk, as he had an uncle, a lord, and that it would be no great expense." "Now, that is a pretense consisting of several facts, part of which may be true, and part false. It may be true, that he had an uncle, a Lord of the Admiralty; but if he had, it does not follow that the rest may not be true; therefore the indictment should have charged what part was false."

This case shows that, according to the general rule of certainty applicable to indictments, the particular pretenses must be set forth, and it must be averred in what particulars they were false.

We are, therefore, of opinion that this can not be sustained as an indictment for a fraud or cheat by false pretenses.

But it has been contended that it is a good indictment for a forgery at common law.

The forgery, it is said, consists in having "ostensibly for the public service, but falsely, and without authority, caused and procured to be issued from the Navy Department of the United States," the requisition set forth in the indictment.

It is a sufficient answer to this idea to say that the indictment itself admits it to be a true requisition, and contains no allegation that the defendant forged and counterfeited it.

The second count does not vary, substantially, in point of law, from the first.

Upon the whole, the judgment of the court upon this demurrer, must be for the defendant.

The indictment upon the transaction with Mr. Harris differs, in matter of law, from that upon the transaction with Mr. Paulding, in the the following particulars only, namely: —

1st. That it avers that two of the drafts drawn by the defendant upon Mr. Harris were drawn in favor of a certain Thomas B. Pottinger, and sold by the defendant with the indorsements thereon of the said Pottinger, to C. S. Fowler, and "that the indorsements of the said Pottinger on the said drafts, were either the genuine indorsements of the said Pottinger, made thereon by him for the accommodation, and at the request of the said Watkins, and without any interest of the said Pottinger therein; or were falsely made thereon by the said Watkins."

2d. That it avers that Mr. Harris, being navy agent, on the 30th of September, 1827, at Boston, "made out his abstract of expenditures as such navy agent, as required by the rules and orders of the Navy Department of the United States, for the third quarter of that year, ending on the said 30th of September; which abstract contained, among many other charges of expenditures as aforesaid, the following three items and charges, under the head of arrearages prior to 1827: —

| | | | | | |
|---|---|---|---|---|---|
| 167. | Sept. 1, | T. Watkins | draft | $300 | |
| 168. | " 10, | do | do of $500 | 499.50 | |
| 169. | " 22, | do | do | 500 | |
| | | | | ——— | $1,299.50 |

which abstract is set forth in words and figures; and it is further averred that the drafts referred to in the said three items were the drafts before charged to have been drawn in favor of C. S. Fowler.

The indictment then proceeds thus: "And the said Harris, having transmitted the said abstract to the said Watkins, as Fourth Auditor of

the Treasury of the United States, who was the proper officer to receive the same, the said Watkins, in pursuance of his said fraudulent intent to deceive and defraud the said United States, and to consummate his said fraud, and to cover and conceal the same, that he might thereby be enabled to keep to his own use, the moneys he had obtained by means of the said drafts, and thereby to defraud the United States, did, afterwards, to wit, on the day and year aforesaid, at the county aforesaid, falsely and fraudulently alter the said abstract, by erasing therefrom the words: —

| | | |
|---|---|---|
| T. Watkins | draft | |
| do | do | of $500. |
| do | do | |

opposite to the said dates of September 1st, 10th, and 22d, prefixed to the aforesaid three items and charges in the said abstract under the head of arrearages prior to 1827, hereinbefore set out, with intent to defraud the United States."

And there is a subsequent averment, that the letters, drafts, and requisition, " and also the erasure of the said abstract, were made and done with intent to defraud the United States, and as false pretenses to enable him to obtain and keep to his own use and benefit, the said several sums of money therein mentioned; and that by means of the said several false pretenses, the said Tobias Watkins did, at the time and times aforesaid, defraud the said United States of the said several sums, amounting to the sum of $2,000, and dispose of the same to his own use and benefit, to the great damage of the United States, and against the peace and government thereof."

The averment respecting the indorsement of Mr. Pottinger, seems to be wholly immaterial to the charge contained in this indictment, which, like that in the other indictment, is for obtaining money by false pretenses, and there is no false pretense alleged in regard to that indorsement. But if it were material, its alternative form would render it perfectly nugatory. It is an averment that it was made either by Mr. Pottinger, or Mr. Watkins, without fixing it upon either. This averment has no connection with the charge, and may be considered as mere surplusage.

The erasure of part of the abstract is charged to have been done by the defendant as a false pretense for obtaining the money for his own use. The indictment itself shows this to be impossible, because it shows that the money was obtained before the erasure was made. But it is also averred, that it was done by the defendant to enable him to keep the money to his own use. But the offense charged is not the keeping the money, but the obtaining it by false pretenses.

The erasure, however, is also averred to have been made with intent

to consummate his said fraud, that is, the fraud in obtaining money by false pretenses. But the indictment shows that that fraud, if committed at all, had been consummated before the erasure was made.

It is also averred, that the erasure was made with intent to cover and conceal his said fraud; but the charge in the indictment is for perpetrating, not for covering and concealing the fraud. This averment, therefore, so far as it regards the charge in the indictment of obtaining money by false pretenses, is wholly immaterial and irrelevant, and therefore may, in that respect, be considered as mere surplusage.

But it is said that the averment concerning this erasure constitutes a substantive and sufficient charge of another offense, namely, a charge of forgery at common law; and that whether the indictment be good or bad as an indictment for obtaining money by false pretenses, it is good as an indictment for forgery.

It can not escape our notice, that the only injury to the United States complained of in this indictment is by the fraud committed by false pretenses; and that this forgery, if it be one, is only alleged incidentally as one of those pretenses. The defendant was not informed by this indictment that he was to come prepared to answer to the crime of forgery. It contains but one count, and that is for obtaining money by false pretenses; and if that same count contains also a specific charge of forgery, it is bad for duplicity. No man is bound to answer to two or more criminal offenses in one count; and even if they are contained in several counts, and be not of the same nature or class, the court will compel the prosecutor to elect that upon which he intends to put the accused upon his trial,[1] but in no case is he permitted to join several offenses in one count.

In civil actions, advantage can be taken of duplicity only by special demurrer; but in criminal cases it is fatal on general demurrer.[2]

The present count undoubtedly contains a clear and distinct, although not a sufficient, charge of fraud by false pretenses. If it contains also a charge of forgery, it is bad for duplicity. It does not, however, seem to us to contain a charge of forgery as a separate offense. What is said of the erasure is merely surplusage.

If this indictment can not be supported as an indictment for forgery, (and we think it can not), it is bad as an indictment for obtaining money by false pretenses, for the reasons stated respecting the preceding indictment.

The judgment upon this demurrer, also, must therefore be for the defendant.

1 Young *v.* King, 3 T. R. 106.

2 Arch. Crim. Pl. 25; Com. *v.* Simonds, 2 Mass. 163; United States *v.* Sharpe, 1 Pet. 131; State *v.* Montague, 2 McCord, 287.

THURSTON, J., dissented and said that on the day that the argument in this case was opened, he had not sat in court, and the state of the weather, his ill-health, and the distance of his residence from the court room, had put it out of his power to examine the authorities on the subject as closely as he could have wished; but he believed he had heard the main part of the argument, and had paid very close attention to it; and he had brought his mind to the conclusion, that the demurrer ought to be overruled, and that the indictment was sufficient. In many of the views of his brethren he had concurred; but as to the insufficient averment in the indictment of a fraud at common law, he differed from them.

There was not a single charge in it of an act done, that was not set out most specifically to have been done with a fraudulent design. He did not know, he said, what the precise duties of the Fourth Auditor are. He did not doubt that the Fourth Auditor might have had a right to demand of the Secretary of the Navy a requisition, and that the issuing of the requisition might, if properly done, have been a legitimate act, which could not be questioned here. But the design with which the requisition was procured to be issued must be looked at. Subsequent acts, said he, show the design to have been fraudulent; and it is sufficiently set out in the indictment that all the acts enumerated in the bill were fraudulent, and were, therefore, false pretenses. He did not concur with his brethren in their disquisition as to the signification of the word "as," which, he said, did not merely mean similitude, but properly formed part of the sentence containing the allegation of false pretenses. I think, said he, that the indictment is sufficient, and that it gives full notice to the party of the charges against him. He did not express his opinion more precisely, for the reasons which he had stated; which was of less importance in this case, as his brother had pronounced a contrary opinion. If this indictment was not a sufficient one, he concluded by saying he thought it was hardly possible to frame one that would sustain a prosecution for a fraud at common law against the United States.[1]

Wednesday, June 3d. A third indictment was this day presented to the court, to which, also, there was a general demurrer.

This indictment charged that the defendant, being Fourth Auditor of the Treasury of the United States, and "intending fraudulently and unjustly to obtain and acquire for himself and for his own private use, the money of the United States," "falsely and fraudulently" wrote a letter to Mr. Paulding, navy agent at New York, informing him that he had drawn on him for $300, to be charged to arrearges prior to

[1] The stenographer who reported this argument of the judge has certainly not done him justice.

1827, under which head a remittance would be made to him, immediately on the Secretary's return to the city; and requesting Mr. Paulding, in the meantime, to pay the draft out of any unexpended balance in his hands, to be replaced on receipt of the treasurer's remittance. That the defendant drew the draft, sold it to Mr. Fowler, received from him the money, and disposed of it for his own use; and that the draft was afterwards paid by Mr. Paulding.

That the defendant, "ostensibly for the public service, but falsely, fraudulently, and without authority, caused to be procured and issued from the Navy Department of the United States a certain requisition to the Secretary of the Treasury of the United States, for the purpose and intent of placing in the hands of the said J. K. Paulding, navy agent, as aforesaid, the sum of $300 of the moneys of the United States (which requisition is set out *verbatim*), by which the money was placed in the hands of Mr. Paulding; and the indictment charges that the said letter and draft, so as aforesaid written and sent, and drawn and sold as aforesaid, and the said requisition caused and procured to be issued as aforesaid, were, and each of them was, so written and sent, drawn and sold, and caused and procured to be issued as aforesaid, without any authority therefor, and not for or on account of the public service, but for the private gain and benefit of the said Tobias Watkins, and with intent to defraud the said United States, and as false pretenses, to enable him to obtain and keep to his own use and benefit the said sum of $300; and that, by means thereof, the said Tobias Watkins did, at the time and times aforesaid, defraud the said United States of the said sum of $300, and dispose of the same to his own use and benefit, to the great damage of the United States, and against the peace and government thereof."

CRANCH, C. J., delivered the opinion of the court. This is a third indictment at common law, against the late Fourth Auditor of the Treasury of the United States, for a fraud upon the public, in obtaining the money of the United States by means of false pretenses.

It is said to be, in point of law, exactly like the former indictment, founded upon the transaction with Mr. Paulding, except that, instead of averring, at the conclusion of the charge in the indictment, that the fraud was effected by means of the said several "false pretenses," it avers that it was effected "by means thereof," that is, of all the acts which, in the preceding part of the indictment, had been set forth and averred to have been done by the defendant, "as false pretenses."

The demurrer upon this indictment not having been submitted to the court, with that in the former case, has afforded the counsel of the United States an occasion to question the correctness of the principles, and of the conclusions which are stated in the opinion of the court in

that case, and has given the court an opportunity, of which it has availed itself, to review its opinion, under the additional light afforded by the able argument of the learned counsel, directed exactly at the opinion itself. We have been the more willing to do this, because, as there is no appeal in these cases, a heavier responsibility is thrown upon this court. We shall proceed, therefore, to a consideration of the points in which the correctness of our former opinion has been questioned, with a hope and a confidence that, if in this examination we shall find that we have committed an error, we shall not be prevented, by any pride of opinion, from acknoweldging it with candor, and correcting it with pleasure. We have taken time to examine the authorities to which we have been referred, with a degree of attention, as we hope, in some degree commensurate with the importance of this cause in the estimation of the public, and with its real importance in the point of law.

The objection taken, by the counsel of the United States, to the decision of the court in the former case is, in substance, that the court drew a false conclusion from the premises which they had established.

The argument on the part of the United States is, in substance, this: According to the opinion of the court, every indictment which sufficiently sets forth a fraud on the public, effected by means other than false pretenses, is a good indictment at common law. This indictment does sufficiently set forth a fraud upon the public, effected by means other than false pretenses. This is, therefore, a good indictment at common law. The conclusion is just if the premises are true.

The major proposition may, for the sake of argument, be admitted to be true. But the minor proposition, namely, "that this indictment does sufficiently set forth a fraud upon the public, effected by means other than false pretenses," is now, as it was in effect before, denied by the court. It was, therefore, incumbent upon the counsel of the United States to prove it before they could arrive at their conclusion. Have they done so? and how?

They take it for granted that they have proved the proposition when they show, that it is alleged in the indictment that "the accused, devising and intending to defraud the United States, wrote and sent the letter of advice set out in the indictment — made the draft and procured the requisition to be issued" — (and we will add, what they omitted, sold the draft, received the money, and applied it to his own use), "and that it is distinctly averred that by these acts he did defraud the United States of the money mentioned in these indictments."

And the counsel for the United States contend that "all that can be necessary to set out in the indictment is, that the party accused intended to defraud the United States; that in pursuance of that intent he com-

mitted certain specific acts; and that by those acts the United States were defrauded."

By the expression "set out" the court understood the counsel of the United States as meaning no more than "aver" or "allege;" and the court, therefore, understood them, in effect, to say, that it is only necessary, in an indictment at common law, for a fraud upon the United States, to aver that the defendant did certain acts with intent to defraud the United States, and that by those acts the United States was defrauded; although the same acts, without the avermnnt of a criminal intent, should appear to be innocent.

The proposition to be proved is, "that this indictment does sufficiently set forth a fraud upon the public, effected by means other than false pretenses."

It must sufficiently set forth a fraud. Fraud is an inference of law from certain facts. A fraud, therefore, is not sufficiently set forth in an indictment, unless all the facts are averred which in law constitute the fraud. Whether an act be done fraudulently or not is a question of law, so far as the moral character of the act is involved. To aver that an act is fraudulently done, is, therefore, so far as the guilt or innocence of the act is concerned, to aver a matter of law, and not a matter of fact. An averment that the act was done with intent to commit a fraud, is equivalent to an averment that the act was done fraudulently. No epithets, no averment of fraudulent intent, can supply the place of an averment of the fact or facts from which the legal inference of fraud is to be drawn. Starkie, in his late treatise on criminal pleading, in p. 163, says: "Whether particular circumstances constitute an indictable fraud, is a question of law; and, therefore, according to a fundamental rule of description in indictments, such circumstances must be set out, in order to show that the facts amount to an indictable offense."

The case of *King* v. *Knight*,[1] was an information against a receiver-general for falsely indorsing certain exchequer bills, and paying them into the exchequer "as if they had been received for customs, and as if they had been truly indorsed; to the deceit and fraud of the king."

The statute of 8 and 9 William III.,[2] required him "to put his name to the bill." The information only charged that he indorsed it. Lord Chief Justice Holt, in delivering the opinion of the court, said: "The word indorse is not sufficient; for *indorsavit* imports a writing on the back of a thing, but not putting his name upon it. But it was urged by the king's counsel that it might plainly be understood by the

[1] 1 Salk. 375.

[2] ch. 20, sec. 65.

words *quasi receptæ essent pro customiis.* I answer this by argument only; and informations are naught for that very cause; for all charges ought certainly to be set out in pleading. But further it was urged that it is said, *falso indorsavit in deceptionem domini regis*, and so found by the jury; and though a fact that appears innocent can not be made a crime by adverbs of aggravation, as *falso*, *fraudulenter*, etc., yet where a fact stands indifferent, as writing, which may be true or false, and is charged to be *falso*, and the jury find it so, all are then estopped to say the contrary. On the other side it was said, *in deceptionem* is only matter of conclusion. But here is no charge; it is not enough to say the king is cheated; he must appear to be so." Again, in the same case, as reported in 3 Salkeld,[1] it is said: "To say *falso indorsavit quasi receptæ essent*, is no direct charge of any thing that is criminal. 'Tis true it is said *in deceptionem domini regis;* but this is only matter of inference and conclusion; whereas the charges contained in every indictment ought to be so certain that the defendant may know what answer to make, and that the court may set the fine in proportion to the offense; and likewise, that if the defendant should be indicted again for the same fact, he may plead *autrefois convict* (that is, that he has been before convicted). 'Tis true that the jury have found that the defendant *falso indorsavit;* but that will not fix the guilt; for they are only to find the contents of the indictment, and if that will not amount to a crime, the adverb *falso* will not make it so."

So, also, Lord Mansfield, in *Rex* v. *Woodfall*,[2] says: "That all the epithets in the information were formal inferences of law from the printing and publishing," and "that the verdict finds only what the law infers from the fact." Again, in page 2669, he says: "If they (the jury) meant to say that they did not find it a libel, or did not find the epithets, or did not find any malicious intent, it would not affect the verdict, because none of these things were to be proved or found either way."

The language of Starkie, also,[3] is this: "It has been said that where the fact laid in the indictment appears to be unlawful, it is unnecessary to allege it to have been unlawfully done. In truth, the averment is in no case essential, unless it be part of the description of the offense as defined in some statute; for if the fact, as stated, be illegal, it would be superfluous to allege it to be unlawful; if the fact stated be legal, the word *illicite* can not render it indictable; and the same observation is applicable to the terms wrongfully, unjustly, wickedly, willfully, corruptly, to the evil example, maliciously, and such like; which are

1 p. 186. 2 5 Burr. 2666. 3 Cr. Pl. 85.

unnecessary if they are not to be found in the very definition of the offense, either at common law, or in the purview of the statute."

So, also, Archbold, in his treatise on criminal pleadings,[1] says: "An indictmeat for an offense against the statute must, with certainty and precision, charge the defendant to have committed the acts, under the circumstances, and with the intent mentioned in the statute; and if any one of these ingredients in the offense be omitted, the defendant may demur, move in arrest of judgment, or bring in a writ of error. The defect will not be aided by verdict, nor will the conclusion, *contra, forman statuti* cure it."

One of the necessary and essential ingredients of fraud is deceit. Without deceit there can be no fraud, in the legal sense of the word. No fraud can be committed but by deceitful practices; practices calculated to deceive. There may be injuries to the public without deceit, and they may be indictable at common law, but they can not be frauds. The particular deceitful practices, by means of which the fraud is alleged to have been committed, must be specially set forth; so that the deceit may appear upon the face of the indictment, in order that the court may judge whether the fraud which constitutes the crime can be inferred from the facts stated in the indictment. Whether the deceitful practices consist of false tokens, or fabricated letters, or forged notes, or false pretenses, expressed either by words or signs or acts, they must be set forth with proper averments, showing and falsifying the pretended facts which were the means of the deceit.

If, then, the law is, as we have stated it to be, that fraud is an inference of law from certain facts, that every indictment for fraud is bad which does not positively aver all the facts necessary to raise that inference of law; that the expressions "fraudulently and with intent to defraud the United States," and "that the United States were defrauded," are not averments of matters of fact, but of inferences of law, there will be nothing left, according to the idea of the counsel of the United States, as to what is necessary in an indictment for fraud upon the United States, but the averment that certain apparently innocent acts were done by the defendant.

Let us, then according to the terms of the proposition, exclude from this indictment all the averments respecting false pretenses; and let us exclude those allegations which are not averments of matters of fact, but of inferences of law; and the following averments of facts will be all that are left, namely: That Tobias Watkins, on the 8th of October, 1827, being then Fourth Auditor, etc., at Washington County aforesaid, with force and arms, wrote and addressed and caused to be sent to J.

[1] p. 23.

K. Paulding, then a navy agent of the United States at the city of New York, the letter of that date set forth in the indictment; and on the same day drew a draft on the said J. K. Paulding, navy agent, for $300, and sold and delivered it to C. S. Fowler, and received from him $300 therefor, and kept and disposed of the same for his own use; which draft was afterwards paid by the said J. K. Paulding. That the said T. Watkins did afterwards, on the 6th of November, 1827, at Washington County aforesaid, cause and procure to be issued from the Navy Department of the United States, the requisition set forth in the indictment, for the purpose of placing in the hands of J. K. Paulding, navy agent as aforesaid, the sum of $300 of the moneys of the United States, which was by that means done. And that these things were so done by the said Tobias Watkins, not for or on account of the public service, but for the private gain and benefit of the said Tobias Watkins, and to enable him to obtain and keep, to his own use and benefit, the said sum of three hundred dollars; and that, by means thereof, the said Tobias Watkins did, at the time and times aforesaid, dispose of the same to his own use and benefit.

These are all the facts remaining in the indictment, upon which the court is called upon to decide whether the indictment is good as an indictment at common law, for a fraud upon the United States.

We look in vain among these facts for such as show that deceit which is an essential ingredient in fraud.

There is no fact averred in relation to the letter, or the draft, or the requisition, which shows any deceitful practice, any attempt to deceive anybody, or to impose upon any agent of the government. Upon that most essential point the facts give us no information. Fraud, even in civil cases, is never to be presumed; and in criminal cases the accused is always presumed to be innocent until the contrary appears.

But it has been suggested that the letter, the draft, the requisition, and the receipt and application of the money to his own use by the defendant, he then being Fourth Auditor of the Treasury Department of the United States, do, of themselves, show a fraud.

They might, indeed, be evidence contributing to establish a charge of fraud, upon the trial before the jury; but the court is not now to inquire what might be the evidence of fraud. The question is, what are the allegations, not what is the proof; for, however strong the proof might be, the court could not give judgment against the accused, if the offense should not be sufficiently alleged. The simple averment that the defendant wrote the letter is not the averment of any fact which might be inferred from the fact of his writing the letter. So in regard to the averments respecting the draft and the requisition, and the receipt and misapplication of the money; they do not amount to an averment

of any inference which might be drawn from either of those acts, or from the combination of the whole. Whatever material inferences of fact might in the opinion of the counsel for the United States, be drawn from those facts, ought to have been averred as facts; and without such an averment those inferences can not be taken into consideration by the court in deciding upon the validity of the indictment, for the same reason which would exclude them in the case of a special verdict.

Excluding, therefore, those averments of false pretenses, which by the terms of the proposition, are to be excluded, and those averments which are only averments of inferences of law, and there remains no averment of fact showing that most important of all ingredients of fraud, the deceitful practice by which the fraud was or could be effected. The counsel for the United States, therefore, having failed to support the minor proposition of the syllogism upon which their argument is founded, must, of course, fail in their conclusion.

A great part of the argument of the counsel for the United States, in the present case, was founded upon a misapprehension of the opinion of the court upon the former case. They, in effect, assumed, as one of the grounds of their argument, this proposition: that the court decided the former indictments to be bad, because they were insufficient as indictments for fraud by false pretenses, although they contained sufficient averments to make them good as indictments for fraud upon the United States without false pretenses. But no such proposition was stated by the court in its opinion. No opinion upon that point was given by the court. On the contrary, the court said: "It can not escape our notice, that the only injury to the United States, complained of in this indictment, is by fraud committed by false pretenses." And again, "The offense, therefore, which the accused is called upon to answer, is a fraud upon the United States, perpetrated by means of the false pretenses previously set forth in the indictment."

If, indeed, the court had seen, that, independent of the averments respecting false pretenses, there were, in the indictments, other sufficient averments of facts showing other deceitful practices by which the fraud was committed, the question might have occurred which is now made, to wit, whether the indictment might not be good notwithstanding the allegation that the fraud was committed by means of certain false pretenses imperfectly set out. The court, however, did not see, in the indictments, any allegations of other facts showing other deceitful practices by means of which the fraud (in the language of Starkie, in the passage cited by the counsel for the United States in p. 103, 104), "could have been effected." That passage was cited to show that it is not necessary to be very particular in setting forth the means by which the fraud was committed.

After saying, as before noticed, that, whether particular circumstances constitute an indictable fraud, is a question of law, and, therefore, must be set out, in order to show that the facts amount to an indictable offense. Mr. Starkie observes, in regard to the question, how far it may be necessary to particularize in describing the means of effecting the fraud, "that if some means be specified, and by those the fraud could have been effected, no objection can be taken on the ground that the description is not sufficiently circumstantial. The case from which alone he seems to have drawn this conclusion, was that of *Young* v. *King*.[1] The fraud in that case was effected by means of a false pretense, respecting a certain bet which the defendant had made "with a colonel in the army, then in Bath." Upon a writ of error, one of the errors alleged was, that the name of the colonel was not stated in the indictment. But the objection was overruled by the court, who said, that "perhaps his name was not mentioned, so that he could not have been described in the indictment with greater accuracy."

The general principle thus extracted by Mr. Starkie from the lean case of *Young et al.* v. *King*, is cited to justify the court in saying, that it is only necessary, in an indictment at common law for fraud against the United States, to state that the defendant did certain acts (whether fraudulent in their nature or not) with an intent to defraud the United States, and they were defrauded thereby.

It is evident, however, that Mr. Starkie intended to say, in effect, that the means specified must be means by which it might be apparent to the court that a fraud could be committed; that is, deceptive means, deceitful practices; for without deceit, or the use of deceptive practices, fraud can not be committed.

The court, therefore, not having perceived in the former indictments any facts alleged (except the false pretenses, which are now admitted to have been imperfectly set out), which showed any deceptive means or deceitful practices by which a fraud upon the United States could be effected, had no occasion to advance the doctrine which the counsel for the United States have supposed was advanced by the court, nor to deny the principle contended for on the part of the prosecution, that "*utile per inutile non vitiatur.*"

Whenever the circumstances of a case shall raise the question, whether an indictment for fraud alleged to have been committed by false pretenses imperfectly set out, can be supported by evidence of other deceitful practices which may happen to have been set out in the indictment, but not averred to be the means by which the alleged fraud

[1] 3 T. R. 98.

was committed, it will be proper to decide it; and the cases cited by the counsel will deserve great consideration; but as we think that that question is not raised by circumstances of the present case, it is not necessary to decide it now.

It has been stated in argument, by the counsel for the prosecution, that it has been settled by the opinion of this court upon the former indictments, "that defrauding the United States was indictable at common law without the use of false pretenses."

The proposition thus extracted, and drawn away from the ideas by which it was accompanied in the opinion which was given, and presented to the view thus badly, appears to have misled the counsel for the United States, and may tend to mislead others. If the expression, "false pretenses," be taken in its most extensive sense, it might, at first view, be doubted whether a fraud could be committed without a false pretense, for falsehood and deceit are the essence of fraud. But the phrase, "false pretenses," has become familiar to the lawyer's ear; and ever since the statute of 30 George II.,[1] which made certain frauds upon individuals indictable which were not indictable by the common law, the phrase has acquired a technical character, and has generally been understood as descriptive of such false pretenses as were punishable by the statute, and as would make those frauds indictable which were not so before.

It is evident, by the manner in which it was sued by this court in its former opinion, that it was so understood by the court, and was used as a description of a particular class of deceitful practices.

It is evident, also, that the court was considering the question, whether, in an indictment for direct fraud upon the public, it was necessary that the fraud should appear to have been committed by the same sort of means which would be required to support an indictment at common law for a fraud upon an individual. Thus, after stating one of the grounds of the demurrer, namely, that fraud is not indictable at common law unless effected by means of some false token, such as false weights or measures or marks, etc., the court said: "But to this it was answered, that frauds affecting the public at large, or the public revenue, constitute a distinct class of cases punishable by indictment, although the fraud be not effected by means of false public tokens, or by forgery, or by canspiracy, or by any particular sort of means; and this position seems to be supported by principle and by precedent." Again, the court said: "The principle, therefore, which, in transactions between individuals, requires, in order to make the fraud indictable as a public offense, that it should be committed by means of

[1] ch. 24.

tokens, or of false pretenses, or forgery, or conspiracy, does not apply to direct fraud upon the public." The court then proceeded to illustrate the distinction in principle between public and private frauds, by many cases of indictable frauds, in which the deceitful practices by which the frauds upon the public were effected did not consist of false tokens, or false pretenses, or forgery, or conspiracy; and then observed, that "these cases seem to establish the broad principle stated by East,[1] that all frauds affecting the Crown and the public at large, or effected by any deceitful or illegal practice or token (short of felony), which affects, or may affect the public, are indictable offenses at common law."

These citations from the former opinion of the court seem to us to show, conclusively, that the court ought not to be understood as saying, that an indictment at common law for a fraud upon the United States, can be supported without the averment of facts which show that the fraud was committed by deceitful practices of some sort or other; although the court did, in effect, say that it was unnecessary to show that the fraud was effected by means of tokens, or of false pretences, or forgery, or conspiracy; because there may be deceitful practices not included in either of those classes.

The counsel for the United States also misunderstood the opinion of the court, in supposing the court to have said, that an indictment which sufficiently sets forth a fraud upon the public, unaccompanied by false pretenses, and which would be a good indictment without any averment of false pretenses, would be wholly vitiated by undertaking to set out such pretenses, and setting them forth insufficiently. Whatever the opinion of the court might be in such case, it certainly was not expressed.

Again, it was stated by the counsel for the United States, that, according to the opinion of this court, the introduction of unnecessary matter into an indictment vitiates the whole indictment. In this respect, also, the opinion of the court was misunderstood. The court gave no such opinion.

It was contended on the part of the United States, that the indictment is sufficient, because "the intent to defraud is plainly charged; the actual perpetration of the fraud is plainly, and the acts by which the fraud was committed, are set forth, the letter, the draft, the requisition;" and it was asked, are these acts such as could not defraud the United States?"

It has been before observed, that the averment of an intent to defraud, will not supply the want of the averment of facts showing the

[1] P. C. 818, 821.

deceitful practice which constitutes the essence of the fraud. It is not the injury alone, but the injury by means of the deceit, which constitutes the crime.

But it is said, that the actual perpetration of the fraud is plainly averred.

The simple averment of fraud, or that the United States were defrauded, is only the averment of a matter of law; a legal inference from facts; which facts must, themselves, appear to justify it.

The acts, by which the fraud was committed, it is said, are also set forth, namely, the letter, the draft, and the requisition. These may be among the acts by which the injury was done to the United States, but they are not such acts as show the deceitful practices by which the fraud was effected. The only facts averred respecting those papers are, that the letter was written and sent; the draft was drawn and sold and paid, and the requisition was procured. These facts, alone, do not show the fraud.

Again: it is contended on the part of the United States, that, "whether these acts did defraud the United States as charged in the indictment, is matter of proof — is exclusively for the jury, and not for the court."

Whether the acts were done, is certainly a question for the jury. But whether those acts did defraud the United States, namely, whether they amount to fraud, is unquestionably a matter of law. It is true, that in finding a general verdict, upon the general issue, in a criminal case, the jury must incidentally decide upon the law as well as the fact, because the question of guilt depends upon both law and fact, which can not be separated in a general verdict; yet whenever by the pleadings, or by a special verdict, which the jury have always a right to find, if they will, the law is separated from the fact; the law is to be decided by the court alone.

As the court said so much in its former opinion, respecting the degree of certainty required by the rules of the common law in indictments, it forbears to add anything upon that point.

But the propriety of adhering to the rule has been questioned, and the passage from Hale's History of the Pleas of the Crown,[1] so often quoted in support of the defective indictments, has been again cited upon us. But his complaint of the over-nicety of the practice under the rule, is the strongest evidence of the existence of the rule itself. And the same venerated judge, in another part of his book, in speaking of the presumptive evidence, says,[2] "it is better that five guilty persons should escape unpunished, than one innocent person should die;" and

[1] vol. 2, p. 193.

[2] pp. 289, 290.

if his opinion had been required, there can be no doubt that his patriotism would have prompted him to say, that it is better that ten guilty persons should escape punishment, than that any one of those rules of the common law, which were adopted for the protection of the personal liberty and safety of the subject or citizen, should be abrogated. Those rules of the common law were not imposed upon the people by an impending arbitrary power, but sprang up spontaneously in the midst of them, according to the exigency of the times. They were rights claimed and enforced by the unconquerable spirit of our sturdy ancestors, who to all the attempts made to deprive them of those rights, answered, with stern resolution, *Leges Angliæ nolumus mutari.* Such of our ancestors as were either driven or allured to this country, claimed the common law as their birthright; and of all its provisions, they clung with most pertinacity to those upon which the security of their personal liberty depended.

It was upon the principles of the common law that our revolution was based and defended; and when the colonies assumed the right of self-government, many, if not all of them, expressly declared that the people were entitled to the privileges and the protection of the common law, and this court would betray the people if it should give them up. Next in importance to certainty in the law, is certainty in the accusation.

Mr. Starkie, in his treatise on Criminal Pleadings,[1] says: "The general rule has long been established that no person can be indicted, but for some specific act or omission; or punished, unless such act or omission be charged in apt and technical terms, with precision and certainty on the face of the record. Before this important part of the subject is resolved into its elementary divisions, it may be proper briefly to notice the principal reasons on the ground of which the law exacts a certain particular description of the offense; for these, it is evident, supply the true test by which the sufficiency of any particular charge is to be ascertained. It is necessary, then, to specify on the face of the indictment, the criminal nature and degree of the offense, which are conclusions of law from the facts; and also the particular facts and circumstances which render the defendant guilty of that offense. 1st. In order to identify the charge: lest the grand jury should find a bill for one offense, and the defendant be put upon his trial in chief, for another, without any authority. 2dly. That the defendant's conviction or acquittal may enure to his subsequent protection should he be again questioned on the same grounds. The offense, therefore, should be defined by such circumstances as will in such case, enable him to plead

[1] p. 73.

a previous conviction or acquittal of the same offense. 3dly. To warrant the court in granting or refusing any particular right or indulgence which the defendant claims as incident to the nature of his case. 4thly. To enable the defendant to prepare for his defence in particular cases, and to plead in all; or if he prefer it, to submit to the court by demurrer, whether the facts alleged (supposing them to be true), so support the conclusion in law, as to render it necessary for him to make any answer to the charge. 5thly, and finally, and chiefly. To enable the court looking at the record, after conviction, to decide whether the facts charged are sufficient to support a conviction of the particular crime, and to warrant their judgment; and also in some instances, to guide them in the infliction of a proportionate measure of punishment upon the offender."

Such being the rule of the common law, such its foundation, and such its reasons, this court thinks itself, not only warranted, but obliged, to adhere to it, whenever its benefit is claimed.

Upon the whole, the court, after a very deliberate and anxious revision of its former opinion, has seen no cause to modify it in any respect; and perceiving no material difference, in point of law, between the present and the former indictment, we are of opinion that the judgment, upon this demurrer also, should be rendered in favor of the defendant.

THURSTON, J., dissented.

The third indictment having been found like the first two bad on demurrer a fourth was presented which charged the defendant with having falsely and fraudulently altered a certain abstract of account rendered by Mr. Harris, navy agent at Boston, to defendant as Fourth Auditor, etc., by obliberating the words "T. Watkin's draft" and "do do" prefixed to three items, etc.

Various objections have been made to the sufficiency of the indictment in this case.

It will not be necessary, however, to notice any other than the first, which is, that the crime of forgery is not charged with sufficient technical precision.

It has been contended, by the counsel for the United States, that in none of the enumerated instances stated in the books, in which certain technical words are necessary to be used in the indictment, in the description of the particular crime, is forgery to be found as one; and hence the inference has been drawn that in an indictment for forgery, it is not necessary to state that the instrument was forged or counterfeited. The principal case relied on to strengthen this position is *Rex* v. *Dawson.*[1] But upon a careful examination of that case it will

[1] 1 Strange.

be found that the only question was, on the special finding of the jury, whether the facts so found amounted to forgery; and therefore we think it not applicable to the question in the present case. We have felt very sincerely disposed duly to weigh and appreciate the able arguments which have been urged in support of the indictment. Upon a careful examination, however, of all the precedents of indictments for forgery at common law, which we have been able to lay our hands on, not one is to be found where the term "forged" or "counterfeited" has not been used, except in the present instance; and there is a circumstance, even in this instance, very worthy of notice; which is, that the learned counsel for the United States, in framing their indictment in a former recent case against this defendant for the same erasures or alterations of the abstract attached to the present indictment, and which, after having been acted on by the grand jury, was returned, "*ignoramus*," seemed to think it necessary to use the term, "forged," in addition to all the other terms used in this indictment. This opinion is certainly entitled to respect, and may be well added to the number of precedents before alluded to. In the absence, then, of any adjudged case to the contrary, we think there is much reason to say that where such has been the long, universal, and uninterrupted usage, such usage may be considered as having grown into law.

In further support of the necessity of using the technical term, "forged," or counterfeited, is the case in the Massachusetts Reports.[1] That was an indictment for altering a writ, after service, and before the return day; and the terms used in the indictment, after stating the introductory part, were, "That he" (the accused) "before the time of trial, did unlawfully erase in and from the said writ the word 'Essex,' and did falsely and unlawfully insert in the room and place thereof, the word 'Worcester,' thereby falsely and unlawfully changing the same writ directed to the sheriff of the county of Essex, or either of his deputies, or the constable of Harvard within the said county, to a writ directed to the sheriff of the county of Worcester, or either of his deputies, or the constable of Harvard within the said county, with an intent to injure, oppress, wrong, and defraud the said J. R., against the peace," etc.

On a motion, in arrest of judgment, on the ground that these terms contain no technical description of forgery, the court say: "If the facts stated in the indictment constitute any crime at common law, it is forgery, but there is not the necessary technical precision in the indictment, to support a conviction of forgery, and judgment must be arrested."[2]

Now, what was the term, in that case, which was required to give

[1] Com. *v.* Mycall.

that indictment legal precision? It seems to us, none other than the word "forged." Are not the terms used in the indictment, in that case, as amply descriptive of the crime of forgery as those used in this case? We think they are.

These considerations are strongly corroborated by the observations of the able editor of the late American edition of Comyn's Digest.[1]

We are, therefore, brought to this conclusion; that there is a want of technical precision in the indictment, in the case before us, and as it is admitted that it can not be sustained as an indictment of fraud at common law, the majority of the court are of opinion that the judgment on the demurrer must be for the defendant.[2]

CRANCH, C. J., dissented.

The fourth indictment being disposed of the prosecution presented a fifth identical with the fourth except that the word "forged" is used in it as descriptive of the offense, and prayed the court to send for the grand jury and instruct them that the facts and intents therein stated

[1] Vol. 4, title, "Indictment." G. 6, p. 688, note y. Speaking of technical terms, or words of art, he says: "Though for many of those terms, sufficient reason can be given, others, there are, which may not be so readily traced to their original, unless we consider them as invented by the lawyers of old, to confine the conduct of a cause to themselves; or as the offspring of chance, made sacred by time and habit; or ascribe them to a zeal for that system and method which ennoble even the meanest art, and give the air of science and wisdom. But from whatever source they spring, it seems proper to preserve them, to avoid, as well the possibility of error, as the disputes that may arise on every innovation. And however untenable upon principles of reason, it is sufficient that they are warranted by precedent; for it was observed, long ago, by Mr. Justice Stanford, upon the question whether any averment by the term *licet*, was sufficient "if it was the usual form to allege it by *licet*, then I would hold with it." And after nstancing certain cases in which the omnipotence of custom over reason was conspicuous, be concludes: "Wherefore, we ought to adhere to the usual form; but in this case it was not the usual form to allege the election under the word *licet*, as you may see in the book of entries; wherefore, since the prosecutor was not tied down to any usual form, but was at liberty to take such words as were proper for the matter, and has not done so, we ought not to hold with the words more than will warrant." And again, upon another occasion, though at the first, an avowry was held bad for want of being averred, yet afterwards, says the reporter, the prothonotaries searched their precedents, and told the justices that the common usage was to make the avowry without averment; with which the justices were satisfied.

Mr. Starkie, in his Criminal Pleading, pp. 69, 70, has the following judicious observations: "The law distributes crime into three great classes; treason, felonies, and misdemeanors inferior to felony. Each of these is attended with peculiar incidents, both before and after conviction. It is, therefore, one important office of an indictment to specify, in technical language, the particular genus of crime imputed to the defendant, that he may avail himself of those advantages which the law allows him; that he may be excluded from those which the law withholds; and that the court may be authorized, after conviction, to inflict the appropriate punishment." A strict adherence to such language may, in some cases, appear too nice and critical, to serve the ends of justice; yet it seems founded upon strong and substantial reasons. For instance, by successive decisions, the legal value and weight of a term or phrase, of art, is ascertained, and should a doubt arise as to its meaning, reference, for the purpose of removing it, may be had to former authorities, whilst every new expression would introduce fresh uncertainty, and the benefit to be derived from precedent, would be wholly lost."

[2] See, also, in support of the opinion of the court, Burridge's Case, 3 P. Wms., 484, and Margaret Cooper's Case, 2 Str. 1246.

constitute the crime of forgery, and if they find those facts and intents that they are bound to call the offense by its legal name, and after argument.

CRANCH, C. J. The counsel for the United States have moved the court to instruct the grand jury, "that the facts and intents, found by them in the indictment, which was decided by the court to be insufficient because it did not use the word 'forged' or 'counterfeited,' constitute in law, the offense of forgery at common law; and that if they find, in a bill of indictment, all the facts and intents necessary to constitute a legal offense, they are bound to call the offense, in the indictment, by its legal and technical name."

The circumstances which have led to this motion are these. In the early part of this term an indictment was found against the present defendant, for a fraud upon the United States, by means of false pretenses, in a transaction with Mr. Harris, a navy agent at Boston. That indictment was, upon demurrer, adjudged insufficient, for want of proper averments in regard to the pretenses used. Among these pretenses was an allegation of the same facts, relative to the alteration of the abstract B., which, with the addition of the words "forge and," before the word "alter," constituted another bill, which was afterwards sent up to the grand jury, and returned "*ignoramus.*" This bill being thus returned, and filed in the court, the counsel for the United States sent up to the grand jury another bill exactly like it, but leaving out the word "forge and," before the word "alter," which the grand jury returned "a true bill;" the only difference between the two bills being, that the former charged that the defendant did "falsely and fraudulently forge and alter" the abstract; and the latter, that the defendant did "falsely and fraudulently alter" the abstract. Both averred the intent to defraud the United States. This latter indictment the court adjudged to be insufficient, because it did not use the word "forge," or the word "counterfeit."

It is stated in argument, by the counsel for the United States, that when the bill, which used the word "forge," was sent up to the grand jury, the indictment for defrauding the United States by false pretenses, which the court had, upon demurrer, adjudged to be insufficient, was also sent up, in order to show the grand jury that they had already found all the facts stated in the indictment for forgery, although they had not used the word "forge." The grand jury after consultation, informed the attorney of the United States that they could not find the bill with the word "forge" in it, and wished to know whether they might strike it out; to which he replied that they could not alter the bill, but must find or reject it as it was. That, in his opinion, the facts stated in the indictment amounted to forgery at common law, and would

justify them in finding the bill as it was sent to them; and, that if they were not satisfied with this opinion, they had better ask the advice of the court. They said they were willing to find the bill without the word "forge." To which the attorney replied, that if they did not agree to find the bill as it was, he would send them another like it, but omitting that word, and the court would decide whether the facts amounted to forgery. The grand jury, without asking the advice of the court, returned the bill, containing the word "forge," *ignoramus;* upon which the other bill, which omitted that word, was sent up, and the grand jury returned it "a true bill." Upon long argument and great deliberation, the court, upon demurrer, decided that it did not charge the offense with sufficient legal precision, because it did not aver, in express terms, that the defendant "forged," or "counterfeited," the abstract. But the court did not give any opinion upon the question, whether the facts stated in the indictment did, in law, constitute the offense of forgery at common law. Whereupon the counsel of the United States made the motion to instruct the grand jury, which is now the subject of consideration, and which, at the request of the court, they reduced to writing, in the following terms, namely —

[Here the Chief Justice read the motion in the words before stated, and proceeded —]

It will be perceived that this is, in effect, a motion to the court to send back to the grand jury an indictment, which the same grand jury had, some days before, at the same term, returned "*ignoramus*," with an instruction that, if they should find the facts stated in it to be true, they should return it a true bill.

Such a motion is certainly unprecedented in this court, and no case has been found even in the acts of the most arbitrary of the English judges, in the worst of times, which could justify the court in giving the instruction asked, in the particular circumstances of this case. On the contrary, in 3 Hargrave's State Trials,[1] it appears that Ch. J. Scroggs, Ch. J. North, Mr. Justice Jones, and Mr. Baron Weston, were impeached by the House of Commons, in 32 Car. II., and one of the charges against them was, that they had discharged the grand jury before they had finished their business, because they had asked the court to present their petition to the king, praying him to call a parliament. Yet the counsel for the United States contend, that if this court should be of opinion that the grand jury refused to find that bill, from an unwillingness to convict the accused of the crime of forgery, the court ought to discharge this grand jury, and and hold the party bound to answer to another, which should be immediately summoned.

1 p. 152.

The opinion of the Chief Justice of the Supreme Court of the United States, in the case of Colonel Burr, has been cited in support of this motion. But the motion in this case is far more extensive than the motion in that; and the instruction now asked goes far beyond that which was actually given by the Chief Justice.

There, the instructions prayed were confined to the admissibility and competence of evidence in general. Here, they extend to all the particular facts charged in the bill, as constituting an offense.

To give this instruction, therefore, is to prejudge the whole question, which would arise upon a demurrer to the indictment.

There, the opinion actually given, extended only to papers of a certain description, which might, possibly, be offered as evidence to the grand jury.[1] Here it is not confined to the admissibility or competency of the evidence, but takes in the whole merits of the case, upon the particular facts alleged in the bill.

There, the motion was originally made immediately after the Chief Justice had delivered his general charge to the grand jury, at the opening of the court, and before any bill had been sent up; and the instruction was given while the bills were pending before the grand jury. Here, the instruction is prayed after the grand jury have acted upon the case, and returned the bill *ignoramus*.

There is, therefore, no similarity whatever in the circumstances of the two cases, except that the prayer for instruction did not, in either case, come from the grand jury themselves.

There is no doubt that this court may, in its discretion, give an additional charge to the grand jury, although they should not ask it; and, when they do ask it, the court, perhaps, may be bound to give it, if it be such an instruction as can be given without committing the court upon points which might come before them on the trial in chief. This is the utmost extent of the *dictum* of the Chief Justice, in the trial of Colonel Burr; for he there said — "That it was usual, and the best course, for the court to charge the jury generally, at the commencement of the term, and to give their opinion upon incidental points as they arose, when the grand jury should apply to them for information; that it was manifestly improper to commit the opinion of the court on points which might come before them, to be decided on the trial in chief; that he had generally confined his charges to a few general points, without launching into many details. One reason was, that some of the detailed points might never arise during the session of the grand jury, and any instructions on them would, of course, be unnecessary; another was, that some of these points might be extremely diffi-

1 Robertson's Rpt. of Burr's Trial, vol. 1, p. 201.

cult to be decided, and would require an argument of counsel, because there was no judge or man who would not often find the solitary meditations of his closet very much assisted by the discussions of others; that he would have no difficulty, however, in expanding his charge, if he had been particularly requested to do it, if he could have anticipated any necessity for it; and that he would have no difficulty in giving his opinions, at this time, on certain points on which he could obtain a discussion by counsel, provided he did not thereby commit his opinion on the trial in chief."[1]

When an instruction to a grand jury is asked, either by the accused or the prosecutor, it is a matter of discretion with the court to give the instruction or not; and, in exercising that discretion, they will take into consideration all the circumstances under which the instruction is prayed, and the extent of the prayer.

The counsel for the United States, however, have contended, that whenever the court shall perceive that the grand jury have erred in matter of law, by rejecting a bill which they ought to have found, and it is presumed that their doctrine includes also the finding of a bill which they ought to have rejected, the court ought to instruct them as to the law, if asked so to do by either party. But to what purpose should the court instruct them after they have acted upon the case, and found or rejected the bill, unless a new bill should be sent for the same offense, by means of which they could correct their mistake? This is now proposed by the counsel for the United States to be done, by sending up to the same grand jury a new bill, exactly like that which they have rejected.

This is in effect, to return them the same bill. But this is contrary to the well established immemorial usage of courts in England and in this country. The usage is stated by Sir W. Blackstone; who says, that when the bill is returned "*ignoramus*," or "not found," the party is discharged without further answer; but a fresh bill may afterwards be referred to a subseqent grand jury.[2] It is also stated by Archbold;[3] by Chitty,[4] and by other elementary writers; and, after a diligent search, we have found no case, nor *dictum* to the contrary. Nor have we found any case in which it had been decided by a court, either in this country or England, that the grand jury should be discharged because they had found or rejected a bill, contrary to the instruction of the court, and a new grand jury, for that reason, summoned to attend at the same term. The usage is supported by the same principles which support the trial by jury; for of what value would the trial by jury be,

[1] Burr's Trial, vol. 1, p. 174.
[2] vol. 4, pp. 305, 308.
[3] Cr. Pl. 34.
[4] 1 Cr. L. 325.

as the "palladium" of personal liberty, unless the jury should be independent, and could give their verdict, especially in criminal cases, freely and according to the dictates of their consciences? Sir William Blackstone says, that the trial by jury is the grand bulwark of an Englishman's liberties.

"The antiquity and excellence of this trial, for settling of civil property," he says, "has been before explained at large; and it will hold much stronger in criminal cases, since, in times of difficulty and danger, more is to be apprehended from the violence and partiality of judges appointed by the Crown, in suits between the king and the subject, than in disputes between one individual and another, to settle the metes and boundaries of private property. Our law has, therefore, wisely placed this strong and twofold barrier, of a presentment and a trial by jury, between the liberties of the people and the prerogative of the Crown." "The founders of the English law have, with excellent forecast, contrived that no man shall be called to answer to the king for any capital crime, unless upon the preparatory accusation of twelve or more of his fellow-subjects, the grand jury; and that the truth of every accusation, whether preferred in the shape of indictment, information, or appeal, should be afterwards confirmed by the unanimous suffrage of twelve of his equals and neighbors, indifferently chosen, and superior to all suspicion. So that the liberties of England can not but subsist, so long as this palladium remains sacred and inviolate, not only from all open attacks (which none will be so hardy as to make), but also from all secret machinations which may sap and undermine it, by introducing new and arbitrary methods of trial, by justices of the peace, commissioners of the revenue, and courts of conscience. And however convenient these may appear at first (as doubtless all arbitrary powers, well executed, are the most convenient), yet, let it be again remembered, that delays and little inconveniences, in the forms of justice, are the price that all free nations must pay for their liberty in more substantial matters; that these inroads upon this sacred bulwark of the nation are fundamentally opposite to the spirit of our constitution; and that, though begun in trifles, the precedent may graudally increase and spread, to the utter disuse of juries in questions of the mose momentous concern."

And Sir Matthew Hale,[1] says: "But, in my opinion, fines set upon grand juries by justices of the peace, oyer and terminer, or jail delivery, for concealments or non-presentments, in any other manner" than by another inquest, under the statute of 3 Henry VII.,[2] "are not warrantable by law; and although the late practice hath been for justices

[1] 2 H. H. P. C. 160.

[2] ch. 1.

to set fines arbitrarily, yea not only upon grand inquests, but also upon the petit jury, in criminal cases, if they find not according to their directions, it weighs not much with me, for these reasons: 1. Because I have seen arbitrary practice still going from one thing to another. The fines set upon grand inquests began, then they set fines upon the petit juries, for not finding according to the directions of the court; then, afterwards the judges of *nisi prius* proceeded to fine the juries in civil causes, if they gave not their verdict according to direction, even in points of fact. 2. My second reason is, because the statute of 3 Henry VII.,[1] prescribes a way for their fining, which would not have been if they had been arbitrarily subjected to a fine before. 3. It is of very ill consequence; for the privilege of an Englishman is, that his life shall not be drawn in danger, without due presentment or indictment; and this would be but a slender screen or safeguard, if every justice of the peace, or commissioner of oyer and terminer, or jail-delivery, may make the grand jury present what he pleases, ortherwise fine them."

The principal value of a grand jury, as a protection to the personal liberty of the citizen or subject, consists in the independence of the jurors. That independence, in order to be valuable at all, must be such as to prompt and enable them to oppose or to disregard what they may deem the arbitrary and illegal instructions of the court; and to render that independence available, the right of a grand jury to find or reject a bill, without assigning any reason therefor, and thereby, to take upon themselves the decision of both law and fact, must be maintained inviolate, however true it may be, in theory, that *ad questionem juris non respondent juratores.*

And the same principle is applicable, with equal force, to the right of the petit jury to find a general verdict in criminal cases.

So strongly has this principle been adhered to by the people of England, that not a case, it is believed, can be found among the decisions of the most arbitrary judges, in the most turbulent times, in which a new trial has been granted in a criminal cause, because the verdict of acquittal was against the plainest evidence, and the most positive instruction of the court in matter of law.

Hawkins says:[2] "It hath been adjudged that if a jury acquit a prisoner of an indictment of felony, against manifest evidence, the court may, before the verdict is recorded, but not after, order them to go out again and reconsider the matter; but this is, by many, thought hard, and seems not, of late years, to have been so frequently practiced as formerly." However, it is settled, that the court can not set aside a

[1] ch. 1.

[2] bk. 2, ch. 47, secs. 11, 12.

verdict which acquits a defendant of a prosecution properly criminal, (as it seems they may a verdict that convicts him), for having been given contrary to evidence, and the directions of the judge."

If a verdict of acquittal, found upon consideration of the evidence on both sides, is thus peremptory and intangible *a fortiori*, should the return of "*ignoramus*," by a grand jury, upon consideration of the evidence on the part of the prosecution alone, be equally sacred; at least during that term.

This rule, which we think as well settled as that in respect to the verdict of the petit jury, seems to us to render it improper that we should now give the instruction which is asked by the counsel for the United States.

But there are other reasons why we should not give it, some of which have been before intimated. One is, that the instruction extends to the whole case as stated in the bill, and is, in effect, an instruction that the bill, if found, will be a sufficient indictment, in law, to charge the defendant with the crime of forgery at common law; thereby forestalling the opinion of the court upon all questions of law which might arise on demurrer. Such a commitment of the opinion of the court, upon points which may arise in a subsequent stage of the prosecution, we consider (to use the language of the Chief Justice of the United States), to be "manifestly improper."

Upon this subject Lord Coke, in his 3d Institute,[1] has the following observations: "And to the end that the trial may be more indifferent, seeing that the safety of the prisoner consisteth in the indifferency of the court, the judges ought not to deliver their opinion beforehand, of any criminal case that may come before them judicially." "And therefore the judges ought not to deliver their opinions beforehand upon a case put and proofs urged on one side, in the absence of the party accused." "For how can they be indifferent, who have delivered their opinions beforehand without hearing of the party, when a small addition or substraction may alter the case? And how doth it stand with their oath who are sworn that they should well and lawfully serve our lord the king and his people, in the office of a justice, and that they should do equal law and execution of right to all his subjects." And again, in the next page he says: "The king's learned counsel should not, in the absence of the party accused, upon any case put, or matter showed by them, privately preoccupate the opinion of the judges."

But upon a point so clearly supported by the principles of natural justice, it is needless to state authorities. Another reason why the court should not give the instruction, is, that it is a very debatable

[1] p. 29.

question whether the facts stated in the bill which is now proposed to be sent up, or rather sent back, to the grand jury, do in law, constitute the offense of forgery, at common law. Much may be said, and much has been said, on both sides. The court did not find itself obliged to decide that question upon the former argument, and therefore declined. For the same reason it declines now. These reasons for not giving the instruction, it will be perceived, are equally valid, whether the grand jury did or did not, act under a mistake of the law. That question, the court does not undertake to decide in this stage of the prosecution, for the reasons before stated.

For the same reasons the court deems it to be its duty to refuse to instruct the grand jury as prayed by the counsel for the United States.[1] Judges not to give their opinion permaturely.

THURSTON J., dissenting.

While this question of instructing the grand jury was pending, that body found three other indictments against defendant, one for the $750 transaction with Paulding as before stated, one for $300 with the same party and one for $2,000 with Hambleton, a purser in the navy at Pensacola. To each of these indictments there was a general demurrer. The first indictment averred that the defendant, T. W., was Fourth Auditor of the Treasury of the United States, and as such required by law to receive all accounts accruing in the Navy Department, or relative thereto; to keep all accounts of the receipts and expenditures of the public moneys of the United States in regard to that department, and of all debts due to the United States, or moneys advanced relative to the said department; to receive from the Second Comptroller the accounts relative to the said department, which had been finally adjusted, and to prepare such accounts with their vouchers and certificates, and to record all warrants drawn by the Secretary of the Navy, the examination of the accounts of which is by law assigned to the said Fourth Auditor; and to make such reports on the business of the said Fourth Auditor as the Secretary of the Navy should deem necessary and require for the services of that department. It further avers that Samuel L. Southard was Secretary of the Navy of the United States, and as such had authority to issue requisitions to the Secretary of the Treasury of the United States, countersigned by the Second Comptroller and registered by the Fourth Auditor, for moneys appropriated by law for the use of the Navy Department; whereupon the Secretary of the Treasury was authorized by law to grant his warrants on the Treasurer of the United States for the amounts, and according to the sums of the said requisitions.

That J. K. Paulding was a navy agent, residing in the city of New

1 See 1 Chit. Cr. L. 696.

York, and was required by law to render his accounts to the Fourth Auditor.

That on the 2d of March, 1827, an act of Congress,[1] was passed, making appropriations for the support of the navy of the United States, in which the sum of $20,000 was appropriated "for arrearages prior to the first day of January, 1827.".

That the defendant, so being Fourth Auditor as aforesaid, and being an evil disposed person, and devising and intending fraudulently and unjustly to obtain and acquire for himself and for his own private use the money of the United States, with force and arms, on the 16th of January, 1828, at Washington County, in the District of Columbia, falsely and fraudulently wrote and addressed, and caused to be sent to the said J. K. Paulding, navy agent as aforesaid, in the city and State of New York, a letter in the words and figures following, to wit (here was inserted the letter of the 16th of January, 1828, which was inserted in the first indictment which was quashed on demurrer).[2]

It then avers that the defendant drew the draft on J. K. P., navy agent in New York, for $750, in favor of C. S. Fowler, at one day's sight, and sold it to Mr. Fowler, and received therefor the sum of $750, and kept and disposed of the same for his own use. That on the 16th of January, 1828, Mr. Paulding, as navy agent, wrote and sent to Mr. Southard, the following letter: —

"NAVY AGENT'S OFFICE, NEW YORK, 16th January, 1828.

"SIR: Be pleased to direct a warrant to issue in my favor for the sum of $12,139.12, to be charged to the following appropriations, viz.: —

| | | |
|---|---|---|
| Pay Aft. | $1,942 | |
| " Shore Stations | 1,058.25 | |
| " Civil Establishment | 643.32 | |
| " Repairs | 2,488.54 | |
| " Medicines | 1,000 | |
| " Increase | 2,904.90 | |
| " Sloops of War | 2,102.11 | |
| | | $12,139.12 |

required for the purposes expressed in the list herewith inclosed. I have the honor to be, very respectfully, your obedient servant,

"J. K. PAULDING."

"Hon. Samuel L. Southard, Secretary of the Navy Department, Washington."

Which letter was received by Mr. Southard, at Washington, on the 19th of January, 1828.

1 4 Stat. at Large 206.

2 *ante*, p. 446.

That the said T. W., "being then and there Fourth Auditor of the Treasury Department of the United States as aforesaid, and being an ill-disposed person, and devising and intending fraudulently and unjustly to acquire for himself, and for his own private use, the money of the United States, and well knowing the premises, with force and arms, on the said nineteenth day of January, which was in the year of our Lord one thousand eight hundred and twenty-eight, as aforesaid, at the county of Washington aforesaid, did falsely, fraudulently, deceitfully, knowingly, and designedly, apply to the said Samuel L. Southard, then being Secretary of the Navy of the United States as aforesaid, to add to the said sum of twelve thousand one hundred and thirty-nine dollars and twelve cents, for which the said J. K. Paulding had requested a warrant to be issued as aforesaid, the sum of seven hundred and fifty dollars, and did then and there pretend to the said Samuel L. Southard, Secretary of the Navy of the United States as aforesaid, that the said sum of seven hundred and fifty dollars, was required for the use and service of the navy of the United States, for the payment of claims settled and adjusted under the appropriation for arrearages due by the Navy Department prior to the first day of January, which was in the year of our Lord one thousand eight hundred and twenty-seven, and to cause the same to be placed in the hands of the said J. K. Paulding, navy agent as aforesaid, for the purpose aforesaid, at the same time, and together with the said sum of twelve thousand and one hundred and thirty-nine dollars and twelve cents, for which the said J. K. Paulding had required a warrant to be issued as aforesaid; and he, the said Tobias Watkins, did then and there unlawfully, fraudulently, deceitfully, knowingly, and designedly, cause and procure to be issued by the said Samuel L. Southard, then being Secretary of the Navy of the United States as aforesaid, a requisition to the Treasurer of the United States for the additional sum of seven hundred and fifty dollars, and did cause and procure the said sum of seven hundred and fifty dollars to be added to the said requisition of twelve thousand one hundred and thirty-nine dollars and twelve cents, which he, the said J. K. Paulding had requested to be issued as aforesaid, and thereby caused the sum of twelve thousand eight hundred and eighty-nine dollars and twelve cents to be included in the said requisition, instead of the said sum of twelve thousand one hundred and thirty-nine dollars and twelve cents, so required to be so issued by the said J. K. Paulding as aforesaid; which said requisition so caused and procured to be issued as aforesaid, is in the words and figures following" (here was inserted the requisition *verbatim*, including the sum of $750, under the head of "Arrearages prior to 1827,") which said sum of twelve thousand eight hundred and eighty-nine dollars and twelve cents, in the said

requisition mentioned, was in conformity thereto, by warrant from under the hand of the Secretary of the Treasury of the United States, drawn out of the treasury thereof, and placed in the hands of the said J. K. Paulding, navy agent as aforesaid, the said sum of twelve thousand eight hundred and eighty-nine dollars and twelve cents, then and there being the property of the United States, with intent to defraud the United States out of the said sum of seven hundred and fifty dollars, in the said requisition mentioned and included as aforesaid, and by means thereof, and of the warrant of the Secretary of the Treasury issued thereon in manner aforesaid, drawn from the Treasury of the United States; whereas, in truth and in fact, he, the said Tobais Watkins, at the time of making the said false pretenses, well knew that the said sum of seven hundred and fifty dollars, in the said requisition included, was not required for the use and service of the navy of the United States, and that it was not necessary to draw the same from the Treasury of the United States, for the payment of claims settled and adjusted under the appropriation for arrearages due by the Navy Department of the United States prior to the first day of January, which was in the year one thousand eight hundred and twenty-seven, nor to place the same in the hands of the said J. K. Paulding, navy agent as aforesaid, for the said purpose aforesaid; and whereas, in truth and in fact, he, the said Tobias Watkins, at the time of making the said false pretenses as aforesaid, did not intend that the said sum of seven hundred and fifty dollars in the said requisition included, and, by means thereof, in manner aforesaid, drawn from the Treasury of the United States, should be applied to the use and service of the navy of the United States, nor to claims settled and adjusted under the appropriation for arrearages due by the Navy Department prior to the first day of January, which was in the year one thousand eight hundred and twenty-seven, nor that the same should be placed in the hands of the said J. K. Paulding, navy agent as aforesaid, for the purposes aforesaid; but then and there intended fraudulently to defraud the United States of the same, and to convert the said sum of seven hundred and fifty dollars to his own use and benefit, and did thereby defraud the said United States of the said sum of seven hundred and fifty dollars to the great damage of the United States, to the evil example of all others in like cases offending, and against the peace and government of the United States. Thomas Swann, Attorney U. S."

2. The second of the said three indictments was upon a transaction with Mr. Paulding for $300, and had two counts. The first count states that the defendant, on the eighth of October, 1827, being Fourth Auditor, etc., and intending fraudulently and unjustly to obtain and acquire to himself from J. K. Paulding, navy agent at New York, the sum of

$300 of the moneys of the United States in the hands of the said J. K. Paulding, "unlawfully, fraudulently, and deceitfully" wrote and caused to be sent to the said J. K. Paulding, navy agent at New York, the following letter, purporting to be dated and written from the office of the Fourth Auditor tec,. : —

"Treasury Department, Fourth Auditor's Office, 8th October, 1827. Sir: I have this day drawn on you in favor of Charles S. Fowler for three hundred dollars, which you will please to charge to 'Arrearages prior to 1827;' under which head a remittance will be made to you immediately on the Secretary's return to the city. In the mean time be pleased to pay the draft out of any unexpended balance in your hands, to be replaced on receipt of the Treasurer's remittance. I am, sir, very respectfully your obedient servant,

"T. WATKINS."

It then avers that the defendant drew the draft, sold it to C. S. Fowler, received the sum of $300 and converted it to his own use; and that the draft was afterwards paid by J. K. Paulding out of the moneys of the United States in his hands.

"And the jurors aforesaid, upon their oath aforesaid, do find that the said letter thus written and dated, and addressed and sent from the said Treasury Department and the office of the Fourth Auditor thereof, purported to be and was fraudulently intended by said Watkins, to appear as an official letter of said Watkins, and was so written, dated, addressed, and sent to deceive the said Paulding by such appearance, and to induce him to pay the draft aforesaid, out of the moneys of the United States in his hands; and the said Paulding was so deceived, and did, in consequence of such deceit, so pay the same out of the said moneys of the United States in his hands.

"And the jurors aforesaid, upon their oath aforesaid, do find that the letter aforesaid, so written, dated, addressed, and sent as aforesaid, purported to be, and was fraudulently intended by said Watkins to appear, and did appear, as an official letter of the said Watkins, and as representing that the said sum of money, therein mentioned, was to be paid for the public service of the United States, and that the draft, therein mentioned, was drawn on account of the public service of the United States, and to deceive the said Paulding by such appearance and to induce him to pay the same out of the moneys of the United States in his hands; and the said Paulding was thereby so deceived, and did pay the same out of the said moneys of the United States in his hands.

"And the jurors aforesaid, upon their oath aforesaid, do find, that, at the time of writing, addressing, and sending said letter, and of making said draft, the public service of the United States did not require

the payment of the said sum of money in the said letter and draft mentioned, and the said Watkins well knew the same not to be so required, and that said Watkins had no authority to draw for the said sum of money, or to write the said letter of advice on account of the public service of the United States, as an official letter of him, the said Watkins, Fourth Auditor as aforesaid, and well knew he had no such authority; and that said Watkins wrote and dated, and addressed and sent the said letter, and made the said draft, ostensibly for the public service as aforesaid, but falsely and fraudulently for his own use and benefit, and to deceive the said Paulding as aforesaid, and to defraud the United States; and that by means of the said letter and draft, so written, dated, addressed, and sent as aforesaid, he, the said Watkins, did unlawfully, fraudulently, and deceitfully, obtain to and for his own use and benefit, the said sum of three hundred dollars of the moneys of the United States, from, and out of, the hands of the said Paulding, navy agent as aforesaid, to the great deceit, fraud, and damage of the United States, and against the peace and government of the United States."

The second count stated, that the defendant, then Fourth Auditor, etc., intending to deceive and defraud the United States of the sum of $300 of the moneys of the United States, on the 8th of October, 1827, having informed J. K. Paulding, navy agent at New York, by letter of that date, and dated "Treasury Department, Fourth Auditor's Office," that he had drawn on him in favor of C. S. Fowler for $300, to be charged to "arrearages prior to 1827," and that, under that head a a remittance would be made to him immediately on the return of the Secretary of the Navy to the city, and desiring the said J. K. Paulding to pay the draft out of any unexpended balance in his hands, to be replaced on his receipt of the Treasurer's remittance, made the said draft and sold it to C. S. Fowler, and received from him therefor, the sum of $300, and applied the same to his own use; which draft was afterwards paid by the said J. K. Paulding out of the moneys of the United States in his hands.

"And the jurors aforesaid, on their oath aforesaid, present that the said letter was written, and addressed, and sent, as aforesaid, fraudulently, and with the intent to impose on the said Paulding the belief that the said draft was made on account of, and intended to be applied to, the public service of the United States and to induce him to pay the same and with intent to defraud the United States. And that the said draft was fraudulently made and sold as aforesaid, with the intent that the same should be paid by said Paulding, under such belief and inducement as aforesaid, out of the moneys of the United States in his hands as aforesaid and with the intent to thus obtain and apply to his own use the said

sum of three hundred dollars of the moneys of the United States, and with intent to defraud the United States.

"And the jurors aforesaid, upon their oath aforesaid, present, that by means of the said letter so written, addressed, and sent, the said Paulding was imposed on to believe that the said draft was made on account of, and intended to be applied to, the public service of the United States, and was thereby induced to pay the same out of the moneys of the United States in his hands, and did, under such belief and inducement, pay the same out of the said moneys of the United States in his hands. And the said Watkins did, by said imposition and deceit, thus used and practiced upon the said Paulding, and by the said letter so written, addressed, and sent as aforesaid, defraud the United States of the said sum of three hundred dollars, to the great wrong of the United States, and against the peace and government thereof. Thomas Swann, Attorney, U. S."

3. The third of the said three indictments was upon a transaction of $2,000 with Mr. Hambleton, a purser in the navy of the United States at the navy-yard in Pensacola.

This indictment states that the defendant was Fourth Auditor of the Treasury of the United States, and recites his duties; that Samuel L. Southard was Secretary of the Navy, and had authority to issue requisitions to the Secretary of the Treasury for moneys appropriated for the service of the navy of the United States, whereupon the Secretary of the Treasury had authority to grant his warrants on the Treasury of the United States, for the amount of such requisitions. That Samuel Hambleton was a purser in the navy of the United States, residing at the navy-yard of the United States, at Pensacola. That the defendant being Fourth Auditor, etc., "and intending fraudulently and unjustly to acquire for himself, and for his own private use, the money of the United States, and well knowing the premises, with force and arms, on the 6th of March, 1827, at the County of Washington, aforesaid, did falsely, fraudulently, deceitfully, knowingly, and designedly write, address, and cause to be delivered to the said Samuel L. Southard, Secretary of the Navy, as aforesaid, a letter, in the words following to wit: —

"Fourth Auditor's Office, 6th March, 1827. Sir — I will thank you to cause a requisition to be issued in favor of Purser S. Hambleton, for $2,000, under the head of 'Pay Afloat,' made payable to my order, at the request of Mr. Hambleton, for the purpose of paying his drafts on me to that amount. I am, sir, respectfully, your obedient servant, T. Watkins. The Secretary of the Navy."

It is then averred that, confiding in the said letter, and believing that the said purser had requested such a requisition to be issued for $2,000,

and that that sum was required for the use and service of the United States, Mr. Southard, as Secretary of the Navy, issued the requisition, as requested. That the said sum of $2,000, in conformity with the said requisition, was, by warrant from the Secretary of the Treasury, drawn out of the Treasury of the United States, and placed in the hands of the defendant; "Whereas, in truth and in fact, the said T. Watkins, at the time he wrote his letter aforesaid to the said Samuel L. Southard, Secretary of the Navy, as aforesaid," "had not been requested by the said S. Hambleton, purser, as aforesaid, to cause any requisition to be issued in favor of him," "payable to the order of him, the said T. Watkins, as aforesaid, for the said sum of $2,000; nor had the said S. Hambleton drawn any drafts upon him, the said T. Watkins, for the said $2,000; and whereas, in fact and in truth, the said Tobias Watkins, at the time he wrote his letter, as aforesaid, did not intend that the said sum of $2,000 should be applied to the use of him, the said S. Hambleton, purser, as aforesaid, or to the use or service of the navy of the United States, or to the payment of any such drafts, as aforesaid, but then and there intended to defraud the United States of the same, and to convert the said sum of money to his own proper use and benefit; and did, by means of the pretenses aforesaid, defraud the said United States of the said sum of $2,000, and did thereby then and there convert and appropriate the said sum to his own proper use and benefit, to the great damage of the United States, to the evil example of all others in like cases offending, and against the peace and government of the United States."

There was a second count in this indictment, containing the same preliminary allegations as in the first count, and averring that the defendant, "intending fraudulently and unjustly to acquire for himself, and for his own private use, the money of the United States, and well knowing the premises, with force and arms, on the said sixth day of March, 1827, aforesaid, at the county aforesaid, did falsely, fraudulently, deceitfully, knowingly, and designedly apply to the said Samuel L. Southard, then being Secretary of the Navy of the United States, as aforesaid, to cause a requisition to be issued on account of the said S. Hambleton, purser, as aforesaid, for the sum of $2,000, under the head of 'Pay Afloat,' to be paid to him, the said Watkins; and did then and there pretend to the said Samuel L. Southard, Secretary of the Navy of the United States, as aforesaid, that the said sum was required for the use and service of the United States, and did then and there pretend that the said S. Hambleton, purser, as aforesaid, had drawn drafts upon him, the said Tobias Watkins, to the amount of the said $2,000, and that he, the said S. Hambleton, had requested the said requisition to be issued, for the purpose of meeting and paying

his said drafts. And the said Samuel L. Southard, confiding in the statement and representation so made to him by the said Tobias Watkins, as aforesaid, and believing the said sum of $2,000 was required for the use and service of the United States, and that the said S. Hambleton had drawn drafts upon him, the said Tobias Watkins, to the amount of the said $2,000, and that he, the said S. Hambleton, had requested a requisition to be issued," etc., required a letter to be written by the said Watkins to him, the said Mr. Southard, Secretary of the Navy, etc., which letter (namely, the written letter of March 6, 1827, set forth in the first count), was written, etc., and caused the said requisition to be issued, etc.; whereupon the Secretary of the Treasury issued his warrant to the Treasurer, etc., for the said sum of $2,000, in favor of the defendant, whereby the said sum was drawn out of the Treasury of the United States, and placed in the hands of the defendant. "Whereas, in truth and in fact, the said sum of money, in the said requisition mentioned, was not required for the use and service of the United States; and the said Watkins, at the time he applied to the said Samuel L. Southard, to cause the requisition to be issued, as aforesaid, that is to say, on the said sixth day of March, 1827, well knew that the same was not so required for the use and service of the United States; and that the said Watkins had not been requested by the said Samuel Hambleton to apply to the said Southard, Secretary, as aforesaid, for any such requisition to be issued, as aforesaid; nor had the said S. Hambleton, purser, as aforesaid, drawn drafts upon him, the said Watkins, to the amount of $2,000; nor had the said Hambleton requested the said requisition to be issued, for the purpose of meeting and paying such drafts. And whereas, in truth and in fact, the said Tobias Watkins, at the time he made his said application for the requisition aforesaid, and wrote and delivered the letter, as aforesaid, did not intend that the said $2,000 should be applied to the use of him, the said S. Hambleton, purser, as aforesaid, nor to the use or service of the navy of the United States, or to pay any such drafts of the said Hambleton; but then and there intended to defraud the United States of the same, and to convert the said sum of money to his own proper use and benefit; and did by means of the false and deceitful means aforesaid, defraud the said United States of the said sum of $2,000, and did then and there convert and appropriate the same to his own proper use and benefit; to the great damage of the United States, etc. Thomas Swann, Attorney, United States."

To each of these three indictments the defendant's counsel filed a general demurrer.

Cranch, C. J., delivered the opinion of the majority of the court, as follows; Three new indictments have been found by the grand jury,

to which the defendant has demurred. The first ground of demurrer is common to the three indictments, and if available at all, is a bar to any prosecution whatever, for the matters therein charged. It supposes the charge in each case to be merely of official misconduct of the defendant, as Fourth Auditor of the Treasury Department of the United States, in which case it is contended by the counsel of the defendant, that it is an offense exclusively against the United States in their national character, in which character they have no common law; and, therefore, there can be no offense against the United States (in that character), which has not been defined, and its punishment prescribed by statute. And, that as there is no statute applicable to the matters charged in these indictments, those matters are not indictable or cognizable by any court of the United States as such. That as the creation of offices and officers, and their duties, are matters of exclusive Federal legislation, and as the judicial power of the United States is co-extensive with its legislative power, no State court can take cognizance of the malversations in office of any Federal officer. That this court can not, by virtue of any transfer of jurisdiction by Maryland to the United States, exercise any jurisdiction, which a State court in Maryland could not have exercised on the 27th of February, 1801, or on the first Monday of December, 1800, when this district became, by law, the seat of the government of the United States; and as no court in Maryland could, at that time, have had cognizance of the matters charged in these indictments, it follows that this court has no cognizance of them by virtue of any authority derived by the United States, from Maryland, by virtue of the session of this part of the District of Columbia.

This doctrine may or may not be correct; but, if correct, it does not apply to the present cases, if the charges in these indictments be not for official misconduct of the defendant, as an officer of the national government.

In considering the demurrer to the former indictments against this defendant, the court was satisfied that the charges, in those cases, were for official misconduct, but for frauds at common law; and, in that respect we see no material difference between those indictments and these.

It is true that the first of these indictments avers that the defendant was Fourth Auditor, etc., at the time when he did the act complained of, and sets forth so much of his duty as such Fourth Auditor, and so much of the duty of the navy agent as was supposed necessary or proper to show the defendant's letter and draft, on the 16th of January, 1828, might deceive or impose upon the navy agent, so as to induce him to pay the draft; and how his pretense, that the sum of $750 was required for the use and service of the navy of the United States,

for payment of arrearages, might deceive or impose upon the Secretary of the Navy, to induce him to increase the requisition in favor of Mr. Paulding, and to show why these officers should have given their confidence to the defendant. But this averment of his official character and duties is not an averment that the acts, with which he is charged, were committed in, or by virtue of, his office, or constituted any violation or neglect of his official duties.

It has been justly observed, that to charge that the defendant, being Fourth Auditor, etc., committed larceny or robbery, or murder, is not to charge him with official malversation.

The court is, therefore, of opinion that these indictments (for that which we have just considered appears to be the strongest case in favor of the defendant, upon this point), do not charge the defendant with official misconduct only, but that they stand, in this respect, upon the the same ground as those upon which the former opinion of this court was given; which opinion, we think, is not shaken by the argument in the present cases, but is as applicable to these as it was to those.

But it is said, that if these indictments are not for official misconduct, yet each of them is insufficient, for want of precise and explicit averments of the deceitful practices by which the frauds are supposed to have been effected, and that the frauds were effected by means of such deceitful practices.

With a view to this question, it will be necessary to examine them separately.

The first is for the $750 obtained from Mr. Paulding.

After setting out the official character of the defendant, as Fourth Auditor and his duties, the authority of the Secretary of the Navy, to issue requisitions to the Secretary of the Treasury, and of the latter to grant warrants on the Treasury of the United States, according to such requisitions, the official character of Mr. Paulding, and a part of his duties as Navy Agent; and that an appropriation of $20,000 had been made by law on the 2d of March, 1827, for the use of the Navy Department, for arrearages prior to the 1st of January, 1827, the indictment charges that the defendant, being Fourth Auditor, etc., and intending fraudulently and unjustly to obtain and acquire for himself, and for his own private use, the money of the United States, with force and arms, on the 16th of January, 1828, at Washington County, in the District of Columbia, falsely and fraudulently wrote, addressed, and caused to be sent to Mr. Paulding, navy agent in New York, a letter of that date in the words and figures following: —

"Treasury Department, Fourth Auditor's Office, January 16, 1828. Sir — I have this day drawn on you for seven hundred and fifty dollars, in favor of C. S. Fowler, on one day's sight, to meet which a remittance

will be made to you by the Treasurer of the United States, so soon as the requisition can pass through the forms of office, under the head of 'Arrearages prior to 1827,' of the like sum, and to this head you will be pleased to charge the draft, when paid. The draft is made at one day's sight, that time may be allowed for the remittance to reach you in due season; but should anything occur to prevent this, you will be pleased to pay it out of any fund in your hand, and make the necessary transfer on the receipt of the Treasurer's draft. I am, respectfully, your obedient servant, T. Watkins. J. K. Paulding, Navy Agent."

And, on the same day, at, etc., made his draft on Mr. Paulding, navy agent, as aforesaid, according to the advice of the said letter, in favor of C. S. Fowler, for the said sum of $750, and then and there sold and delivered it to the said Fowler, and received of him therefor the said sum of $750, and kept and disposed of the same for his own use; which draft was afterwards paid by the said Navy Agent, out of the moneys of the United States in his hands.

The indictment further charges, in the same count, that the said J. K. Paulding, navy agent, as aforesaid, on the 16th of January, 1828, wrote, addressed, and sent to the Secretary of the Navy a letter, requesting him to issue a requisition, in his favor, for the sum of $12,139.12, under certain specified heads of appropriation, the head of "Arrearages" not being one of them; which letter was received by the Secretary of the Navy, at Washington, on the 19th of January, 1828. That the defendant then and there, being Fourth Auditor, etc., and intending fraudulently and unjustly to acquire for himself, and for his own private use, the money of the United States, and well knowing the premises, with force and arms, etc., on the said 19th of January, 1828, at, etc., did falsely, fraudulently, deceitfully, knowingly, and designedly apply to the Secretary of the Navy to add to the sum for which Mr. Paulding had requested a warrant to be issued, as aforesaid, the sum of $750, and did then and there pretend to the said Samuel L. Southard, Secretary of the Navy of the United States, as aforesaid, that the said sum of $750 was required for the use and service of the navy of the United States, for the payment of claims adjusted and settled under the appropriation for arrearages due by the Navy Department of the United States, prior to the 1st of January, 1827; and did then and there unlawfully, fraudulently, deceitfully, and designedly cause and procure to be issued by the said Samuel L. Southard, then being Secretary of the Navy of the United States, as aforesaid, a requisition to the Treasurer of the United States, for the said additional sum of $750; and did cause and procure the said sum of $750 to be added to the said requisition of $12,139.12, which the said J. K. Paulding had requested to be issued, as aforesaid, thereby causing the said sum of $12,889.12 to be included

in the said requisition, instead of the sum of $12,139.12, so required, etc., by the said J. K. Paulding, as aforesaid (which requisition is set out in words and figures), which said sum of $12,889.12, mentioned in the said requisition, was in conformity thereto, by warrant under the hand of the Secretary of the Treasury of the United States, drawn out of the Treasury thereof, and placed in the hands of the said J. K. Paulding, navy agent, as aforesaid, the said sum of $12,889.12, then and there being the property of the United States, with intent to defraud the said United States out of the said sum of $750. Whereas, in truth and in fact, he, the said T. Watkins, at the time of making the said false pretenses, well knew that the said sum of $750, in the said requisition included, was not required for the use and service of the United States; and whereas, in truth and in fact, the said T. Watkins, at the time, etc., did not intend that the said sum of $750 should be applied to the use and service of the navy of the United States, but then and there intended to defraud the United States of the same, and to convert the said sum of $750 to his own use and benefit, and did thereby defraud the United States of the said sum of $750, to the great damage of the United States, etc.

The first objection to this indictment is, that it charges two distinct offenses in the same count; first, that the defendant, with force and arms, intending to acquire the public money for his own use, wrote the letter of the 16th of January, 1828, and drew, and sold, and received the money for the draft of $750 on the navy agent, who afterwards paid it out of the moneys of the United States in his hands; secondly, that the defendant, with force and arms, intending, as aforesaid, and knowing that the navy agent had asked for a requisition for $12,139 only, on the 19th of January, 1828, applied to the Secretary of the Navy to add $750 to the requisition; and falsely pretended that it was for the public use and service, and caused a requisition to be issued, including the $750, which sum was, in conformity thereto, by warrant drawn from the Treasury of the United States, and placed in the hands of the navy agent, and did thereby defraud the United States of the said sum of $750.

This objection, we think, can not be sustained. It seems to the court that this count charges only one offense, the defrauding of the United States of the $750, by the means set out in the whole count. The first part of the count charges only some of the means used to accomplish the fraud; the second part states the residue, and its actual accomplishment, which is averred to have been done thereby; which word, the counsel for the defendant have justly said, refers to the whole preceding matter contained in the count.

The next objection is, that it does not appear in the count by what deceitful practices the defendant got, or could have got the money of the United States out of the hands of the navy agent; for until the money was got out of his hands, the offense, it is said, was not complete. The false pretense to the Secretary, it is supposed, only shows the deceit by which the money was drawn from the Treasury, and placed in the hands of the navy agent; but that was no fraud on the United States, for it was safe in his hands.

But the answer to that objection is, that the getting the money out of the Treasury was a necessary link in the chain of means to accomplish the fraud; and if that single link was obtained by the deceptive practices of the defendant, those deceptive practices are as effectual in constituting the offense, as if every other link in the chain had been forged by the like deception.

Another objection has been taken to this indictment. It is said that, in order to show an indictable fraud in this case, it must not only appear that the defendant drew the draft on Mr. Paulding and received the money, and that the draft was paid by Mr. Paulding out of the public moneys in his hands, but that the requisition which was obtained by false pretenses, and by means of which the money was drawn out of the Treasury, and placed in the hands of Mr. Paulding, should, by a proper averment, be connected with the transaction between the defendant and Mr. Paulding, in regard to the draft, which, it is supposed, is not done in this indictment; and that, as there does not appear, on the face of the indictment, any connection between the $750 drawn for and received by the defendant, and the $750 transferred from the Treasury to the navy agent, it must be intended that there are two distinct sums of $750 mentioned in the indictment; and that, therefore, when it is said, in the conclusion of the indictment, that the defendant "did thereby defraud the United States of the said sum of $750," it is uncertain which of the two sums of $750 is meant; and that, therefore, the indictment is bad for uncertainty, and for not connecting the defendant's receipt of the money with the false pretenses.

It has already been said, by this court, that the getting the money out of the Treasury was a necessary link in the chain of means to accomplish the fraud; and that if that were done by the deceptive practices of the defendant, those deceptive practices are as effectual in constituting the offense, as if every other link of the chain had been make by the like deception.

But it is now urged that the links of that chain are not connected; that the chain consists of two parts, which have never been joined; and that the false pretense is applicable to one of those parts.

The chain of facts is this: —

1. The letter from the defendant to the navy agent at New York, in which he informs him that he has drawn on him, in favor of C. S. Fowler, for $750, at one day's sight, to meet which, a remittance of a like sum will be made to the said navy agent, by the Treasurer of the United States, as soon as the requisition can pass through the forms of office, under the head of "Arrearages prior to 1827," and that to this head he should charge the draft, when paid; and that, if the remittance should not reach him in due season, he should pay it out of any fund in his hands, and make the necessary transfer on the receipt of the Treasurer's draft.

2. The draft, drawn on the same day, according to the advice of the letter.

3. The sale of the draft to Mr. Fowler.

4. The receipt of the money, by the defendant, from Mr. Fowler.

5. The payment of the draft by the navy agent out of the moneys of the United States in his hands.

6. The requisition and the Treasurer's draft, in conformity with the assurance contained in the letter.

7. The false pretenses by which the requisition and the Treasurer's draft were obtained; and by which the $750 were drawn from the Treasury and placed in the hands of the navy agent.

8. The averment that the defendant did thereby defraud the United States of the said sum of $750.

We see no want of connection in this chain. The Treasurer's draft, which transferred the 750 dollars from the Treasury to the hands of Mr. Paulding, is as much connected with the original letter of the 16th of January, as the draft of the defendant is connected with it. They are both mentioned in that letter; and Mr. Paulding had as good a right to expect the one as the other. It is true, there are other facts mentioned in the indictment, but they are only such as were necessary to show the false pretenses by which the defendant obtained that Treasury draft; and do not break the connection of the material circumstances by means of which the fraud is supposed to have been effected. If the allegation respecting the Treasury warrant had immediately followed the averment of the payment of the draft by Mr. Paulding, and it had been introduced by such words as these: "And the jurors aforesaid, upon their oaths aforesaid, further present that the said Tobias Watkins, in conformity with the assurance contained in the said letter of the 16th of January, 1828, afterwards, to wit, on the 19th of January, 1828, at the county of Washington aforesaid, did cause the like sum of $750 to be drawn from the Treasury of United States, and

placed in the hands of the said J. K. Paulding, navy agent as aforesaid, by means of a warrant issued by the Secretary of the Treasury of the United States," etc., and if it had been followed by the proper averment of the deceitful practices used by the defendant to obtain the warrant, we think this objection would not have been taken; yet the words "in conformity with the assurance contained in the said letter of the 16th of January, 1828," would have been only an averment of an inference of law from the facts stated. For, whether the remittance was in conformity with the assurance contained in the letter, was a mere question of law; it would, therefore, have been an immaterial averment, and would have amounted to nothing more than the law would infer from a comparison of the terms of the letter with the averment respecting the warrant. We think, therefore, that the connection between the defendant's letter of the 16th of January, 1828, and his draft, and the Treasurer's remittance, is sufficiently apparent upon the face of the indictment; and that it does sufficiently appear that the $750, of which the defendant is charged with defrauding the United States, are the $750 included in the requisition and warrant, which the defendant, by anticipation, perhaps, drew out of the hands of the navy agent, through the medium of Mr. Fowler, the broker.

We have said, "by anticipation, perhaps;" for it does not appear, upon the indictment, whether the Treasurer's remittance reached Mr. Paulding before or after he had paid the draft. Nor is that question material; for if he paid it before he received the remittance, he paid it upon the assurance of a remittance which was afterwards actually made. In either case, therefore, he paid it out of the moneys of the United States in his hands.

It seems to us, therefore, that the chain of facts and circumstances which are set forth in the indictment, as the means of effecting the supposed fraud, are sufficiently connected; and that the deceitful practices averred to have been used, by the defendant, in obtaining one of those means (namely, the requisition), infect with fraud the whole transaction, as it appears upon the face of the indictment.

Another objection taken to this indictment is, that the offense was not complete until the money was paid by the navy agent in New York, and that unless all the acts which constitute the fraud were committed in this county, this court has not jurisdiction of the cause.

It was suggested, however, that, even if that doctrine be correct, it will apply only to the acts of the defendant himself, and not to the act of the navy agent in New York who paid the money.

But to this it was answered that Mr. Fowler, in whose favor the bill was drawn, and who received the money from the navy agent in New

York, was the innocent agent of the defendant, and acted under his authority in receiving the money there.

Admitting this to be so, yet Mr. Fowler, with some reason, may be considered as the innocent agent of Mr. Paulding in paying the money here, in Washington; for his act was ratified by Mr. Paulding, when he accepted and paid the bill in New York; and a ratification is equivalent to an original authority, according to the maxim which the common-law lawyers have drawn from the civil law, *omnis ratihabitio retrotrahitur, ac mandato æquiparatur.*[1]

The discount of a bill is only the anticipation of the fund upon which the bill is drawn. The money is advanced on the credit of the bill, and in the expectation that it will be accepted and paid. If it be accepted and paid, the broker who discounted it is reimbursed. His act, in advancing the money, has been ratified; and the drawer of the bill, for whose accommodation it was discounted, has got by anticipation the very fund upon which he drew. The ratification by the drawee, of the act of the broker, relates to the time of that act, and constitutes the money advanced, the money of the drawee, at the very time of advancing it. In the present case, the defendant did not receive the money of the United States in New York; he received it at Washington from Mr. Fowler, who advanced it on the credit of the bill; and when the navy agent in New York paid the bill, he adopted and ratified Mr. Fowler's act in advancing the money, and this ratification related to the time of the discount.

It is only by a fiction of law that it can be pretended that the defendant received the money of the United States in New York, and it is not a greater fiction to suppose that Mr. Paulding, by the instrumentality of Mr. Fowler, paid the money in Washington, than that the defendant, through the same instrumentality, received it of Mr. Paulding in New York. If the defendant received Mr. Fowler's money in Washington, and afterwards received the money of the United States in New York, then he must have received the money twice, which is not pretended. Then, if he received 750 dollars only once, and if he received 750 dollars of the money of the United States, the 750 dollars which he received was the money of the United States. If the only money he received was received by him in Washington, and if he received 750 dollars of the money of the United States, then the money of the United States which he received was received by him in Washington. The argument is, at least, as strong in favor of his having received the money of the United States at Washington, as it is of his having received it at New York.

[1] D. 50, 17, 152, 2. The Digest, 50, 17, 152, 2, extends the principle to criminal cases — "*in maleficio ratihabitio mandato comparatur.*"

But there is another view of this subject which has been taken by the counsel for the United States, and which it may be proper for the court to notice.

It is contended by them that the offense (meaning the offense charged in this indictment, which is a fraud upon the United States), was complete when the defendant sold the draft and received the money from Mr. Fowler, and before the draft had been paid by Mr. Paulding out of the moneys of the United States in his hands; and that the defendant might have been immediately prosecuted and convicted for this offense, even if Mr. Paulding had refused to honor the draft, because the United States might have been prejudiced thereby if the draft had been paid and that the risk which was thereby occasioned to the United States by the drawing of the bill was an actual prejudice to the United States, although that prejudice is not stated in the indictment as the injury done to the United States by the fraud; and although the injury alleged in the indictment is the defrauding of the United States, by the defendant's getting and applying to his own use 750 dollars of the money of the United States.

It is said that the fraud was complete, upon somebody, when the defendant received the money from Mr. Fowler; that it is immaterial whether it was then a fraud upon the United States or upon Mr. Fowler; that it certainly was a fraud upon one or the other; and that the defendant is equally guilty whether one or the other was, or whether both were injured thereby. That the question who was injured thereby, or how injured, does not affect the question of guilt. That they are immaterial circumstances, and need not be set forth with averment of time and place.

But a majority of the court is of opinion that this indictment, which is for obtaining by false pretenses, or deceitful practices, 750 dollars of the money of the United States, could not have been maintained if Mr. Paulding had not paid the draft; and that until the draft was paid, the offense charged in this indictment was not complete.

Upon the whole, it is the unanimous opinion of the court, that none of the objections taken to this indictment can be supported.

As to the second of these indictments, the court wishes further time for consideration.

As to the third of these indictments (that upon the transaction with Mr. Hambleton), the principal objection is, that it appears, upon its face, that the offense, if any, was committed more than two years before the finding of the indictment — the time limited by the thirty-second section of the Act of the 30th of April, 1790 — by which it is enacted, "that no person or persons shall be prosecuted, tried, or punished, for treason, or other capital offense aforesaid, willful murder

or forgery excepted, unless the indictment for the same shall be found by a grand jury, within three years next after the treason, or capital offense aforesaid, shall be done or committed; nor shall any person be prosecuted, tried, or punished, for any offense not capital, nor for any fine or forfeiture under any penal statute, unless the indictment or information for the same shall be found or instituted within two years from the time of committing the offense, or incurring the fine or forfeiture aforesaid. Provided that nothing herein contained shall extend to any person or persons fleeing from justice."

In answer to this objection it has been said: —

1st. That it does not appear, upon the face of the indictment, at what time it was found.

2d. That advantage of the limitation can not be taken upon demurrer, because the United States would thereby be precluded from replying, according to the proviso of the act, that the defendant fled from justice within two years. And,

3d. That the limitation extends only to such offenses and penalties, etc., as are created by acts of Congress, and not to common-law offenses, because there could be none such against the United States, in its national character.

1. The answer to the first objection is, that it will appear, from the caption of the indictment, whenever the record is made up, at what time the indictment was found; and, upon demurrer, the judgment of the court must be upon the whole record. And if upon the whole record, it should appear to the court that the offense was committed beyond the time limited, they could not give judgment against the defendant.

Thus, in *King* v. *Fearnly*,[1] "the court said they were of opinion that this was a good objection; because, by the caption of the indictment it appeared that the Quarter Sessions had no jurisdiction. Upon a demurrer to an indictment, the court must look to the whole record to see whether they are warranted in giving judgment on it." So in the cases of *Rex* v. *Fisher*, and *Rex* v. *Saunders*.[2] "In the case of *Fisher*, judgment was arrested after verdict; and, in the case of *Saunders*, one indictment was quashed, being taken at an adjourned Sessions, and it not appearing what day the original Sessions began, to bring it within the time prescribed by the statute."

2. To the second objection, that the defendant can not take advantage of the limitatiou upon demurrer, the answer is this, that however it may be in practice, yet in theory, and by law, if judgment, upon demurrer to an indictment for a misdemeanor, be given against the defendant, it is a peremptory judgment of condemnation; and although, in

[1] 1 T. R. 320.

[2] 2 Strange, 865.

practice, the court will often rather intimate its opinion than pronounce sentence, and will permit the defendant to withdraw his demurrer and plead to issue, yet upon the question whether the defendant may avail himself, by demurrer, of a bar apparent upon the record, the court must consider what would be the legal consequence of a judgment upon the demurrer; and when we see that it may be a peremptory judgment, and that the defendant has a good defence upon the face of the record, the court can not deprive him of the benefit of it.[1]

We think, therefore, that the defendant has a right, upon demurrer, to avail himself of the limitation of the statute.

It has been said that the United States would thereby be precluded from replying the flight of the defendant, if such should have been the fact. But that is not the fault of the defendant; the United States have put themselves in that situation, by stating the fact to have happened at a time beyond the day of limitation. They were not bound to do so, for they might have laid the day to be within the time of limitation, and have proved a different day at the trial; and if the day proved should be beyond the time of limitation, and the United States could have shown that the defendant fled within the two years after committing the offense, they might have given it in evidence; or they might have stated in the indictment the true time, and any facts which existed, and went to show that the defendant could not avail himself of the limitation.

3. As to the third objection, that the statute does not apply to common-law offenses, committed within this district, the answer is, that this court, so long ago as December term, 1812, in the case of *United States* v. *Porter*,[2] who was indicted for certain frauds at common law, decided that the limitation of the Act of 1790 did apply to such cases. It is true that, in that case, it appears by the docket-entries that the defendant pleaded "not guilty, and the act of limitations;" but Mr. Key, who was counsel for the defendant in that cause, having, upon the trial, objected to evidence of transactions which took place more than two years before the finding of the indictments, said: "We do not rely upon the special plea of the statute of limitations, but make the motion on the plea of 'not guilty.'" Mr. Jones, who was then attorney for the United States, contended, as it is now contended by the counsel for the United States, "that the act of Congress does not apply to this case. It was passed in 1790, and refers only to the cases within the jurisdiction of the Circuit Courts of the United States, and only to crimes punishable in those courts. It does not apply to jurisdictions created subsequent to that act. What crimes and offenses were then in

[1] Pugh *v.* Robinson, 1 T. R. 116.

[2] 2 Cranch, C. C. 60.

the contemplation of the Legislature? Nothing but offenses created by act of Congress. The Circuit Courts of the United States had no common-law jurisdiction. They had no cognizance of common-law offenses." Mr. Key, *contra*, observed: "The law ought to be construed liberally, for the benefit of the accused. This case is in the very words of the statute."

This court in that case was clearly of opinion that the act of Congress of the 30th of April, 1790,[1] applied to that case, and directed the jury that they could not find the defendant guilty upon that evidence.

This decision of the court has been acquiesced in by the public; and the question, we believe, has never been made since.

We are, therefore, of opinion that the judgment upon the demurrer to this indictment must be for the defendant.

THRUSTON, J. On demurrers to two indictments, known to the Bench and Bar as indictments Nos. 1 and 2, — No. 1 charging the defrauding the United States of $750, and No. 2 of $300.

I remarked on Saturday last, in the course of the argument on a point which the court, at the earnest instance of the defendant's counsel, permitted them to be heard upon, because the reasons assigned by the court, in their opinion (which was against the demurrer No. 1), on the much agitated question of jurisdiction, were such as had not been before considered and discussed, that I had not an opportunity of full examination of the indictments, but that I had met the other two judges, and advised with them; and that, as to the one for $750, I had concurred with the court in its sufficiency, and that the demurrer ought to be overruled; but that I had, on Thursday evening, taken home with me the two indictments aforesaid, and attentively examined them, and that I was more confirmed in my belief that the court were right in their opinion, delivered in the one for $750, or No. 1, although, perhaps, my reasons for this belief were not entirely the same as those assigned in the opinion of the court. I also remarked that I was prepared, when the court gave their opinion on the second indictment, No. 1, but took time for further consideration on No. 2, to give my opinion as to the sufficiency of No. 2, which, I said, I deemed the most unexceptional of the two; but I did not think proper, at the time the said opinion was pronounced, to mention my satisfaction with the said No. 2, from courtesy to the majority of the court. After a few preliminary remarks, I shall state my reasons for the opinions above suggested.

An intimation was thrown out also, on Saturday last, that I had indicated some impatience, occasioned by the protracted discussion of the cases before us. If I have done so, I was not sensible of it; and

[1] sec. 32, 1 Stats. at Large, 119.

if my deportment subjected me to such suspicion, or if I unconsciously exposed myself to it, I must look for an apology in the eight or nine weeks of daily debate, of at least six hours each day, chiefly on technical points, which ought to be understood, if they can be understood at all, at least in as many days as we have consumed weeks. But we have, as I thought, with great patience listened to all that we were desired to hear; and with the more willingness, as the importance of the case has been urged with much solemnity, although I have never been able to discern any peculiar circumstances which can distinguish this case from that of others of the same grade.

Fraud at common law is but a misdemeanor. This is a general term for that class of offenses which are considered the least heinous; and I understand that the punishment, on conviction, is but one degree above that of the lowest offense. Pecuniary fine is considered, I believe, the lightest punishment known to the law of fraud; imprisonment may be superadded, but at the discretion of the court.

If this case, then, be of any particular importance, we must search for it in extrinsic circumstances; this is forbidden ground to judges; we can not travel out of the record, and if, in the course of judicial investigations, or from other sources, any knowledge may reach us, of facts calculated to excite in our breasts, sympathy for the accused, we are bound by the stern mandates of duty to suppress them, while we occupy these seats.

The questions now before the court, are on the sufficiency of the two indictments. Two points have been made. 1st. That offenses, charged in the indictments, are not cognizable in this court; and if they are that they are not properly charged.

The question of jurisdiction results from the statement (as it is alleged), in both indictments, that the fraud, if any, was completed in New York, where the money was received from the navy agent, Paulding; and that, therefore, if the facts alleged, constitute a fraud, it is indictable there, and not here. The indictment, No. 1, has also been impeached on the ground that it charges two distinct offenses; the one for $750 received, by the means of Fowler's draft from Paulding in New York, and another for a like sum, from the Treasury, by means of the Treasurer's warrant issued here on the order of the Secretary of of the Treasury, upon the requisition of the Secretary of the Navy; which requisition included the false and spurious item of $750 for "arrearages prior to 1827," imposed, by false pretenses, on the said Secretary, to lead him to add it to Mr. Paulding's legitimate demand of $12, 139.12, thereby causing falsely, and fraudulently, the said Secretary to issue a requisition on the Treasury Department for $12,889.12 including this imposed item, instead of the first lawful amount.

The indictment No. 2, has been stigmatized as wanting precision and proper averments.

In support of these criticisms on the indictments, a great number of authorities were cited, chiefly from compilations and digests from modern date, which, if I had the books now before me, as in truth I have not, I should not have time to examine them with sufficient deliberation, and, therefore must make up my opinion from the impressions received at the time the authorities were cited, from general principles of law, and the exercise of such understanding as it has pleased Providence to endue me with. But these books were, principally, as I said before, compilations and digests, which, if I understand them, are attempts to frame general rules out of particular cases, and in support of those rules, the authorities are cited in the margin; that is, reports of adjudged cases. Now, as to so much of the case before us, as relates to the form and structure of the indictments, the allegations, averments; the narrative part, if I may so call it, of a course of transactions, resulting in a breach of the laws, particularly in frauds, nothing can be more fallacious than general rules. Let us consider the infinite diversity of stratagems and devices by which a fraud may be achieved. Some, like the old legitimate drama, consist of unity of time, place, and action; others, like the more modern, have a number of acts and scenes, which are shifted from place to place, and time to time, till the plot ripens and is perfected. Hence, and from the peculiar and diversified nature of the contrivances made use of to accomplish a fraud, there must be an equally diversified form and manner in the statements in an indictment. A fraud may be completed at one place, and by one act; and if A. uses a false token to B., and cheats and imposes on him, to get hold of B.'s money, this is a simple fraud, and easily charged in an indictment. But a fraud which requires, for its accomplishment a more extended and compound course of deceptions, partly by false representations in writing, and partly verbal, where several persons are to be deceived, before the attainment of the end, and where operations are to be carried on in several distant places; here, all these various circumstances being required to be set out in an indictment, such an indictment must necessarily vary from and other indictment that was ever drawn before it; and, therefore, as to its peculiar form and structure, no precedent of forms can be found to apply to it. I do not want precedents to inform me of the leading principles which must govern all indictments, that they must be certain and precise in their charges; that the *quo animo* must be averred, the *scienter*, etc.; that the negations must exclude any possible legal inference of innocence in the arts or intents of the accused, etc., and as far as such general rules and principles as these go, I will pay all due

respect, and have applied them, and measured these indictments by them, and have not found them deficient. My confidence in those books, also, is much impaired by what I have seen on this trial and what I have often seen before. I have seen book opposed to book by opposite counsel; nay, I have seen the same book used to bear on the same point by both sides, which leads me to the mention of an observation of a very learned judge on this subject, whom I had occasion to allude to once before. This distinguished Chancellor of Virginia, having been rendered exceedingly impatient at the frequent reversal of his decisions, by the Court of Appeals of Virginia, he published, as I said before, a book in vindication of his opinions, and arraigning those of the appellate court. I remember in a certain case, the Superior Court had cited a precedent from Bulstrode, which pressed hard on the chancellor's decree. He did not know how to get rid of the force of this case, and therefore belittled — if I may use the term, it has high authority for its legitimacy — the author by saying, "Ah! as for Bulstrode, he is like a Swiss soldier, he will fight any side for pay." May not this be said of some of our innumerable modern book-makers? I have often seen them (to carry on the venerable chancellor's figure) battling on both sides. I do most seriously deplore and depreciate this overwhelming inundation of books, particularly of the class just mentioned. They are good labor-saving machines to the practitioner, but they have a woful effect on the administration of justice; and I really do apprehend, that they will, if not stopped, subvert to its foundations, the empire of common sense, and render the law which is said by my Lord Coke to be the most miserable slavery if it be vague or uncertain, the most uncertain and doubtful of all human sciences. Now, to apply the form of any one indictment (which has been attempted), from the books to the indictments before the court, so different in the facts, intents, incidents, stratagems, and artifices by which to test them, is like applying two vacant figures and forms, one to the other, to test their coincidence. As to those books, again; I have observed that many of the authorities cited by them, do not support the rules laid down by them; whether this proceeds from misprints, or a want of understanding of the spirit of those authorities, I know not.

I will now go into the examination of the indictment, No. 1, for $750 and try it not by precedents of other forms of indictments for other offenses, but by the principles I have mentioned above.

This indictment is said to charge two distinct offenses. Let us dissect it and see if this be the case. 1st. The first paragraph alleges that on the 16th and 19th of January, 1828, and before and after that time, Tobias Watkins was Auditor of the Navy Department, and states his

duties as such, Fourth Auditor. 2d. The second paragraph alleges that Samuel L. Southard, at the same time was Secretary of the Navy, and sets out his authority as such. 3d. The third paragraph states, that, at the same time, J. K. Paulding was navy agent of the United States, residing in New York, and was required by law to render his accounts to the Fourth Auditor of the Treasury Department, etc., etc.

4th. The fourth paragraph states that an Act of Congress was passed on the 2d day of March, 1827, appropriating $20,000 for the use of the Navy Department, for arrearages prior to the first day of January, 1827.

So far, it is manifest, the indictment is merely historical or narrative, but necessarily connected with the charges which follow; then comes the narrative of the fraud and deception practiced on Paulding to obtain, out of the public money, the $750, commencing with the letter advising Paulding of his design to draw on him in favor of Fowler, which sum would be replaced in his hands "by a remittance to be made in due season, so soon as a requisition can pass through the forms of office," etc., therein premeditating the remittance which the indictment, in a subsequent part, charges to have been obtained by false pretenses used to the Secretary of the Navy. Then follows the draft in favor of Fowler, and the procuring the $750 from him, by means of the said draft, and the payment of the draft by Paulding. Now, although this transaction is stated in the form of a charge, and to be done with force and arms, etc., yet it is not the offense which constitutes the *gravamen* of this indictment. It might have been made, perhaps, a ground of indictment as a distinct offense *per se*, as in the $300 indictment, but is not so contemplated in this indictment. It is here introduced, because of its connection with the real charge, the fraud practiced upon the Secretary of the Navy; for it was to supply this defect in the public funds drawn out of the hands of Paulding, that the subsequent fraud on the Secretary of the Navy became necessary; and it is that fraud and its consequences which are the real subjects of this indictment. Then comes another narrative part of the indictment, stating the letter sent by Paulding to the Secretary of the Navy, dated the 16th of January, 1828, requesting a warrant to issue in his, Paulding's favor, for $12,139.12, to be charged to certain specified appropriations at the foot of that leter, which letter is stated to have been received by the Secretary on the 19th of January, 1828.

The indictment, thus far consisting merely of narrative, I consider as introductory or introducing to the main charge, that of obtaining the public money by means of false pretenses made to the Secretary of the Navy, and deceit and imposition practiced on him. Because it professes to be, on its face, an indictment for fraudulently obtaining the public money

by false pretenses, and no false pretense is set out in the former part of the indictment. Now, here commences the real charge — the true *gravamen* of the indictment, which is, "that the said Tobias Watkins, being then and there Fourth Auditor of the Treasury Department of the United States as aforesaid, and being an evil-disposed person, and devising and intending fraudulently and unjustly to acquire for himself, and for his own private use, the money of the United States, and well knowing the premises, with force and arms, on the said nineteenth day of January, which was in the year of our Lord" 1828, "as aforesaid, at the county of Washington aforesaid, did falsely, fraudulently, deceitfully, knowingly, and designedly apply to the said Samuel L. Southard, then being Secretary of the Navy of the United States as aforesaid, to add to the said sum of" $12,139.12, "for which the said J. K. Paulding had requested a warrant to be issued as aforesaid, the sum of" 750 "dollars; and did then and there pretend to the said Samuel L. Southard, Secretary of the Navy of the United States as aforesaid, that the said sum of" 750 "dollars was reqnired for the use and service of the Navy of the United States for the payment of claims for arrearages due by the Navy Department of the United States prior to the first day of January, which was in the year of our Lord" 1827, "and to cause the same to be placed in the hands of the said J. K. Paulding, navy agent as aforesaid, for the purposes aforesaid, at the same time and together with the said sum of" $12,139.12, for which "the said J. K. Paulding had requested a warrant to be issued as aforesaid."

Then follows the requisition of the Secretary of the Navy on the Secretary of the Treasury, at the foot whereof are the specifications of Paulding, under the title of appropriations, in which are stated the particular services for which the money is wanted, namely: "Pay, etc., navy afloat, $1,942;" "shore stations, $1,058.25;" and, after some others, comes last this $750, the specified service of which is "arrearages prior to 1827, $750." The indictment then avers "that the said sum of $12,889.12, in the said requisition mentioned" (which includes this false and spurious item of $750), "was, in conformity with the said requisition, by warrant from the Secretary of the Treasury, drawn out of the Treasury of the United States, and placed in the hands of the said Paulding, navy agent as aforesaid," with intent to defraud the United States out of $750. It then states, "whereas, in truth and in fact, the said T. Watkins, at the time of making the said false pretenses well knew," etc. From hence to the conclusion follow the averments of the *scienter*, of the criminal intent, and the necessary negations; the whole of which are, to my understanding, in apt and technical form, and relate entirely to these $750 gotten from the Treasury by means of

the false pretenses practiced on the Secretary of the Navy, and the subsequent transactions consequent thereon, and to no other $750 whatever.

Having now taken this indictment to pieces and examined its parts, we will put it together again and examine it as a whole. And I will premise, that as to precision in the charges, the averment of the fraudulent intents, of the false pretenses, and, in short, as to all the forms required in indictments, it seems to be unimpeachable; nor has a single passage been selected and presented to the court wherein any defect of form has been suggested. Let it be examined, and shown where any such defect appears.

But the character of the offense charged has been questioned. It was urged that it was entirely official, as laid, and therefore not cognizable here. But the indictment deserves no such reproach: the charges are exclusively of a private, and not official aspect; there is no allegation of a breach of official duty. It is true, that in the three first clauses, the official titles, powers, and duties of T. Watkins, as Fourth Auditor, Samuel L. Southard, as Secretary of the Navy, and J. K. Paulding, as navy agent, are stated; but this seems necessary for the purpose of explaining and illustrating the connected links in the long chain of deceptions that were practiced; because it was from the facilities derived to two of these functionaries from their official stations, and the influence of his own official station, that the defendant was able to effect his fraudulent devices, but he himself exercised no official function in the course of his fraudulent doings, although he availed himself of the official powers and faculties of the other two. What he did was not an abuse of any official authority vested in him, but was entirely in his personal and private character, though he was aided in facilitating his plans by the influence of his official station. So much as to this objection.

The next was to the frame and structure of the indictment; that it charged two distinct and independent offenses in the same indictment. I think I have sufficiently answered this objection in my analysis of the instrument. I will add no more on this point.

The next and last objection there is no ground for, that the fraud was not completed within the jurisdiction of this court, but in a foreign jurisdiction, namely, New York. Now the $750 having been obtained from the Treasury by the Secretary's warrant, rendered the offense complete here; for if the Treasury be anywhere it is here; and where Paulding received it is of no account, nor does the indictment state where he received it. The money was also appropriated to the private use of the defendant, for it was applied to the payment of his debt to Paulding, to reimburse that sum which, by fraudulent devices,

he had drawn out of his hands, and the public have sustained a loss to that amount. This indictment, in the view I have taken of it, is not liable to the objection, that the fraud was completed in a foreign jurisdiction; and if it were, I should doubt of the validity of the objection. I think the whole of the late argument on this point, as to this indictment, was totally inapplicable to it.

I am, therefore, of opinion, that judgment on this indictment be for the United States.

(The defendant proposed to withdraw his demurrer in the $750 case, and to plead the general issue.)

CRANCH, C. J., delivered the opinion of the court (THURSTON, J., dissenting).

After the court had given an opinion that none of the exceptions taken to this indictment, for defrauding the United States of $750, could be sustained, and before any judgment had been rendered by the court upon the demurrer, the counsel for the defendant moved the court for leave to withdraw the demurrer and plead the general issue. To this motion the counsel for the United States objected, and prayed that peremptory judgment of condemnation should be entered against the defendant; contending that the court has no discretionary power to permit the defendant to withdraw his demurrer and plead the general issue, after the argument upon the demurrer, and after the delivery of the opinion of the court.

It seems to be certain, that if the court should now proceed to give judgment upon the demurrer, that judgment can not be judgment of *respondeas ouster*, but must be judgment of condemnation.

The questions then are,

1st. Whether the court has a right, in its discretion, to give the defendant leave to withdraw his demurrer, and plead the general issue, after the opinion of the court has been expressed against the validity of the objections taken to the indictment? and

2d. Whether the court, if it has that right, ought, under the circumstances of this case, to exercise it?

1. Upon the first question, it may be observed, that the right in civil cases is conceded, and has been often exercised. But it is said, that there is no instance in which this court has exercised it in a criminal case. This may be true, but it may be because demurrers, in criminal cases, are very rare, inasmuch as upon a motion to quash, or in arrest of judgment, the defendant may avail himself of all the matters which he could upon demurrer. But, because no criminal cases in this court have called for the exercise of the right, it does not follow that the right does not exist; and no reason is perceived why it should not exist in criminal as well as in civil cases.

On the contrary, Chitty, in his Criminal Law,[1] speaking of criminal cases, says, that "by leave a demurrer may be withdrawn." And again, in p. 440, he says, "when once a demurrer is filed, the defendant can not withdraw it without the consent of the parties on whose prosecution he is indicted; or, at least, without the permission of the court." And although he says, in p. 439, that "in cases of misdemeanor or judgment of *respondeas ouster* is of right demandable, when an issue in law is found against the defendant, for the decision operates as conviction," yet he says, "as a matter of favor, the defendant may still be permitted to plead not guilty."

That a *respondeas ouster* is not of right demandable, in the present case, is admitted; and if we now proceed to judgment, that judgment must be peremptory. And the law is admitted as laid down by Chitty, in p. 441, that, "in mere misdemeanors, if the defendant demur to the indictment, and fail in the argument, he shall not have judgment to answer over; but the decision will operate a conviction."

Here the defendant does not ask the judgment of the court, upon the demurrer, that he shall answer over; but he asks leave to withdraw the demurrer, before the actual decision of the court upon it.

The cases cited, which, at first view, seem to support the counsel of the United States in opposing the motion, on the ground of the want of such a discretionary power to suffer the demurrer to be withdrawn, only show that the judgment, when given upon the demurrer, must be a peremptory judgment. In civil cases, such a motion has been often made and granted, in this court; and we think we have as much right, in our discretion, to grant it in a criminal case as in a civil. Indeed, we think the reasons for it are much stronger in the former than in the latter, in proportion as a man's reputation and liberty are dearer to him than his lands or goods.

2. The second question is, whether the court, in the exercise of its discretion, ought to grant the leave which has been asked?

That a man has mistaken the law, and, therefore, mistaken his defence, does not seem of itself, to afford a reason why the peremptory judgment of condemnation should be entered up against him; and if he had a probable ground to suppose that he was not bound to answer criminally for the act charged, but is mistaken, it seems hard that he should not be permitted to deny the fact. For although, technically speaking, he must be considered as having admitted the facts, before he could call upon the court for their opinion, whether those facts constituted a crime, yet it must be seen that such admission is only made for the purpose of raising the question of law.

[1] vol. 1 p. 437.

That the questions of law, which have arisen in this case, were important, and in some degree doubtful, and that some of them were new, at least in this court, must be apparent from the time consumed in argument by the able counsel, and by the time which the court deemed necessary for deliberation. This, therefore, can not be called a frivolous demurrer.

It may be observed, also, that, although the judgment of the court upon the demurrer, if against the defendant, is peremptory, it is not so if against the United States; for they may send up new bills of indictment successively, until they shall have made their case perfect in form.

Another circumstance is, that in this case there is no appellate court to reverse our judgment, and correct it if it should be erroneous.

It also deserves consideration, that, from the known practice of this court to suffer demurrers, in civil cases, to be withdrawn after argument, and after an expression of the opinion of the court, and from the circumstances that there has been no criminal case, in this court, in which such leave has been denied, and that the reasons in favor of it, in criminal cases, were apparently as strong, at least, as in civil cases; the defendant, or his counsel, may have been led to believe that the same indulgence would be extended to criminal cases; and this belief may have been kept up during the argument of these causes, by the circumstance that the witnesses for the United States, who were to support the indictment before the petit jury, have been detained here during the whole of the arguments upon the demurrer. Whereas, if the United States had discharged those witnesses as soon as the defendant had demurred to the indictment, so that the defendant might have understood that the United States expected a peremptory judgment, the defendant might have offered to abandon his demurrer before the opinion of the court was declared, and even before the argument of counsel.

It is true that the defendant might have availed himself of the same objections to the indictment upon a motion in arrest of judgment, as by demurrer; but it is not perceived how the United States would have been in any degree benefited by such a course. On the contrary, if the judgment upon the demurrer to any one of the indictments should be against the United States, it would save the expense of a jury trial upon that indictment, and the United States might send up a better.

The court is, therefore, of opinion that the leave asked by the defendant's counsel ought to be granted; provided the defendant shall waive his right of moving in arrest of judgment for any matters apparent upon the indictment.

THURSTON, J., dissenting saying:

That he felt himself compelled to differ from a majority of the

court, in the opinion just rendered by them. That he should be well satisfied that the merits of the case should be heard, which would give the accused a fair opportunity of proving his innocence to the world, and which, by the judgment of the court, he will have; but he could not see that he had any discretion which he could exercise on this occasion. And although the majority of the court, among the reasons they assigned for granting leave to withdraw the demurrer, said that they did not see why this can not be done in a criminal, as well as a civil case, he thought there was a very strong reason for it, and that was that the law forbade. And although he was not, perhaps, among those judges who entertain a very profound respect for all the *dicta* to be found in compilations and digests, yet, when they are supported by solemn decisions of courts of great dignity and authority, he felt himself bound by them. That no case could be found in which, after a demurrer was fully argued, and the opinion of the court delivered thereon, that the demurrer could be withdrawn, and the demurrant permitted to plead over. The judge then read certain passages from Chitty's Criminal Law, in support of his position. The first was:[1] "When once a demurrer is filed, the defendant can not withdraw it without the consent of the parties on whose prosecution he is indicted, or at least without the leave of the court." That, although this passage might seem to favor an application, in certain cases, for leave to withdraw, yet it is far from sustaining the motion in the present case. That it was very true, perhaps, that, after demurrer filed, even in a case of misdemeanor, the court, before argument, would allow the accused a *locus pœnitentiæ;* and not tie him down to a step which he may have taken without due deliberation. That if the court have a discretionary power, it is in this stage of the proceeding, and not after full deliberation, and after the defendant had fought every inch of ground in support of his demurrer, and found himself defeated, after one of the most obstinate and pertinacious conflicts that was, perhaps, ever witnessed in a court of justice. That he could see no substantial difference between the opinion of the court, solemnly delivered after argument, and the judgment of the court. That the judgment ought to be entered after the opinion delivered, in which case the defence would be concluded, and he understands that the majority of the court so considers it; and that, before the clerk can be directed to enter the judgment of the court on the opinion delivered, if the defendant's counsel choose to interpose a motion of this kind, it seemed to him that it should not make any difference in the principle or in the results.

[1] 1 Chit. Cr. L. 440.

The judge further observed, that even if it was clear that he had a discretion to permit the demurrer to be withdrawn, under existing circumstances he should doubt the propriety of exercising it in the present case, after the defendant had rested on his demurrer with such confidence, and supported it with such obstinacy; and persisted in refusing to ask the exercise of this power in his behalf, until he had become informed of the opinion of the court.

The judge, then, to sustain the remarks above made, read the following authorities: [1] "But in mere misdemeanors, if the defendant demur to the indictment, whether in abatement or otherwise, and fail in the argument, he shall not have judgment to answer over, but the decision will operate as a conviction."

That this authority appeared, from the references, to be supported by a solemn decision of the Court of King's Bench, in which all the judges concurred. That the language of Lord Ellenborough, and all the judges, in that case, was so positive, and therefore the authority (in the absence of a single case against it, either in the books or in our own practice). so imperative, that he could not resist it. This case is to be found in 8 East.[2] Lord Ellenborough there says: "Only one instance has been mentioned of the same privilege" (meaning the privilege asked of this court to withdraw the demurrer and to plead over),[3] "and that is the precedent referred to in Tremaine, on account of the magnitude of the punishment for striking another in the king's palace, being no less than the loss of the offender's hands."

Grose, Justice, concludes his opinion with these words: "But it seems that in criminal cases, not capital, if the defendant demur to an indictment, etc., whether in abatement or otherwise, the court will not give judgment against him to answer over, but final judgment." "All the judges of the King's Bench concurred in that opinion; and he felt himself bound by such positive authorities, and therefore was obliged to dissent from the opinion of the court, and to refuse the motion."

The defendant having thus had leave to withdraw the demurrer to the indictment for the 750 dollars, pleaded not guilty, and the case came on for trial upon the general issue.

[1] 1 Chit. Cr. L. 442.

[2] p. 112, King v. Gibson.

[3] But see the case itself.

## FALSE PRETENSES — AGENT AND PRINCIPAL COLLUDING AS TO PRICE OF LAND — MOTIVE.

## SCOTT v. PEOPLE.

[62 Barb. 63.]

*In the Supreme Court of New York, 1872.*

1. **An Indictment for Obtaining the** signature of a purchaser to promissory note s given for the purchase price of property sold to him by false pretenses and representations as to the price asked for the property by a third person, who was the owner, can not be sustained, where the proof shows that no representations were made by the defendant in regard to the price, except that he told the purchaser, in the course of the negotiations, that he did not think that the seller would take less than a sum named; and that the only representations as to price, at the time of the sale and purchase, were made by the seller.
2. **Although the Price Asked,** and finally agreed to be paid by the purchaser, be fixed by collusion between the owner of the property and the defendant, for the purpose of defrauding the purchaser, such collusion, though it may be an indictable offense, is not the offense charged.
3. **If, in Fact, the Price Agreed** to be paid by the purchaser was the price demanded by the seller, at the time of the sale, the motive in asking that price is of no consequence, so far as the offense charged is concerned.

Writ of error to the Jefferson Oyer and Terminer. The plaintiff in error, Scott, was indicted jointly with one William B. Nicholson, for obtaining under false pretenses, the signature of one George A. Wilson to six promissory notes of $1,000 each

At the close of the proof the prisoner's counsel moved the discharge of the prisoner, on the grounds generally of the insufficiency of the indictment and the proof; which motion was denied.

The jury found a verdict of guilty in manner and form as charged in the indictment. A motion in arrest of judgment and for a new trial was made upon the case as settled. The motion was denied, with exceptions.

JOHNSON, J. The plaintiff in error was indicted with one Nicholson, for obtaining the signature of George A. Wilson, to six promissory notes of $1,000 each, by false pretenses, upon the purchase by the latter of Nicholson, of the title to one-half of a certain patent right. Several pretenses alleged to have been false were set out in the indictment, only one of which it will be necessary to consider, as the judge who presided upon the trial, when submitting the case to the jury charged and instructed them that upon that one only could the plaintiff in error be convicted of the offense charged.

That pretense was in regard to the real and true price for the whole right. The charge in the indictment upon this subject, was that Scott, the plaintiff in error, and Nicholson, falsely pretended and represented

that the real and true price in money, asked and fixed by Nicholson for the said right, was the sum of $12,000, whereas, in truth, the true price in money, asked and fixed for said right by said Nicholson, was only $3,000. The plaintiff in error was convicted on this charge in the indictment, his accomplice Nicholson, the owner and vendor of the patent, being used as a witness by the People. The only facts in regard to the price, and the representations in respect to it, which the evidence tended to prove, were that Nicholson, who was the owner of the patented right, desired to sell the same, and wished the plaintiff in error to assist him in making the sale. That the plaintiff in error inquired of Nicholson what he would take for his right, and was informed by Nicholson that he would take $3,000. That thereupon the plaintiff in error informed Nicholson that he would get him three goods notes for it, but he, Nicholson, must ask $12,000 or $15,000 for it, so that he, the plaintiff in error, could make something out of it. On the evening of the same day, the plaintiff in error and Nicholson together saw Wilson, and negotiations commenced for the purchase of the right. Nicholson at first asked $15,000. Wilson thought the price ought not to be over $10,000; but it was finally fixed by Nicholson at $12,000, and the bargain was made at that price. The plaintiff in error pretended to be a joint purchaser with Wilson of the right. Wilson gave the notes in question for his half of the purchase price, and the plaintiff in error pretended to give separate securities for his half. The patent was then duly transferred to Wilson and the plaintiff in error, who became the owners thereof. After the trade was thus consummated, Nicholson returned to the plaintiff the securities he had turned out and the six notes given by Wilson were divided between Nicholson and the plaintiff in error, each taking three. There was some conflict in the evidence in regard to the representations as to the price; but the judge charged the jury that if they found the representations in respect to the price to be false, as charged in the indictment, they should render a verdict of guilty against the plaintiff in error.

The question whether the indictment in this particular, set out any such offense, and also, whether the evidence on the subject of price, admitting all that was testified to on behalf of the State to be true, was sufficient to establish the crime of obtaining the signatures to the notes by false pretenses, was sufficiently raised in various forms for the plaintiff in error. That the contrivance between Nicholson and the plaintiff in error, by which the trade was effected, and the notes obtained from Wilson, was grossly unfair and dishonest, in a moral point of view, must, of course, be admitted. But it does not follow from this that the transaction constituted the crime of obtaining the signatures to the notes by false pretenses, as charged in the indictment. Wilson, by the bargain, got

all he bargained for, and all he expected to get, to wit, the title to one-half the patent right, and whether it was worth more or less than the price he agreed to pay by his notes, the case does not disclose. The case as it stands upon the evidence, is, not that Wilson was really injured and suffered loss by the bargain, but that he might have made a more advantageous purchase, and gained more, had the facts in regard to what Nicholson was to receive been stated and made known to him. The point is, was there a false representation as to price, at the time of the trade, which was material in the eye of the law. There is no evidence to show that the plaintiff in error made any representation whatever in regard to the price, except that he told Wilson, in the course of the negotiation, that he did not think Nicholson would take less than $12,000. This was a false and dishonest expression of an opinion as to what Nicholson would or would not do; but it was no representation as to what Nicholson's price in fact was. All the representations as to the price were made by Nicholson. Had the indictment been for a conspiracy to cheat, between Nicholson and the plaintiff in error, Nicholson's representations, for the purpose of effect- the common object, might be held to be those of the plaintiff in error. But that rule, I apprehend, does not apply to a case like this. But whether this is so or not, it is perfectly well settled that the pretense alleged to be false, must have formed some part of the inducement to the doing of the act, and must be of some existing fact, and made for the purpose of inducing the prosecutor to part with his property, or to do the act. Both the inducement and the fraudulent purpose are facts to be proved, and are not to be presumed. It is to be borne in mind that the false pretense charged, and upon which the conviction was had, was that the price of the patent was $12,000, where in truth it was only $3,000; and we are to look at the case now, as though nothing else had been charged in the indictment, and no proof given in regard to any other pretense which was there charged, as the other pretenses, and the evidence relating thereto, were all stricken out, or held to be out of the case. The notes, it is certain, were signed by Wilson, to complete his purchase, and obtain his title to one-half of the patent right. It is quite apparent that he would not have given his notes for $6,000 for this interest, if the price asked had been only $1,500, or $3,000 for the entire right. To suppose the contrary, would be against all experience in commercial transactions, and all the grounds of common inference.

We all know that the higher price enters into the inducement of the seller to sell, and the lower price enters into the inducement of the purchaser to purchase. The old struggle for the higher price on the part of the seller, and the lower price on the part of the purchaser,

which began at the beginning of traffic between men, still continues, and from the very nature of things, must continue as long as commerce is carried on. When, therefore, Wilson the purchaser, testifies that he would not have signed these notes for $6,000 if he had supposed the price was not $12,000, but only $3,000, we can see that he only intends to say that he would not have given that price if he had understood he could have purchased for less; and not that the fixing of the high price formed, or entered into, the inducement to make the purchase, and sign any notes to complete it. But in regard to the existing fact, as to the price, how is that? Price is the value which a seller places upon his goods for sale. It is not a fixed and unchangeable thing. It may be one thing to-day and another to-morrow, and one valuation to one customer, and a different one to another on the same day or hour. Whatever a seller asks any one to give is the price, until he changes it for another. The price asked is the existing fact, until it is changed. When the price asked is changed to another price, the former price is no longer an existing fact. The existing fact is not what a party may be willing to take in case he can not do better, but what he then proposes to take. The indictment in this case, in this respect, and the evidence on the part of the People, and the charge of the judge to the jury, all proceed upon the assumption that the price asked, when this bargain was made, was not the price, but something different; a mere false pretense. This is a mere confusion of ideas. That $12,000 was the price that Nicholson in fact asked on the occasion of that trade, no one denies, but all the evidence, on both sides, conclusively establishes. He first asked $15,000, and was offered $10,000. He finally came down to $12,000, and avowed his intention not to sell at that time unless he could get that price. There is no chance for dispute about this, at least on behalf of the People. But it is said that this price was fixed by collusion between Nicholson and the plaintiff in error for the purpose of defrauding Wilson. This may be so, but it does not affect the question we are considering. That may have been an offense of another character, but it was not the offense in question. No matter so far as this question is concerned, how the price came to be fixed and asked, or pretended at that amount. It was, in fact, asked, and though it may have been asked for the purpose of taking a dishonest advantage of Wilson, the asking was the existing fact. No other price was asked, or named, or fixed between the parties to the transaction, on that occasion, than that above referred to.

The motive in asking this large price is of no consequence, so far as this offense is concerned, if, in fact, the price was demanded by the seller. It would be a most extraordinary and unheard of thing to convict a merchant of obtaining money, or the signature to a note, by false

pretenses, because in selling his goods, by which the money or note was obtained, he had asked the purchaser, and obtained, a higher price for the goods than his price-mark, or than he had offered to sell the same goods to another customer, or than he would have been willing to take, had the purchaser refused to give the pretended price asked, and insisted strongly enough on a lower price.

Or, take the case of a person who procured the aid of an agent or broker to assist him in making sale of his property, real or personal, and who is willing, and proposes to such agent to sell at a given price, and who at the suggestion of the agent consents to ask a higher price, and to give the difference between the two prices to the agent in case the higher price can be obtained; can it be pretended for a moment that either the principal or the agent could be convicted of obtaining money, or the signature of the purchaser to obligations, by false pretenses in regard to price, even though, as in the case before us, they had pretended that the higher price was the true and only price, and that they would refuse to sell for anything less. The cases are precisely analogous so far as the false pretense is conerned. The element of collusion and conspiracy, which has been brought into the case at bar, belongs to another and different class of offenses. It must be seen, we think, and admitted, that the false pretense as to the price charged and sought to be proved in this case, is not the false pretense contemplated by the statute, and that the plaintiff in error was wrongfully convicted of that offense.

The judgment should therefore be reversed, and the plaintiff in error discharged absolutely.

TALCOTT, J., concurred.

---

## FALSE PRETENSES — PRISONER MUST KNOW THAT PRETENSE IS FALSE.

## R. v. BURROWS.

[11 Cox, 258.]

*In the English Court of Criminal Appeal, 1869.*

**On an Indictment** for fraudulently obtaining goods in a market by falsely pretending that a room had been taken at which to pay the market people for their goods, the jury found that the well-known practice was for buyers to engage a room at a public-house, and that the prisoner, pretending to be a buyer, conveyed to the minds of the market people that she had engaged such a room, and that they parted with their goods on such belief: *Held*, there being no evidence that the prisoner knew of such a practice, and the case being consistent with a promise only on her part to engage such a room and pay for the goods there, a conviction could not be sustained.

Case reserved for the opinion of this court by Mr. Baron BRAMWELL.

This was an indictment for obtaining goods by false pretenses. It was tried before me at the last assizes for Hertfordshire. The evidence was as follows: —

Eliza Osborn (wife of William Osborn): On Friday February 12, I went to Tring Market. Met prisoner at five minutes past nine. She came and asked price of plait. I said "fourteen pence." She said, "Thirteen pence," I said "No; it was very good work." She asked how many scores there were. I said "Thirty." She said, "I will have it." I said, "Let me bring it in; I will keep it dry." She said, "No, I will bring it in." That means bring it in, as I supposed, to the Rose and Crown. I asked for a ticket. She said, "That did not matter." I said, "Then where do you pay?" She said "In the Rose and Crown tap-room; there she would pay me." She took it then; I let her have it. Our general way of speaking to the buyers is to say, "Where do you pay." We have to go to a public house to be paid. I parted with it on belief she would pay me. I did not know her as a plait dealer. I thought she was a plait dealer because she bid for it, and told me where she would pay for it. Several buyers pay there. I went to the Rose and Crown. They begin to pay about half past nine. I might have believed her if she had said she would pay at half-past nine in the market place. I di l not find her. Other dealers were there.

Cross-examined: I have attended Tring market thirty years. She took it after I asked where she paid, and after she told me, I believed she would pay me, and so parted with it. There are many public-houses where they pay. They pay at some private houses. I went to the Rose and Crown in a quarter of an hour.

Tamar Crockett (wife of George Crockett, Tring): She asked what I wanted for plait. I said, "Tenpence halfpenny." She said, "Ten pence." She took it. I said, "Where do you pay, good woman?" She said, "At the Blooming Feathers." I said, "I don't know that." She said, "I'll pay at the Rose and Crown tap-room." She took it off my hand. It is a common rule for many plait buyers to take it. I believed I should find an honest woman in the tap-room to pay. I did not find her there. She offered ten pence, and then took the plait. Then we spoke about the Crown.

Cross-examined: When I asked her where she would pay, she had got the plait.

How: I saw the prisoner. She took plait, and asked what I wanted for it. I said "Eight pence." She said, "Seven pence." I asked her where she paid. She said, "At the Rose and Crown." I said, "Where are you paying, or where will you pay?" She said,

"You'll be sure to find me." I believed she was an honest woman. I thought she took the room as well as others. I thought she had been there and taken a room to pay. That is the practice. We ask the buyers if we don't know them. I believed she had taken the room. They stop a penny out of the price, and we have beer; some do, and some do not, but pay the room themselves, and stop nothing.

To me: I parted with my plait, I because I though she was an honest woman, and had put up there.

Sarah Kidd (barmaid at the Rose and Crown): It is the practice of plait buyers to have so much beer. They come and ask for the room. The beer is for the use of the room. The sellers come to receive. They don't pay for the room. Two front rooms were taken this day. Each buyer had a separate table. The prisoner had not taken a room, nor anything to justify her in saying she was going to pay there.

Cross-examined: If they did not have beer they would have to pay. I can swear, I think she was not there. There was no strange plait buyer that day. The buyers pay for the beer. The prisoner was not in the room.

To me: We have regular customers. Have had no fresh ones for six years.

Robert Goodyear: I took prisoner at Leighton that afternoon. I searched every house in Tring first. Could not find her. Leighton is a mile from Tring. I said, "Are you a plait buyer?" She said, "I buy a little sometimes for my neighbors." I said, "Have you bought any to-day?" She said, "No." I said, "Tell the truth; a woman has been to Tring market and got a lot of plait without paying; have you been to Tring market?" She said, "No." She turned to the person and said, "You know that." Upstairs in a back room, I found plait. She afterwards said, "How much further have I to go?" She said, "I have been to Tring Market, and bought plait and paid for it, but not for first two bundles."

*Codd* (counsel for the prisoner) submitted there was no case.

The indictment was appropriate to the case proved.

I told the jury as follows: If it is the practice for buyers to engage a room, or table in a room at public houses, of which the Rose and Crown is one, to pay sellers of plait, if that practice is well known; if what she, prisoner, said, naturally conveyed to seller's minds that she had done so; if that was untrue; and, if they, or any of them, parted with their goods in the belief that she had done so, then they might find her guilty.

They found her guilty.

I have to request the opinion of the Court of Criminal Appeal whether

there was evidence of the matters left to the jury as to any of the cases, and whether the direction was correct in point of law.

If the direction was correct as to any of the cases, and there was evidence to support it, the conviction as to such case is to stand, otherwise to be quashed.

The prisoner is on bail.

G. BRAMWELL.

*Codd*, for the prisoner. The conviction was wrong. All that the evidence amounts to is a breach of contract. The false pretense laid in the indictment was that the prisoner alleged that she had taken a room, but the evidence does not support a conviction on that ground; all that the case shows is that said she would pay for the room.

No counsel appeared for the prosecution.

KELLY, C. B. It is consistent with all that is stated in the case that the prisoner may have gone into the market, not knowing whether she would make any purchases or not, and having made some purchases, that she then promised to pay for them at the Rose and Crown public house. At the time she made the promise she had not taken a room at the Rose and Crown, and there is no evidence that she knew there was a practice in the market to take a room for making such payments. It is quite consistent with the evidence that all she meant was that she would there take a room, and there pay for the purchases. That is not a false pretense and the conviction must be quashed.

The rest of the court concurred.

*Conviction quashed.*

---

## FALSE PRETENSES — INTENT TO DEFRAUD ESSENTIAL — PROSECUTOR MUST RELY ON REPRESENTATIONS.

## FAY *v.* COMMONWEALTH.

[28 Gratt. 912.]

*In the Court of Appeals of Virginia, 1879.*

1. **False Pretenses — Intent to Defraud.** — F., expecting to buy a certain lot, sold it to R. telling him that he owned it, and received the money for it. After selling to R., F. made a written contract for the lot and paid a portion of the price, but he never paid the full price for the lot nor ever acquired title to it. F. was prosecuted for obtaining R.'s money by false pretenses, the false pretense being the statement that he owned the lot. *Held*, that if F. at the time he made the sale to R. and obtained his money, honestly intended and expected to make title to the lot to R. he did not have the intent to defraud required by the statute and should not be convicted.

2. **The Party Alleged to have been Defrauded** must be induced to part with his money by means of the false pretense, *i.e.*, he would not have parted with it if the pretense had not been made. *Held*, that the evidence in this case does not establish this fact.

In September, 1876, William Fay was indicted in the Hustings Court of the city of Richmond, for stealing divers notes of the United States currency, amounting to two hundred and eight dollars, the property of Nelson Randolph. He was tried at the October term of the court, and was found guilty, and the term of his imprisonment in the penitentiary was fixed by the court at three years.

The prisoner then moved the court for a new trial, which was refused by the court; and sentence according to the verdict was passed upon him.

The prisoner excepted to the opinion of the court overruling his motion for a new trial; and the facts as shown by the bill of exceptions were as follows: —

Sometime in the spring of 1873, at Seabrook's warehouse, the prisoner had an interview with one George E. Bowden, the owner of two lots of land, in which Bowden expressed his willingness to sell the two lots together for three hundred dollars, but declared that he would not sell them separately.

In the latter part of January, 1874, the prisoner sold one of these lots to Nelson Randolph, a colored man, for two hundred dollars, telling him that he owned them; and Randolph paid him fifty dollars in cash, and agreed to pay the residue in monthly installments of fifteen dollars each. About the 8th or 9th of February, 1874, the prisoner called on Bowden and said, "I have come for those lots," and Bowden replied, "You can have them." The prisoner asked on what terms as to time, the amount being mutually understood, and nothing being said about it at that time; and it was agreed that fifty dollars of the amount (including the two lots) should be paid cash, and the residue in three notes, at eight, sixteen and twenty-four months. The prisoner paid the cash and executed the notes, which, at prisoner's request, were dated on the 1st day of February, as was the contract, the actual time of contract being the 9th or 10th of February, whereupon a paper was drawn up and delivered by Bowden to Fay, setting forth the contract, which paper was as follows: —

"RICHMOND, VA., February 1st, 1874.

"This 1st day of February, 1874, between Geo. E. Bowden, of the city of Richmond, of the first part, and Wm. Fay, of the said city, of the second part, doth agree, in consideration of the sum of three hundred dollars, payable one-fourth cash and the balance in equal installments of eight, sixteen and twenty-four months (with interest added) respectively, after date, to convey to Wm. Fay of the second part, or his heirs or assigns, certain real property in the county of Henrico, near Union Hill, on the west side of Twenty-fifth Street, between R and S Streets, fronting sixty feet on Twenty-fifth Street, running back between

parallel lines one hundred and twenty-five feet to an alley in common fourteen feet, designated a lots Nos. six and seven in square 121 of Adam's plan, being the same and conveyed to the said George E. Bowden, of the first part, by deed dated July 13th, 1868. And we do agree that the title to the above property shall be retained until all the purchase-money is paid.

"GEO. E. BOWDEN.
"WILLIAM FAY."

It was further proved, that on the delivery of this paper, the prisoner said to Bowden, "I have made one hundred dollars to-day, for I have sold those two to colored men," and asked that the deed should not be made until they paid, and then made to them, to save expense; that Bowden replied, "I don't care, as I have got my price;" that the prisoner thenceforward paid the taxes on the lots, Bowden declining to pay when the bills were presented to him, and sending the collectors to Fay, the prisoner, telling them that Fay had bought them; the taxes on Randolph's lot being charged to him, and paid by him to Fay in the first payment to Fay; that when the prisoner's first note fell due he failed to pay it, saying the negroes had not paid him; that he paid it eventually, but in installments.

And that he failed to pay the balance, continuing his excuse for failure to pay on the same ground, and did not pay at all; the balance remaining unpaid until paid by the negro, Randolph, in April, 1876, to Bowden, in order to get his title; and that Randolph never knew or was informed that the property did not belong to Fay until he asked for his deed.

It was further proved that shortly after the last payment on said note, Fay went into bankruptcy, and has never paid the other notes.

It was further proved that, upon Nelson Randolph completing his payments as agreed, Fay gave him the following order on Bowden, to wit: —

"April 3, 1876.

"MR. BOWDEN — *Sir:* This is to certify that Nelson Randolph has paid all except $1 for one lot of land on Twenty-fifth Street, in sq. 121, fronting on Twenty-fifth Street, 30 feet, running back 125 feet, it being the south lot. Is entitled to his deed as soon as he pays the balance, and I settle with you.

"WM. FAY."

That Randolph went to see Bowden with Fay's order, but that Bowden refused to give Randolph his deed unless the balance of the one hundred and fifty dollars due on that lot by Fay was paid to him, and Fay himself, a few days after, went with Randolph to see Bowden, with

the same result, and that Randolph finally paid his balance, amounting to eighty-seven dollars of principal and interest, when Bowden executed his deed to Randolph, the prisoner telling him that was the best thing to do, and promising to reimburse him; which he had not done.

It was further proved that the prisoner had lived in the city for above twenty years, and was a man of good repute.

Upon the application of the prisoner, a writ of error and *supersedeas* was awarded by this court.

*Crump, Young & Kelly*, for the prisoner.

*The Attorney-General*, for the Commonwealth.

ANDERSON, J., delivered the opinion of the court.

This is a prosecution in fact for obtaining money on false pretenses, which is made larceny by the statute; and the indictment is for larceny.

It is a reasonable proposition that upon this indictment it is necessary for the Commonwealth to prove every fact which would be required to be alleged in an indictment for obtaining money on false pretenses. And in such indictment it would be a material allegation that the money was obtained by the false pretense alleged, and therefore was necessary to be proved in this indictment in order to a conviction. The false pretense must be the instrument of the cheat.[1]

The pretense need not have been the only inducement. If, operating either alone or with other causes, it had a controlling influence, so that but for it the person to whom it was addressed would not have yielded, it is sufficient. In a note to the above section the author says: In *Commonwealth* v. *Drew*,[2] Morton, J., stated the true doctrine thus: "That the false pretenses, either with or without the co-operation of other causes, had a decisive influence upon the mind of the owner, so that without their weight he would not have parted with his property."

In *People* v. *Haynes*,[3] Chancellor Walworth employed much the same language, saying: "It is not necessary to constitute the offense of obtaining goods by false pretenses, that the owner should have been induced to part with his property solely and entirely by pretenses which were false; but if the jury are satisfied that the pretenses, proved to have been false and fraudulent, were a part of the moving causes which induced the owner to part with his property, and that the defendant would not have obtained the goods if the false pretenses had not been superadded to statements which may have been true, or to other circumstances having a partial influence upon the mind of the owner, they will be justified in finding the defendant guilty of the offense charged, within the letter as well as the spirit of the statute on the sub-

[1] Bish. Cr. L., sec. 347.

[2] 19 Pick. 179.

[3] 11 Wend. 557; 14 Wend. 546.

ject." Other inducements may have combined with the false pretenses to induce the owner to part with his property; but it must appear that but for the false pretenses the owner would not have parted with his property, that they had the controlling, prevailing influence.[1]

The only proof of any false pretense in this case, or that the prisoner made any statement that was not strictly true is, that he said he was the owner of the lots. It appears from the certificate of facts that, in the spring of 1873, the prisoner had an interview with George E. Bowden, the owner of two lots of land, in which Bowden expressed his willingness to sell the two lots together for $300, but declared that he would not sell them separately; and that afterwards, in the latter part of January, 1874, the prisoner sold one of them to Nelson Randolph, a colored man, for $200, telling him he owned them; that Randolph paid him, fifty dollars in cash, and agreed to pay the balance in monthly installments of fifteen dollars each. It is contended for the Commonwealth, that "telling him he was the owner of the lot" was a false pretense.

But it is not proved that he, Randolph, was influenced by that declaration to make the purchase, and that he would not have purchased and made the cash payments, but for that declaration of the prisoner, nor can it be inferred. It is rather to be presumed that Randolph desiring to have the lot, would have accepted the offer of the prisoner if he had said nothing to him about the ownership, as he made no inquiry of him about it, so far as this record shows.

It does not appear that the declaration made by the prisoner was made in response to an inquiry made by Randolph, but seems to have been incidentally mentioned by the prisoner. This defect in the proof, if it had been in the allegations of an indictment for obtaining money on false pretenses, would have been fatal on demurrer, and it would seem ought to avail the prisoner as effectually in this proceeding.

The court is of opinion, therefore, that upon this ground the verdict was contrary to the law and the evidence, and ought to have been set aside.

The court is further of opinion, that unless the selling was by false pretense, with intent to defraud the buyer, the case is not within the statute. It follows that the fraudulent intent must have existed at the time the false pretenses were made by which the money was obtained. If there was an intention by the prisoner to defraud Randolph, he could not have intended, when he sold him the lot, and received fifty dollars in part of the price, ever to pass to him title for the same.

But the facts, as certified by the court, show the contrary.

[1] Anable's Case, 24 Gratt. 563, 567.

It is a fair inference from them that he had previously been in treaty with Bowden for the purchase of the lots, and ascertained that he could purchase them together for three hundred dollars, and was well satisfied that all that was necessary for him to do was to accept Bowden's offer, and the lots were his; and finding that he could sell each lot for two hundred dollars, and make a handsome speculation, he determined to take them at Bowden's offer, and considered them as virtually his. It is evident that he had no purpose to cheat Randolph by inveigling him to pay him his money for property which he had no right to sell him, and for which he could not and did not intend to make him a title. This is shown by the fact, that a few days after the sale to Randolph he went to Bowden and completed the contract of purchase with him, paying him in cash fifty dollars, the money or the amount he had received from Randolph, and executing his notes for the deferred payments, and entering into articles of agreement with him, setting out the terms of the sale and purchase, informing him that he had sold each of the lots for two hundred dollars, at an advance of one hundred dollars on the price he was to pay him for them, and requesting him, when the purchase-money was paid, to convey the lots respectively to his vendees. By this conduct he showed a *bona fide* intention that Randolph should get what he sold him, and for which he had received the cash payment, and conclusively repels the idea of an intent to cheat and defraud him in the sale. If in his subsequent dealings with him there was evidence to show that he had changed his purpose, and sought to cheat and defraud him, which we think there is not, it could not make the previous act fraudulent and criminal, which was *bona fide* and lawful. The payments which he afterwards received from Randolph, though in small sums, he ought to have turned over to Bowden until he had secured title to Randolph, and to have run no risk of not being able to make the payments to Bowden when they fell due. But it would be a harsh judgment to say that his not doing so evidenced an intention to cheat and defraud Randolph. It is more probable, and it is more just to conclude, that he calculated upon being able, and *bona fide* intended to make the payments to Bowden when they fell due from other sources, in which he was disappointed by misfortunes, which reduced him to bankruptcy; and that his failure to fulfill his contract, and to secure Randolph's title, was, though censurable, rather his misfortune than a crime.

But he had reduced the amount on Randolph's lot to eighty-seven dollars, which Randolph paid to Bowden, and received his deed with the approval of the prisoner, who, though discharged from his legal liability by the act of bankruptcy, revived it by his promise to refund the amount to Randolph. The court is clearly of opinion that the evi-

dence is wholly insufficient to establish the fraudulent intent, which conclusion is strengthened by the fact that the prisoner has resided in this city for twenty years in good repute.

The indictment charges the larceny of divers notes of the United States currency, for the payment of divers sums of money, in the whole amounting to the sum of $208, the property and notes of Nelson Randolph. The evidence does not show that the prisoner received from Randolph notes in United States currency. The proof is, that he received fifty dollars in cash, and that Randolph agreed to pay the balance in monthly installments of fifteen dollars each. Upon the authority of the case of *Johnson* v. *Commonwealth*,[1] the court is of opinion that in the absence of proof that such money as was charged by the indictment to have been stolen was received by the prisoner, the jury was not warranted in finding a verdict against him.

Upon the foregoing grounds the court is of opinion to reverse the judgment, and to remand the cause.

*Judgment reversed.*

---

## FALSE PRETENSES — CRIME NOT COMMITTED WHERE NO PROPERTY OBTAINED.

### STATE *v.* ANDERSON.

[47 Iowa, 142.]

*In the Supreme Court of Iowa.*

**Where by the Agreement** between the prosecutor and the defendant, the defendant gets no title to the property which is delivered to him on the faith of the alleged false pretenses, the crime of obtaining property by false pretenses is not committed.

SERVERS, J. The indictment charged "that * * * defendant did obtain from the St. Paul Harvester Works, through J. C. Yetzer, * * * one Elward harvester, of the value of one hundred and ninety dollars." The defendant pleaded not guilty. The false pretenses used for the purpose of obtaining said property were in writing, and were as follows: —

"$115.00 ATLANTIC, IOWA, July 12, 1875.

"For value received, on or before the first day of October, 1876, I, the subscriber of Benton Township, county of Cass, and State of Iowa, promise to pay to the order of the St. Paul Harvester Works, one hundred and fifteen dollars, at the Cass County Bank, in Atlantic, with

[1] 24 Gratt. 555.

interest at ten per cent per annum, from date until paid, and, in addition, I will pay five per cent attorney's fees, if suit is commenced on this note.

"The express condition of the sale and purchase of the Elward harvester, for which this note is given, is such that the title, ownership, or possession, does not pass from said St. Paul Harvester Works until this note is paid in full; that said St. Paul Harvester Works shall have full power to declare this note due, and take possession of said machine at any time they may deem themselves insecure, even before the maturity of this note. For the purpose of obtaining credit, I, P. H. Anderson, hereby certify that I own, in my own name, forty acres of land in section thirty-one, township of Benton, county of Cass, and State of Iowa, with twenty-five acres improved, worth $1,000 which is not incumbered by mortgage or otherwise, except —— ——. I own $800 worth of personal property over and above all indebtedness.

"P. H. ANDERSON.

"P. O. Atlantic, county of Cass, State of Iowa."

The "State introduced evidence which tended to show the representations made and their falsity, and also that defendant purchased of the St. Paul Harvester Works a harvester, which the agent of the company was induced to sell and deliver by and through said representations."

After the State rested, the defendant moved the court to "direct the jury to acquit the defendant, for the reason that it appeared by the contract the defendant did not obtain, by the alleged false representations, the title to or property in said harvester, but the same remained in the St. Paul Harvester Works Company, and that said company, notwithstanding the delivery of the harvester to defendant, continued to be the owner of the same, with the right to resume possession thereof at any time," which motion was sustained, and the jury so directed. The correctness of this ruling is the only question to be determined.

The statute provides: "If any person designedly and by false pretense, or by any privy or false token, and with intent to defraud, obtain from another any money, goods or other property * * *:"[1]

In 3 Archbold's Criminal Practice and Pleading,[2] it is said: "In order to convict a man of obtaining money or goods by false pretenses, it must be proved that they were obtained under such circumstances that the prosecutor meant to part with his right to the property in the thing obtained, and not merely with the possession of it." This doctrine is recognized in 3 Greenleaf,[3] and also, as we understand in 2 Wharton on Criminal Law.[4]

1 Code, sec. 4073.
2 p. 467.
3 sec. 160.
4 sec. 2149.

The only cases cited by the attorney-general as being in conflict with these authorities, are *Skiff* v. *People*,[1] and *People* v. *Haynes*.[2] The former has but little, if any, bearing on the question before us, and the latter was reversed, in *People* v. *Haynes*,[3] and it was then held, where a person sold goods to another on credit and delivered the same on a steamboat designated by the purchaser, to be forwarded to his residence, that the sale became complete, and the title and possession vested in the purchaser. After such delivery the seller made the attempt to stop the goods while in transit, to prevent which the purchaser made certain false representations, in consequence of which the seller did not persist in his attempt to seize the goods. The purchaser was indicted for obtaining the goods by means of false pretenses, and it was held he could not be convicted. It is evident, in the case at bar, that the seller did not intend to part with either the right of property or possession, for it is expressly provided in the contract of purchase and sale "that the title, ownership or possession does not pass" until the note is paid, and the right "to declare the note due and take possession of the machine at any time," was expressly reserved.

The defendant did not even obtain an unqualified right to the possession. The plaintiff , in a legal sense, parted with nothing. It is unnecessary to go as far as the rule laid down in Archbold, in order to sustain the ruling below. At least we think the defendant must have obtained, by means of the false pretenses, either the title or the unqualified right of possession as between himself and his vendor, for at least some length of time. Here the delivery and resumption of the possession by the vender could be at the same instant of time, or as near thereto as it was possible for the mind to act and determine.

*Affirmed.*

---

## FALSE PRETENSES — MONEY MUST BE OBTAINED — OBTAINING CONSENT TO JUDGMENT.

## COMMONWEALTH v. HARKINS.

[128 Mass. 79.]

*Supreme Judicial Court of Massachusetts, November Term, 1880.*

**An Indictment Under a Statute** which provides that "whoever designedly, by a false pretense, or by a privy or false token, and with intent to defraud, obtains from another person any property * * * shall be punished," etc., will not lie against one who by

1 2 Park. Cr. 139.

2 11 Wend. 558.

3 14 Wend. 547.

**false pretenses obtains the consent of a city to the entry of a judgment against it in an action then pending in his favor, and receives a sum of money in satisfaction of such judgment.**

COLT, J., delivered the opinion of the court.

The defendant was indicted for obtaining money from the city of Lynn by false pretenses. He moves to quash the indictment on the ground that it did not set forth an offense known to the law.

It is alleged in substance that the defendant falsely represented to the city of Lynn, through its agent, the city solicitor, that a street which the city was bound to repair had been suffered to be out of repair, and that the defendant while traveling thereon with due care was injured by the defect; that the defendant at the same time exhibited an injury to his foot and ankle, and represented that it was caused by the alleged defect. It is further alleged that the city and its solicitor were deceived by these representations, and being induced thereby, agreed to the entry of a judgment against the city in a suit then pending in favor of the defendant in this case; and upon the entry thereof paid the amount of the same to him. It is not alleged that the suit was to recover damages on account of the defendant's injury from the alleged defect, but we assume that this was so, for otherwise there could be no possible connection, immediate or remote, between the pretenses charged and the payment of the money in satisfaction of the judgment rendered.

In the opinion of a majority of the court this indictment is defective. The facts stated do not constitute the offense of obtaining money by false pretenses. The allegations are that an agreement that judgment should be rendered was obtained by the pretenses used, and that the money was paid by the city in satisfaction of that judgment. It is not alleged that, after the judgment was rendered, any false pretenses were used to obtain the money due upon it and, even with proper allegations to that effect, it has been held that no indictment lies against one for obtaining by such means that which is justly due him. There is no legal injury to the party who so pays what in law he is bound to pay.[1] A judgment rendered by a court of competent jurisdiction is conclusive evidence between the parties to it that the amount of it is justly due to the judgment creditor. Until the judgment obtained by the defendant was reversed the city was legally bound to pay it, notwithstanding it may have then had knowledge of the original fraud by which it was obtained; and with or without such knowledge it can not be said that the money paid upon it was in a legal sense obtained by false pretenses which were used only to procure the consent of the city that the judgment should be rendered.

[1] Com. *v.* McDuffy, 126 Mass. 467; People *v.* Thomas, 3 Hill, 169; Rex *v.* Williams, 7 C. & P. 354.

The indictment alleges the fact of a judgment in favor of the defendant which, if not conclusive as between the parties to this criminal prosecution, is at all events conclusive between the parties to the transaction. To hold that the statute which punishes criminally the obtaining of property by false pretenses, extends to the case of a payment made by a judgment debtor in satisfaction of a judgment, when the evidence only shows that the false pretenses were used to obtain a judgment, as one step towards obtaining the money, would practically make all civil actions for the recovery of damages liable in such cases to revision in the criminal courts, and subject the judgment creditor to prosecution criminally for collecting a valid judgment, whether the same was paid in money or satisfied by a levy on property.

Exceptions sustained.

GRAY, C. J., AMES and SOULE, JJ., dissented.

---

## FALSE PRETENSES — FALSE REPRESENTATION MUST BE MADE BEFORE DELIVERY OF GOODS.

## PEOPLE *v.* HAYNES.

[14 Wend. 546; 28 Am. Dec. 530.]

*In the Court for the Correction of Errors, New York, December, 1835.*

1. **Purchase and Sale of Goods — False Representation as to Solvency by Purchaser Subsequent to Delivery.** — H. bought certain merchandise of A. which was put in a box, marked with H.'s name and address, and delivered on board a boat named by him to be carried to his home. After this, but before A. who had received the shipper's receipt and invoice had given them to H, A. hearing that H. was in embarrassed circumstances inqnired of him. In answer thereto, H. made false representations as to his solvency. *Held,* that the goods having been obtained by H. and in his possession before these representations were made he was not guilty of false pretenses.
2. **Whether on an Indictment** for obtaining goods by false pretenses, an indictment setting forth several false pretenses inducing the sale of the goods will be sustained by proof of some of the false pretenses, *quære.*
3. **An Untrue Answer to an Inquiry** as to one's financial ability is not a false pretense. Per TRACY, Senator.
4. **For Errors on Mere Questions** of fact, the remedy of the injuréd party is by a motion for a new trial. No writ of error lies to an inferior court to review its decision upon matters of fact.

Indictment for obtaining goods under false pretenses. The General Sessions pronounced judgment on the verdict of guilty. Error to this court. The facts are fully set forth in Chancellor Walworth's opinion.

*F. B. Cutting,* for the prisoner.

*S. Sherwood,* for the People.

WALWORTH, Chancellor. We are called upon in this case to review a decision of the Supreme Court, upon a bill of exceptions taken on the trial of the plaintiff in error, upon an indictment for obtaining goods by false pretenses. No bill of exceptions can be taken in a criminal case, to authorize a superior court to correct an erroneous opinion of the court below, on the decision of a jury, upon matters of fact merely. The recent provision of the Revised Statutes only authorizes the defendant on the trial of an indictment, to except to decisions of the court in the same cases and in the same manner provided by law in civil cases;[1] and it is well settled in civil cases that the charges of the court or the decision of the jury upon matters of fact, can not be reviewed on a bill of exceptions, where there has been no erroneous decision of the court upon matters of law. The remedy of the party who is injured by a misdirection of the court or an erroneous verdict of a jury upon mere questions of fact, is by an application for a new trial, and not by writ of error.[2] Mr. Justice Story, in delivering the opinion of the Supreme Court of the United States, in the case of *Carver* v. *Jackson*,[3] says the court to which a writ of error is brought has nothing to do with the charge of the court below upon mere matters of fact, or with its comments upon the weight of evidence. Such observations are understood to be addressed to the jury as the ultimate judges of matters of fact, merely for their consideration, and are entitled to no more weight or importance than the jurors, in the exercise of their own judgments, choose to give them. But if the court in summing up the evidence to the jury, should misstate the law, it would furnish a proper ground for an exception to the charge of the court. Even in that case, however, the exception should be strictly confined to such mistake in the law which was applicable to the case.

Whether it is competent for the court before which an indictment for felony is tried, to grant a new trial at the instance of the defendant where there has been a palpable misdirection of the court upon mere matters of fact, or a verdict clearly against the weight of evidence without any such misdirection, where no erroneous decision in point of law has been made, is a question which this court is not now called upon to decide. If the court before which the trial is had can not grant a new trial in such a case, the remedy if any, is with the Legislature; as it is a settled principle of law that no writ of error lies to an inferior court, to review its decision upon matters of fact. So much of the charge of the recorder in the present case as related to the sufficiency of the evidence to establish the falsity of the pretenses charged

[1] 2 Rev. Stats., p. 736, sec. 21.

[2] Graham *v.* Cammann, 2 Cai. 168; Bull. N. P. 216.

[3] 4 Pet. 80.

in the indictment must therefore be laid out of view by this court in its decision, as being merely the expression of an opinion upon questions of fact which were submitted to the jury for their consideration, and not an erroneous decision of the court upon a question of law, for which a bill of exceptions would lie.

It is insisted however by the counsel for the defendant in error, that the charge was erroneous in point of law, because the jury were instructed, that it was not necessary for the public prosecutor to establish the falsity of all the pretenses charged in the indictment as false; but that it was sufficient to authorize a conviction, if the jury were satisfied that some of the pretenses were false, and that the accused obtained the goods solely and entirely on these pretenses, which were proved to be false, with an intent to cheat and defraud the persons from whom the goods were thus obtained. On this point I agree with Mr. Justice Nelson, who delivered the opinion of the Supreme Court, that the charge in this respect was more favorable to the accused than a correct construction of the statute would warrant.

It is not necessary to constitute the offense of obtaining goods by false pretenses, that the owner should have been induced to part with his property solely and entirely by pretenses which were false; but if the jury were satisfied that the pretenses proved to have been false and fraudulent, were a part of the moving causes which induced the owner to part with his property, and that the defendant would not have obtained the goods, if the false pretenses had not been superadded to statements which may have been true, or to other circumstances having a partial influence upon the mind of the owner, they will be justified in finding the defendant guilty of the offense charged within the letter as well as within the spirit of the statute on this subject. I am accordingly of opinion, that in the case now under consideration, although all the pretenses stated in the indictment, as those upon the strength of which the goods were obtained, were charged to be false, if either of them was in fact false, and was intended to deceive the owners of the goods, and thus to induce them to part with their property, and actually produce that effect, the indictment was sustained. One false pretense was sufficient te constitute the crime, although other false pretenses were also charged in the indictment. As a general rule, if an averment in an indictment, is divisible in its nature, and any one part thereof is sufficient of itself to constitute the crime, the other parts of the averment need not be proved, unless they are descriptive and material to the identity of that which is essential to the charge contained in the indictment.

Thus in an indictment for treason, where several overt acts of the

same treason are charged in one count of the indictment, it is sufficient to sustain the count, if any one of them is proved.[1]

So in an indictment upon the statute, making it a capital felony for clerks, carriers and others employed in the care or transportation of the mail, to steal or take out of a letter any bank post-bill, note, bill of exchange, etc., it was held sufficient to prove that the defendant was employed in one capacity, in the care of the mail, although the indictment charges that he was employed in two; and where the indictment charged that the letter which was purloined contained a bank post-bill and a bill of exchange, it was held sufficient if the proof showed it contained either.[2] In the case of *King* v. *Hunt*,[3] which was an indictment for composing and publishing a libel, Lord Ellenborough held it sufficient to prove the publication, although no evidence was adduced to show the composing of the libel by the defendant; that if an indictment charged that the defendant did and caused to be done a particular act, it was enough to prove either. He also says: "This distinction runs through the whole criminal law, and it is invariably enough to prove so much of the indictment as shows that the defendant has committed a substantive crime therein specified." [4]

Neither is it necessary to constitute the statutory offense of which the plaintiff in error was convicted, that any false token should be used, or that the false pretenses should be such that ordinary care and common prudence were not sufficient to guard against the deception. Such was undoubtedly the rule in relation to cheats which were punishable by indictment by the common law in England. On this subject our English ancestors originally adopted a laxer rule of morality than their Scottish neighbors, who very properly held the crime of swindling, or of obtaining goods by willful lying or other false pretenses, as one on a par in point of moral turpitude with stealing; and it was punished accordingly under the common law of Scotland. Thus in *Hall's Case*,[5] the prisoner was convicted and transported for seven years, for the crime of falsely assuming the character of a merchant by hiring a shop and filling it with fictitious bales; by which pretense he induced several persons to furnish him with goods, on a credit, when he had in fact no intention of carrying on business as a trader.

In *Scott's Case*,[6] the swindling for which the prisoner was convicted and sentenced to eighteen months' imprisonment, was the obtaining of hay from a farmer upon the false and fraudulent pretense that he was

1 Lowick's Case, 13 How. St. Tr. 277.

2 Rex *v.* Ellins, Russ. & Ry. C. C. 188. See also Rex *v.* Shaw, 1 W. Bl. 790.

3 2 Camp. 584.

4 See also King *v.* Hollingberry, 4 Barn. & Cress. 329, and Hill's Case, Russ. & Ry. 390.

5 1 Hume Cr. L. 173.

6 1 Alison Cr. L. 365.

the contractor's clerk, taking up forage for the use of the cavalry. Joanna Rickerby was also convicted of swindling in obtaining wearing apparel, by assuming a false name and falsely pretending that she had lost her clothes by shipwreck. In *Reid's Case*,[1] the fraud consisted in falsely assuming the character of an excise officer, and thus obtaining money under the pretense of compounding for the forfeiture on goods that had been smuggled. In *Harvey's Case*,[2] the prisoner was convicted and transported for seven years, for obtaining goods deposited with another by the owner for safe keeping, under the false pretense that he was employed by such owner to receive the goods so deposited; and in *Kirby's Case*,[3] the prisoner was sentenced to be transported for five years, for obtaining a sum of money from a banker in Leith, under the false pretense that he had a sum of money in the hands of his banker in London, and accordingly drawing a draft on a banker there with whom he had no account, and when he had no reason to suppose the draft would be paid.

It was found in England, as early as the reign of George II., that the rule of the English common law was not sufficiently rigid to protect the honest and unsuspicious — that class who stand most in need of protection — against the falsehoods and impositions of swindlers; and a statute was thereupon passed to remedy the defect of the common law, which is the origin of our own statutory provisions and of the subsequent English statutes on this subject. These statutes have adopted the principles of the Scottish common law and the decisions under them, both in this State and in England, have been substantially the same as in the cases above referred to from Hume, Burnet, and Alison, who are the principal writers upon the common law of Scotland. Under these statutes, as in the law of Scotland, the offense consists in intentionally and fraudulently inducing the owner to part with his goods or other things of value, either by a willful falsehood or by the offender's assuming a character he does not sustain, or by representing himself to be in a situation he knows he is not in. Thus in *Airey's Case*, under the English statute, the prisoner was convicted and transported for seven years for obtaining pay for the carriage of goods, upon the false pretense that he had delivered the goods and taken a receipt for the same, which he had lost or mislaid.[4]

So in *Witchell's Cass*,[5] the obtaining of money upon a false account of the number of workmen employed in the business of a manufacturing establishment by which the prisoner, who was intrusted to pay them, obtained a larger sum than was due to them for their wages, was

[1] Burn. 173.
[2] 1 Alison, 364.
[3] 1 Hume, 174.
[4] King *v.* Airey, 2 East, 30.
[5] 2 East's P. C. 830.

held to be within the statute. In *Rex* v. *Johnson*,[1] upon an indictment for obtaining goods under the false pretense of immediate payment, by giving in payment a check on a banker with whom the prisoner had no funds, and with whom he kept no account, Bailey, J., said the same point had recently been before the twelve judges, and they were all of opinion that it was an offense indictable under the statute, to obtain goods by giving a check upon a banker, with whom the party kept no cash, and which he knew would not be paid. In this State, also, so far as questions have been brought before the higher tribunals, the statute has received a similar construction; and the decisions in the courts of Oyer and Terminer, so far as they have come under my notice, especially since the decision of the case of *People* v. *Johnson* in 1815,[2] have been in conformity with the principles adopted by the English judges, in giving effect to their statutory provisions on this subject. *Lynch's Case*, cited by the counsel for the plaintiff in error, from the City Hall Recorder,[3] was incorrectly decided, as the offense in that case was clearly within the statute. The fact that checks are frequently drawn by men of business, before they have funds actually in bank to meet them, could not alter the law of the case; as it must always be a question for the consideration of the jury whether the prisoner intended to commit a fraud by imposing a check upon another which he knew would not be paid when presented.

I am aware from numerous cases which have been under my observation, judicially and otherwise, that the rule of morality established by the decisions under these statutes and by the common law of Scotland, has been deemed too strict for those who in 1825 and subsequently, have been engaged in defrauding widows and orphans, and the honest and unsuspecting part of community, by inducing them to invest their little all, which in many instances was their only dependence for the wants and infirmities of age, in the purchase of certain stocks of incorporated companies, which the vendors fraudulently represented as sound and productive, although they at the time knew the institutions to be insolvent and their stock perfectly worthless. But I am yet to learn that a law which punishes a man for obtaining the property of his unsuspecting neighbor by means of any willful misrepresentation or deliberate falsehood with intent to defraud him of the same, is establishing a rule of morality which will be deemed too rigid for the respectable merchants and other fair business men of the city of New York or of any other part of the State. Neither do I believe that any honest man will be in danger of becoming a tenant of the State prison, if the statute against obtaining money or other things of value by false

1 3 Camp. 370.

2 12 Johns. 292.

3 1 City Hall Rec. 138.

and fraudulent pretenses, is carried into full effect, according to the principles of the decisions to which I have referred. But it may indeed limit and restrain the fraudulent speculations and acts of some whose principles of moral honesty are regulated solely by the denunciations of the penal code. The law upon this point as laid down by the Supreme Court in this and numerous other cases, is unquestionably the settled law of the land, in conformity with both the spirit and the intent of a positive legislative enactment. But if those members of this court who are Senators, believe that either the morals or the welfare of the community will be promoted by repealing this statutory provision for punishing the crime of swindling, which in point of moral turpitude is frequently more aggravated than some cases of simple stealing, it will be then their duty in their legislative capacities to vote for a repeal of the law; leaving the honest and the unsuspecting to protect themselves as they may against the acts and deceptions of those who intentionally defraud them of their property by willful and corrupt lying and other false pretenses, calculated to deceive that class of citizens which is most in need of the protection of the law. In this place as members of the court of dernier resort, it is our duty to declare the law as it now exists; so that the declared will of the Legislature may be carried into full effect.

In the case now under consideration I have no doubt that the prisoner was properly convicted of the offense charged in this indictment, if the goods were obtained upon the representations which were proved to be false. It is evident from the testimony, that at the time the representations were made, he was hopelessly insolvent to the amount of seventy thousand dollars; that he knew his situation and for the purpose of inducing the owners of the goods to let him have them on a credit, he represented himself in easy and unembarrassed circumstances as to his money matters, able to pay all he owed; and that he was worth from nine to ten thousand dollars over and above all his debts. It only remains therefore to consider the question whether the delivery of the goods was obtained by means of these false and fraudulent pretenses or whether in legal contemplation the goods had been delivered before that time, although the prisoner was not then aware of that fact.

It appeared from the testimony that the plaintiff in error had been in the habit of dealing with Cochran, Addoms & Co., previous to the time when these goods were obtained, and upon credits of about four months; that when he applied for these goods, they entertained no suspicion as to his credit; that the goods were selected, packed up in a box marked Charles Haynes, Boston, which was the place of his residence, and sent on board of the Providence steamboat, according to his direction, to be transported at his expense to the latter place, and taken from thence to his place of residence; and that a receipt was taken

therefor from the master of the steamboat, stating that the box of goods was to be transported to Providence and delivered to the Boston wagoner, who receives goods at Providence and delivers them at Boston, according to the marks and addresses on the packages; and one of the prosecutors, who was a witness, testified that after the box was delivered on board the steamboat as directed by Haynes, he considered it as being at the risk of the latter if it was lost or stolen. After the box had been thus delivered on board the boat, but before Haynes was aware of that fact, the witness heard a report respecting the latter, which induced him to suspect his credit; and upon Haynes coming to the store the witness, without informing him that the goods had already been sent to the steamboat, told him they could not deliver the goods in consequence of having heard that he had a note protested. Upon which occasion the false representations as to his situation and credit were made; and the witness being satisfied therewith, handed to him the receipt and the invoice of the goods, and took his note for the same at thirty days.

The counsel for the prisoner insisted and asked the court so to instruct the jury, that the delivery of the goods on board of the boat was a complete delivery, and that as the pretenses were made after such delivery, although they might have prevented Cochran, Addoms & Co. from obtaining a re-delivery of the same, that was not sufficient to sustain the charge as laid in the indictment. The court, however, charged the jury that the prisoner had undoubtedly obtained the goods from the prosecutors as charged in the indictment; to which charge an exception was taken. If the decision of the court was wrong upon this question of law which arose in the case, the judgment of the court below should be reversed, on the ground that the plaintiff in error did not obtain the delivery of the goods by reason of his false pretenses, although he intended to do so at the time the false representations were made.

The Supreme Court considered the delivery of the goods as incomplete and conditional, because the invoice had not been delivered nor the security for the purchase-money given, and because the receipts of the master of the boat was still in the hands of the vendors. I do not understand from the testimony, however, that there was any agreement or understanding between the parties, either express or implied that the goods should be retained until the invoice should be delivered and a note given for the purchase-money; and the receipt of the master of the boat was merely taken by the vendors as a voucher, to show that they had sent the goods on the boat as directed. From the testimony it also appears that the possession of the receipt was not necessary to enable the purchaser to obtain the goods upon their arrival at

the place of destination. Even where goods are sold upon the understanding that they are to be paid for on delivery, if the goods are delivered without insisting upon payment at the time of the delivery, the title passes absolutely to the purchaser, unless there is a special agreement or a usage of trade showing the delivery to be conditional. Delivery of goods also to a servant or agent of the purchaser, or to a carrier or master of a vessel, when they are to be transported by a carrier or by water, is equivalent to a delivery to the purchaser; and the property with the correspondent risk, immediately vests in the purchaser, subject to the vendor's right of stoppage *in transitu*, if the purchaser becomes insolvent before the goods arrive at their place of destination; and particularly, when the carrier is specially named by the vendee.[1] In the present case, therefore, I think we are bound to consider the delivery of the box on board of the boat to be sent on to the vendee's residence at Boston, and delivered there according to the directions on the box itself, as a valid delivery of the goods, so as to divest the vendors of the possession as well as of the title, leaving them the mere right of stoppage *in transitu*, in case of the purchaser's insolvency.

The right of the vendor to reclaim his goods as a security for the unpaid purchase-money, while in the hands of the middleman, was originally derived from the court of chancery. It is a mere equitable authority to repossess himself of the goods, upon the insolvency of the vendee; and it can not be exercised at the mere caprice of the vendor, when no such insolvency exists.[2] To invest the vendor with the right of property and possession of the goods, after they have been absolutely delivered to the carrier or middleman, there must be an actual stoppage by a positive exertion of the right, by the vendor or his agent, either by taking corporal possession of the goods, or by a notice to the carrier not to deliver them to the vendee, or by some equivalent act; and until such right is actually exercised, the right of property and possession remains in the vendee, who may maintain an action of trover against any one withholding the goods from him. But the actual exercise of the right revests the title to the property in the vendor, and enables him thereafter to maintain trover against any one who subsequently to the exercise of his right, obtains possession of the goods and refuses to deliver them to him.[3] In the present case the right of possession and of property was actually vested in Haynes, by the delivery on board the steamboat at the time the false and fraudulent pretenses were put forth by him; and the vendors had not in fact

[1] 2 Kent's Com. 499; Dawes *v.* Peck, 8 T. R. 330.

[2] Per Lord Stowell in the case of The Constantia, 6 Rob. Adm. 321.

[3] Litt *v.* Cowley, 7 Taunt. 169.

reinvested themselves with the title to the property by stopping it *in transitu.* He did not, therefore, in legal contemplation obtain the possession or delivery of the property by means of the false pretenses stated in the indictment; although he intended to do so, not being aware of the fact of the delivery of the goods on board the steamboat, at the time the false representations as to his situation and solvency were made. Although in point of moral turpitude there is no essential difference between obtaining the possession of the goods by willful and deliberate falsehood in the first instance and preventing the vendor from exercising a legal and equitable right by similar fraudulent and corrupt means, it would, I think, be going too far, in a prosecution for felony, to say the two cases are the same, and that the accused may be convicted of the latter offense under an indictment charging him with obtaining the delivery of the goods by means of these false pretenses.

I therefore for this reason only, think the judgment of the court below was erroneous and that it should be reversed.

TRACY, Senator. I think some of the exceptions to the charge of the recorder were well taken and that the supreme court has erred in deciding otherwise.

The indictment was under the statute against obtaining property by false pretenses with intent to defraud. The proof on the trial went entirely to show that the goods were obtained on a previously established credit, without any pretense or representation whatever, and at most that after being so obtained the defendant succeeded in retaining the possession of them by means of false pretenses. If this be the true character of the transaction the defendant was convicted of an offense not prohibited by law, and for which he certainly was not indicted. Whether it be so or not depends on the fact of the delivery of the goods. Addoms, the principal witness for the prosecution, testifies that Haynes had a very good credit with the house of which the witness was a partner; that he (Haynes) selected the goods himself; that they were put aside from the rest of the goods, packed up in a box which was marked on the outside and addressed to Charles Haynes, Boston, being the place of his residence, that the goods were afterwards sent to the Providence steamboat, according to Haynes' directions, and a receipt taken, by the cartman. I have no doubt that these facts constituted an absolute delivery and indeed it is admitted on all sides that it was such a delivery as put the property wholly at the risk of the vendee, and it might be added such a delivery as would enable him to maintain trover or any other action for their loss or injury. But it is said that while the goods were in this situation, and before they had reached their final destination at Boston, the vendors had a right to resume the actual possession of them. This I very much doubt, for the fact that

Haynes was on the spot, personally to select the goods, and to have them laid aside, boxed and directed, seems to me to be a perfect delivery, such as to deprive the vendor of any specific lien on them. I take the rule to be that though goods are sold upon credit, yet if they are actually delivered to the purchaser without any arrangement as to the security for the payment of them, the vendor's lien upon them is gone.[1]

The case is in this respect distinguishable from those in which the goods have never reached the hands of the vendee, but have only passed from the hands of the vendor to some intermediary person as a carrier, etc., to be by him delivered to the vendee. But supposing the fact that Haynes' presence at the purchase and setting aside of the goods made no difference as to the character of his possession, and that they were only in transition so that the vendor still had a lien on them, Haynes was yet the legal owner of the goods. So far as ownership is concerned the delivery to the master of the steamboat or even to the cartman was sufficient, and any disposition which Haynes saw fit to make of them would be valid, subject at most to the equitable lien of the vendor for the amount due to him. Delivery of goods to the servant or agent of the purchaser, or to a carrier or master of a vessel, where they are to be sent by a carrier or by water, is equivalent to the delivery to the purchaser, and this though the carrier was to be paid by the vendor.[2] The right of stoppage *in transitu* has not the effect which the Supreme Court seems to suppose, of making the delivery conditional, but is only a lien which the vendor under certain circumstances may enforce to secure the price, and even if enforced the goods strictly belong to the vendee; and if they shall prove of more value than the lien, though that be for the whole purchase-money, the balance belongs to the vendee. It is erroneous to suppose that the right of stoppage continues the ownership in the vendor. "It is a contradiction in terms," says Justice Buller, "to say a man has a lien on his own goods, or has such a right to stop his own goods *in transitu.*" The right of the vendor to goods *in transitu*, in case of the insolvency of the vendee, originated in the courts or equity, and was first heard of in *Wiseman* v. *Vandeputt*,[3] and though it has been greatly favored and encouraged by the courts of law, as well as those of equity for the purpose of substantial justice, yet it has never been held to rest on the ground of a right to rescind the contract;[4] and, therefore, it is well settled that a court of equity has no jurisdiction to support it by process of injunction.[5]

1 Boghtlink *v.* Inglis, 3 East, 396; Dixon *v.* Baldwin, 5 *Id.* 175; Wright *v.* Lawes, 4 Esp. 82.

2 King *v.* Meredith, 2 Campb. 630; Dutton *v.* Solomonson, 3 Bos. & Pul. 584; Chapman *v.* Lathrop, 6 Cow. 114; *s. c.* 16 Am. Dec. 433.

3 2 Vern. 203.

4 *Vide* Hodgson *v.* Loy, 7 T. R. 445.

5 2 Kent's Com. 492.

But the Supreme Court thinks that although the property was undoubtedly for some purposes to be considered delivered, yet the delivery was "incomplete and conditional," so that the vendors had the right to resume the possession. If this were conceded I do not see how it affects the present question, unless the offense charged was that of preventing the vendors from resuming the possession by means of false pretenses which it requires no argument to show would not sustain an indictment. But I find nothing in the case to show that the delivery was incomplete and conditional; indeed, I am not sure that I comprehend what is meant by an incomplete delivery, but presume it means at most, no more than a conditional delivery; and to constitute a conditional delivery it is necessary the condition should be express.[1] The circumstances from which the Supreme Court infer that the delivery was conditional, are, (1) the invoice had not been delivered; (2) security for the purchase-money had not been given; and (3) the receipt of the master of the boat was in the hands of the vendors. The first and last of these circumstances no way affect the fact or character of the delivery; the invoice or bill of the goods was immaterial, and the receipt of the master of the boat was necessarily given after the delivery and of course any disposition made of it could not affect that fact. The objection that "security for the purchase-money had not been given," assumes what nowhere appears, that security was to be given. The utmost security that could have been contemplated was the purchaser's note, and if this had been an express condition of the sale, of which there is no evidence, yet it was waived by a delivery without a concurrent and express demand. This principle was fully settled in *Chapman* v. *Lathrop*,[2] and in this court in *Lupin* v. *Marie*.[3] In every view, therefore, that I can take of this point, I am satisfied the exception that there was no evidence that the goods were obtained by means of the false pretenses was valid.

I am also satisfied that another exception was well taken; it is that to the instruction to the jury, that if some of the pretenses were false, and they (the jury) believed the goods were obtained solely by means of them, the indictment was sustained notwithstanding other pretenses alleged to be means of obtaining the goods and averred to be false, were not proved to be false. My impression on the argument was against this exception; but on re-examining the opinion of the Supreme Court, their views on this point appear to me to be plainly erroneous. The offense of obtaining goods by false pretenses is combined of two distinct elements, to wit: false pretenses, and obtaining the goods, neither of them alone constitutes an offense. An indictment, therefore,

1 Hussey *v.* Thornton, 4 Mass. 405; Farniss *v.* Home, 8 Wend. 247.

2 6 Cow. 110; 16 Am. Dec. 433.

3 7 Wend. 77.

must set forth the pretenses by which the goods were obtained and expressly aver them to be false; and when so set forth and averred to be false, they, together with the obtaining of the goods, constitute the offense charged. It follows necessarily that every pretense thus set forth and charged to be false is made a substantive part or constituent element of the offense for which the indictment is found, and of course can not be deemed immaterial, much less impertinent. The distinction between material and immaterial averments in an indictment is settled to be, that if the averment be connected with the charge, it must be proved; but if it be wholly immaterial, or if the averment be totally unconnected with the charge, it need not be proved.[1] Here each and every pretense set forth and alleged to be false is not only intimately connected with the circumstances that constitute the crime, but is in fact a part and portion of the crime charged. It is, therefore, a much stronger case than those usually put to distinguish a material from an immaterial or impertinent averment.

The general rules and principles of pleading with respect to the structure of a declaration are applicable to an indictment, and if we look to the decisions as to averments in the former which must be proved as laid there would seem no room for doubting the necessity in the present case. The leading case, *Bristow* v. *Wright*,[2] settled by a judge renowned for disregarding technical rules when they interfered with substantial justice, was of an averment by no comparison as material as that under consideration. The Supreme Court seems to regard the cases of *King* v. *Perrott*,[3] and *People* v. *Stone*,[4] as authorities which support the recorder's charge on this point; but I find nothing in them that can be properly viewed in this aspect; certainly not in the first case, the whole reasoning of which is to show the necessity of making the charge specific, by a distinct averment of the falsity of those pretenses or representations which are intended to be relied on as constituting the offense. Why it should be indispensable thus to designate them, if they or any of them, when so designated and averred, can be disregarded on the trial, as "not intimately connected with the circumstances which constitute the crime," I am unable to perceive; and in *Stone's Case*, though there is an expression of the court seeming to confound the case of several pretenses with that of several assignments of perjury in one count, yet Justice Sutherland, who delivered that opinion, in showing that it was necessary to negative only the pretenses relied upon as material, says: "If it were necessary to negative all the false pretenses in the indictment, it would be necessary to prove them all false on the trial," plainly indicating that notwithstanding his intima-

[1] 1 Chit. Cr. L. 192.

[2] Doug. 665.

[3] 2 Mau. & Sel. 379.

[4] 9 Wend. 182.

tion of its being sufficient to prove one of several assignments in the same count, he perceived the necessity of making the proof, on an indictment for false pretenses, co-extensive with the pretenses especially averred to be false. The supposed analogy to an indictment for perjury does not hold. Here several perjuries, each constituting a distinct offense, may be assigned in the same count, and proof of one is sufficient, which is indeed no more than to say if several offenses are charged in several counts, proof to support one count is sufficient; but here the several false pretenses charged constitute but one offense; and each is alleged by the indictment as an ingredient of it.

To say that enough of them was proved to show that the jury did no injustice to the prisoner by convicting him, is no more satisfactory than the same argument might be if there had been no indictment whatever. The objection of the inconvenience and difficulty of proving every pretense to be false that the indictment alleges to be false is entitled to no weight, even if such inconvenience and difficulty really exist; but they do not. The grand jury have no right to find that any other pretenses were false than such as are proved to them to be so; and if they do not, there will be no more difficulty of proving their falsity on the trial than before them. And here is to be found a decisive test of the necessity of having the proof sustain all the averments of the indictment. Unless it does the grand jury may indict for one offense, and the traverse jury convict for another. This actually has occurred in the present case. That the grand jury would have indicted for what the petit jury have convicted, or *vice versa*, is what may be surmised, but never can be known; consequently that great principle of security for personal liberty which requires the concurrence of both in the same facts to produce a conviction has not been observed.

I have another strong objection to the conviction which is founded in the belief that the false declarations proved were not, under the circumstances in which they were made, false pretenses within the meaning of the statute. They were direct answers to distinct interrogatories put to the defendant, and are I think, distinguishable from those artfully contrived stories against which only, in my opinion, the statute was designed to guard. To say as in this case, that an untrue reply to an inquiry made of a person how much he is worth, or whether he is embarrassed, is what the statute means by a false pretense, is to give to it a sweeping and mischievous construction — a construction which if carried out to all the cases it would reach, no court could enforce, no community could tolerate.

I admit with Lord Kenyon,[1] that the offense created by the statute is

[1] Young *v.* King. 3 T. R. 102.

described in terms extremely general and that there is difficulty in drawing a distinct line between the cases to which it does and to which it does not apply. But this very admission of Lord Kenyon made many years after the statute was in force, proves what till very lately has never been doubted, that a bare, naked lie, unaccompanied with any artful contrivance, is not what the statute denominates a false pretense. If it were Lord Kenyon's remarks would be altogether unfounded; for in that case there could be no difficulty in drawing the line, indeed there would be no line to draw. At common law no mere fraud, not amounting to a defined felony, was an indictable offense, unless it affected the public. Lord Mansfield observed that "an offense to be indictable must be such an one as affects the public;" and he instanced the use of false weights and measures in the course of general dealing, fraud by means of false tokens, etc. But fraud by a false token, designed to cheat only the individual defrauded, was not indictable at common law; it must be a false token designed to affect the public generally — such as false weights and measures, counterfeit marks on goods, etc. To meet the insufficiency of the law in this respect, the statute 33 Henry VIII. was passed, making frauds on individuals by means of privy tokens, misdemeanors. Under this statute it was settled that to constitute a token, it must be something real and visible — as a ring, a key, etc.; but as this statute did not reach cases of fraud effected by verbal misrepresentations, however, ingenious in their contrivance and well fitted they might be to deceive the most wary, and a case of most flagitious fraud occurring, where the perpetrator went unwhipped of justice because there happened to be no token used, notwithstanding the means that were used were equally fitted to throw a cautious man off his guard, the statute 30 George II., called commonly the statute against false pretenses, was enacted. From this statute the term false pretenses, found in our statute was taken; and the connection in which it is placed in our statute shows plainly that it was adopted there with a regard to the circumstances which, in the original English statute, attached to it a particular and technical meaning. Our statute[1] reads: "Every person who, with intent to cheat or defraud another, shall designedly by color of any false token or writing or by any other false pretenses," etc. The inquiry here is whether "any other false pretenses" means any false assertion however bald and naked it may be — as in the present case, when the defendant on being asked if he was any way embarrassed, he replied he was not, — or means such false pretense as would naturally have an effect on the mind of the person to whom it was addressed equivalent to that of a false token. The history of the adoption of the term

[1] 2 Rev. Stats. 677, sec. 53.

leaves me with no doubt that the latter is its statutory meaning. It indeed is not as clear as it has been assumed to be, that the common lexicographical meaning of pretense is assertion. An authorized definition of it is "a delusive appearance produced by false representations;" and this comes much nearer to my notion of its statutory meaning, than any definition does which confounds it with a naked falsehood.

It was many years after the act of George II. before the English courts made any considerable advance towards the construction that is now so much favored. *Young* v. *King*,[1] may, in this respect, be considered a pioneer case; and when the facts in it are compared with those of some modern cases, it will be seen how fast of late the new doctrine has been traveling. In that case four persons conspired to defraud another by concertedly and falsely representing to him that a large bet had been laid with a colonel in the army that a certain pedestrian feat would be performed, and that they, or some of them, had shares in the bet, thereby inducing him to advance to one of them a sum of money, and become a shareholder in the wager. This, which in truth, was indictable at common law as a conspiracy, was held to be within the statute, and the rule was then laid down that when a party has obtained money or goods by falsely representing himself to be in a situation in which he was not, or by falsely representing any occurrence that had not happened, to which persons of ordinary caution might give credit, he was guilty of the offense. This rule the Supreme Court adopted, without argument or explanation, in the case of *People* v. *Johnson*,[2] and it has been gradually enlarging itself down to the present case. The rule, as originally announced and applied, is not, perhaps, exceptionable, except for its vagueness, and great liability to abuse. It meant in the case where it was first applied a false representation with circumstances fitted to deceive a person of common sagacity, exercising ordinary caution. It is now construed to mean any false declaration by which any person has been deceived.

The construction adopted in this case is, I am persuaded, not only an incorrect, but a mischievous, construction of the statute — a construction which, if strictly maintained, would overflow our courts with criminal prosecutions, and our jails and penitentiaries with convicts; the whole penal code beside would not be half so burdensome to execute, or half so fruitful of convictions; most of the common dealings of life might give birth to complaints before grand juries, and every exchange of property, from a ship's cargo to a barrel of flour, and even less, might afford occasion for a public prosecution. The principle that has

[1] 3 T. R. 102.

[2] 12 Johns. 292.

been advanced in the opinion we are reviewing is, that "where falsehood has a material effect to induce a person to part with his property, the offense has been committed." Apply this rule not only to the great exchanges of property, but to the innumerable and comparatively insignificant dealings of men — to every swap of horses — in fine, to every transaction by which property is transferred, a note given, or money paid — and no man could count the cases it would reach. Merchants and others in the habit of giving credits, of incurring great risks of the chance of great profits, might at first be gratified with a rule that enabled them to enforce collections by the terrors of a criminal prosecution; but when even handed justice commands the poisoned chalice to their own lips, and they shall find themselves arraigned at the bar of criminal justice for every misrepresentation of the cost, quality, salableness, or value of every article they had sold, they too will be ready to exclaim: "'Tis rigor, and not law."

It can be said, I know, there will be no difficulty if men are honest and tell the truth. All will admit the obligations of truth and honesty; all have admitted them from the beginning of time; but how feeble have human laws proved in their efforts to enforce them. Does it follow if men are not honest and will not tell the truth, that they are to be arraigned and tried and convicted as felons? What scheme of criminal jurisprudence could carry out this principle? What prisons could contain the convicts? We have it from the highest authority that by nature "all men are liars;" and a master judge of the human character has said that "to be honest as the world goes, is to be one man picked out of ten thousand." To punish as a crime then, what the multitude of offenders make a custom is an attempt to what we can never hope to execute. It is the remark of a profound philosopher that "the operation of the wisest laws is imperfect and precarious; they seldom inspire virtue; they can not always restrain vice; their power is insufficient to prohibit all that they condemn, nor can they always punish the actions which they prohibit." Though the laws will not justify, yet they must recognize the frailties and imperfections of human nature, and they do deal with men as being subject to propensities and passions which they may aid to restrain, but which it is impossible to extirpate. How inconsistent would it be, when the law will not receive a man's oath, if he has sixpence at stake upon it, that it should send him to the State's prison for an untrue answer to an inquiry into his pecuniary affairs, which he may have the strongest motive for concealing. And how disturbed and uncomfortable would be the condition of a community like ours where traffic and credit are infinitely ramified and unceasingly active, if every person dissatisfied with a bargain or disappointed by a misplaced confidence, in the responsibility or punctuality of another, shall be quick-

ened, by the prospect of redress or revenge, to recollect some untrue representation made in the course of the transaction. Stimulated by the hope of rescinding a bad bargain or of securing a doubtful debt, or irritated by the unexpected loss of what he had supposed a good one — how natural it is that he should persuade himself that "falsehood had a material effect to induce him to part with his property;" and prompted by an opinion which interest or irritation had created, first to threaten a criminal prosecution, and afterwards, if the terror of it proved unavailing, to sustain it by testimony always colored, and sometimes wholly composed by his passion. It is dangerous to give one man such power over the reputation and personal liberty of another. If possessed it would be often abused; and it is inevitable that perjuries would be multiplied, and injustice and rank oppression promoted.

I can not concede or conceive that a construction is sound, or fitted to advance the general welfare, which proposes to protect property from loss by impositions which the owners can easily guard against and exposes reputation and liberty to invasions which no prudence or integrity may always repel. Besides it is an Utopian idea that the sanctions of criminal justice can be made co-extensive with moral delinquencies. However agreeable to our sentiments of natural justice, it might be to punish every immoral act, it would be Quixotic to attempt it. No community ever assumed the obligation of protecting by penal laws every member of it from the consequences of his own credulity, imprudence or folly; and if any one should, it would be but following "false images of good," that could make no promise perfect. It is impossible for the public to sustain the burden of redressing every injury or loss which individual credulity or cupidity may bring upon itself. The most it can do, and what by the statute under consideration it proposes to do, is to protect individuals from those ingeniously contrived frauds and unusual artifices against which common sagacity and an ordinary experience of mankind will not afford a sufficient guard. Beyond this men must trust to their own prudence and caution, with such aids and redress as may be obtained from the civil tribunals.

For all and each of the objections I have stated, I am for reversing the judgment of the Supreme Court.

Opinions were also delivered by Senators EDMONDS, EDWARDS, and MAISON, concurring with the chancellor and Senator TRACY in their conclusions that the delivery of the goods on board the steamboat was an absolute delivery, and invested the purchaser with both the title and possession; and that consequently under no possible view of the case, could the prisoner be considered as having obtained the goods by false pretenses.

On the suggestion of the chancellor the court agreed in the first instance to pass only upon the question whether the delivery of the goods on board the steamboat under the circumstances of the case, was an absolute delivery, and invested the purchaser with the title as well as the possession of the goods; and on the question being put the members of the court unanimously expressed the opinion that the delivery was absolute. Whereupon the judgment of the Supreme Court was reversed.

*Judgment reversed.*

---

## FALSE PRETENSES — OBTAINING CHARITABLE DONATIONS.

## People *v.* Clough.

[17 Wend. 351; 31 Am. Dec. 303.]

*In the Supreme Court of New York, July, 1837.*

**Obtaining a Charitable Donation** by false representations is not indictable as a false pretense; *e. g.* one who falsely represents himself to be deaf and dumb and obtains money thereby.

Indictment against the defendant for obtaining money by false pretenses, by representing himself to be deaf and dumb, and thereby obtaining donations of money. Demurrer to the indictment which was overruled; but judgment suspended until the opinion of this court could be had.

*Z. L. Newcomb*, for the defendant.

*J. J. Briggs*, for the People.

*By the court*, Cowen, J. The decision of this case depends upon the question whether the statute to punish the obtaining of money or goods by false pretenses was intended to protect the citizen from frauds beyond his commercial dealings, and to reach forgeries and other like pretenses commonly got up by beggars to excite compassion and induce acts of charity in favor of themselves or others. I find no case or *dictum* bringing this class of persons within the operation of this statute. In 2 Russell on Crimes,[1] a case is put which the writer represents as a curious species of indictable fraud, viz., that of a man who maimed himself in order to have a more precious pretense for asking charity, and Coke, Hale and Hawkins are referred to. This led me to examine the authors alluded to, and I find that none of them put the case on the

[1] p. 289.

fraud, but on the mayhem, and accordingly treat of it under the title "Maiming." They all go on the case stated by Lord Coke, who says: "In my circuit in anno 1 Jacobi Regis, in the county of Leicester, one Wright, a young, strong and lustie rogue, to make himself impotent thereby to have the more color to beg, or to be relieved without putting himself to any labor, caused his companions to strike off his left hand, and both of them were indicted, fined and ransomed therefor; and that by the opinion of the rest of the justices for the cause aforesaid."[1] This and other causes are introduced by Lord Coke with the observation, "Note, the life and members of every subject are under the safeguard and protection of the king." So that the indictment was clearly not for the fraud. I have looked into the books farther and failed to find a single case which holds a false pretense of any kind to the end that another should do a charitable act to be indictable. The absence of any such authority especially in England, where beggars greatly abound, drilled and practiced too in all the fraudulent devices of their trade, is itself enough to raise a doubt. The exercise of the virtue of charity has practically been left, where I suspect the law intended it should remain, upon the basis of the mere moral duty, both of the beggar and donor. The virtue is sufficiently cold, inquisitive and scrupulous to be safe without the protection of the criminal law. The duty of the donor is one of imperfect obligation and I am not aware that the beggar's duty as to the means of calling it into exercise is anything more. I should even doubt whether an action for money had and received would lie to recover back a charitable advance made on a false pretense; for I believe the understanding is always to let the scanty pittance go on the representation, true or false, better or worse without any implied duty of restoration.

I admit that the crime in question is one of a very dark moral grade. So are adultery, ingratitude towards benefactors, and various other moral offenses not noticed by the criminal law. I admit, also, that it is within the words of our statute and within the enacting clause of 30 George II.,[2] from which our statute is copied. Our system of revision however, has in this, as in many other cases, unfortunately obscured the history and reason of the law not only by alterations of words, but many times by dropping the recital. The true reason of both the English and New York statutes was, doubtless, the same; and it will be useful, therefore, to look at the reasons stated for the first. After reciting "Whereas divers evil-disposed persons, to support their profligate way of life, have by various subtle stratagems, threats, and devices,

[1] Co. Lit. 127 a.

[2] ch. 24.

fraudulently obtained divers sums of money, goods, wares, and merchandises to the great injury of industrious families, and to the manifest prejudice of trade and credit," the statute proceeds as follows: "Therefore, for punishing of all such offenders, be it enacted, etc., that from and after, etc., all persons who knowingly and designedly, by false pretense or pretenses, shall obtain from any person or persons, money, goods, wares or merchandises, with intent to cheat or defraud any person or persons of the same; or shall send, etc. (a threatening letter) with a view to extort, etc., shall be deemed offenders against law and the public peace." It then prescribes the punishment which is to be by fine, imprisonment, pillory, whipping, or transportation to this country.[1] Looking merely to these punishments, one can not but admit that some of them are admirably calculated for such "lustie rogues" as he of my Lord Coke and many others; but the recital seems clearly to point out evils entirely different from any which ever arose in the history of charity. When did we ever hear of industrious families ruined, and certainly never of any prejudice to trade or credit, under any system of fraudulent beggary? On the contrary, our books of morals and tales, with a few scattering exceptions, are continually complaining of deaf ears and hard hearts, even when addressed by the best authenticated stories of real distress; so much so, indeed, that our law has been obliged to interpose a system of regulated public charity for the protection of the honest sufferer. Nay, it makes the offense of begging a crime, punishable by summary proceeding before a magistrate.[2] Looking to our statute, the man who merely gives to a beggar without ordering him instantly to be taken into custody and carried before a justice of the peace, as he may do,[3] would seem to be a moral participant in the crime of vagrancy. It would sound somewhat extravagant were we to apply a law severely penal to such an act.

On the whole, we all feel quite clear that this indictment is not sustainable. We all agree that the pretense, had it been exercised in a matter of trade or credit, would have fallen within the statute; but we can not bring ourselves to hold that this or any pretense resorted to merely to enforce a beggar's request, is cognizable by the criminal law. The Sessions are advised to discharge the defendant.

1 22 Pick. Stat. at Large, 114.

2 1 Rev. Stats., 640, 641 (2d ed.) secs. 1, 3.

3 *Id.*, sec. 2.

## FALSE PRETENSES — MUST BE OF EXISTING FACT.

## R. v. Henshaw.

[L. & C. 444.]

*In the English Court for Crown Cases Reserved, 1864.*

1. **In an Indictment** for false pretenses it must clearly appear that there was a false pretense of an existing fact.
2. **An Indictment Alleged** that C. pretended to A.'s agent that she (A.'s agent) was to give him 20s for B. and that A. was going to allow him 10s a week. *Held*, that it did not sufficiently appear that there was any false pretense of an existing fact.

The following case was stated by the Recorder of Brighton.

At the General Quarter Sessions of the Peace for the borough of Brighton, holden on the 18th of March, 1864, Lewis Henshaw and John Clark were tried before me upon the following indictment: —

Borough of Brigton, to wit. The jurors for our lady the Queen upon their oath present that Lewis Henshaw and John Clark on the 14th day of January in the year of our Lord 1864 unlawfully knowingly and designedly did falsely pretend to one Henrietta Pond who then lived at one Madame Temple's and acted as her representative that the said John Clark had come down from London to the residence of the said Lewis Henshaw and that the said Henrietta Pond was to give him 10s and that the said Madame Temple was going to allow the said John Clark 10s a week for the benefit of his health, by means of which said false pretense the said Lewis Henshaw and John Clark did then attempt unlawfully to obtain from the said Henrietta Pond the sum of 10s, with intent to defraud, whereas in truth and in fact the said Henrietta Pond was not to give the said John Clark the sum of 10s or any other sum of money, and whereas in truth and in fact the said Madame Temple was not going to allow the said John Clark the sum of 10s a week or any other sum of money for the benefit of his health, as they the said Lewis Henshaw and John Clark well knew at the time when they did so falsely represent as aforesaid, against the form of the statute in such case made and provided.

The facts of the case, so far as they are material to the point reserved, were as follows: —

On the 15th of January last, in the evening, the two prisoners went together to the shop of Madame Temple, in Brighton. She has also a shop in London. After Henshaw, in the presence and hearing of Clark, had made a statement to one of Madame Temple's assistants, he requested to see the one of the assistants who kept the accounts. Henrietta Pond, being the person by whom the accounts of Madam Temple's

Brighton establishment are kept, then came forward. Her evidence was: "Henshaw, in the presence and hearing of Clark, said that young man (meaning Clark) had come down from London; that he (meaning Clark) had been in the Brompton Hospital with a bad leg; that he (meaning Clark) had seen Madame Temple in London; That Madam Temple said that I (Henrietta Pond) was to give him (meaning Clark) 10s a week, while he was at Brighton, for the benefit of his health. I refused to do so saying that if Madame Temple wished me to do it she would send me a letter the next morning. Once or twice Henshaw said, 'You do not intend to give the 10s?' Henshaw said to Clark, 'Was that what Madame Temple said?' Clark said, 'Yes.' Henshaw then said that he would write to Madame Temple; and the prisoners went away together."

Madame Temple was called, and denied ever having seen or having any knowledge of either of the prisoners.

The counsel for the prisoners objected that the indictment alleged no false pretense of an existing fact, and negatived no false pretense of an existing fact, all the facts alleged or negatived being future.

I held that the false pretense that the said Henrietta Pond was to give him 10s was a sufficient false pretense of an existing fact to support the indictment, and that the second false pretense, even if not of an existing fact, might, therefore, be taken into consideration in conjunction with the first false pretense, but reserved the point for the consideration of the Court of Criminal Appeal.

The jury found both prisoners guilty; and they were sentenced by me to four calendar months' imprisonment with hard labor, and were committed to the House of Correction, at Lewes, in execution of that sentence.

The question for the consideration of the honorable the justices of either Bench and the honorable the Barons of the Exchequer is, whether upon this indictment the said conviction was right.

This case was argued on the 30th of April, 1864, before POLLOCK, C. B., BLACKBURN, J., KEATING, J., MELLOR, J., and PIGOTT, B.

No counsel appeared for the prisoner.

*Conolly*, for the Crown. There was a sufficient false representation of an existing fact, laid in the indictment, vis., that Henrietta Pond (who acted as Madame Temple's representative) was to give John Clark 10s.

POLLOCK, C. B. What is stated in the indictment seems to leave the nature of the false pretense quite uncertain.

BLACKBURN, J. I doubt whether what is stated in the indictment amounts to a false pretense. Can you supply the words, "on account of Madam Temple?" Because the evidence shows the false pretense

was that Madam Temple had given them authority to ask for the 10s; but is that laid?

*Conolly.* The indictment does state that Pond acted as Madame Temple's representative. The evidence disclosed a sufficient false pretense, and showed the sense in which the indictment was to be taken.

POLLOCK, C. B. If a man were to go to a person likely to lend him money, and were to say, "I am a peer," and so obtain the money, that, if untrue, would be a false pretense. If, however, he were to say only, "I expect to be made a peer," or, "I expect to be elected a member of Parliament," that would be no false pretense, however improbable it might be. The language of an indictment ought to be plain and clear. Here, on the contrary, it is uncertain; and it is quite consistent with the pretense alleged that the prisoner may only have meant that he was in a condition to demand the 10s of Pond, because so and so was about to happen, or because he had no doubt he should be able to persuade Madame Temple to let him have it.

MELLOR, J. There are two allegations in the indictment: The first is that Pond is to give the prisoner 10s; the second that Madame Temple is going to allow Clark 10s a week for the benefit of his health. Do they, or does either of them, necessarily import a false pretense of an existing fact.

*Conolly.* There is no doubt that a false pretense of a future fact, which is rather in the nature of a promise not intended to be kept, is not indictable. Thus, in *Rex* v. *Goodhall*,[1] where the prisoner had obtained meat by promising that he would pay for it on delivery, it was held that there was no false pretense within the statute. Here, however, the two allegations taken together amount to a representation that the prisoner had Madame Temple's authority to demand the money, which in fact he had not.

BLACKBURN, J. That might be so, if the indictment alleged that Pond was to give the money on account of Madame Temple. In *Regina* v. *Archer*,[2] the defendant was indicted for obtaining goods by pretending that there was a man named John Smith, an ironmonger living at Newcastle, whom he dare trust with £1,000, and that he wanted the goods for him. The jury found that the prosecutor parted with his goods in the belief that the defendant was a person with whom he might safely contract as being connected with the supposed John Smith, and employed by him to obtain the goods. The conviction was supported on the ground that there was a false representation that the defendant was connected with a person of opulence.

[1] Russ. & R. 461.

[2] Dears. C. C. 449.

*Conolly.* That is an authority in favor of the validity of this indictment, for the statement that Pond was to give him the 10s imports that he was in a condition to demand it, and that could only be so if he had Madame Temple's authority. Even if the second allegation, viz.: that Madame Temple was going to allow Clark 10s a week, be considered as nothing more than a representation of a future fact, yet that will not invalidate the indictment; for in *Regina* v. *Fry*,[1] it was held that a false pretense of an existing fact without which the property would not have been obtained, will support the conviction, although it is united with false promises which alone would not have been indictable.[2]

*Cur. adv. vult.*

The judgment of the court was delivered at a later period on the same day as follows: —

POLLOCK, C. B. The majority of the court are of opinion that the indictment does not state with sufficient certainty any false pretense according to law, that is, that it does not clearly allege any false pretense of an existing fact. An inference that there was such a false pretense may undoubtedly be drawn from the allegations made in the indictment. But that is not enough. The indictment must state the pretense with certainty.

BLACKBURN, J. I quite agree with the majority of the court that the indictment should state the false pretense with certainty, but I should have said that, where it was alleged that Pond, who was the representative of Madame Temple, was to give 10s, and, further, that Madame Temple was going to allow 10s a week, coupling the two together, it might have been construed to mean that Pond was to give the money on account of Madame Temple. The evidence shows that to have been the false pretense actually made, and I believe we are all of opinion that that false pretense, if stated in the indictment, would have been sufficient. Speaking for myself, I think the allegations of the indictment do amount to that. But, as I do not feel confident enough to require the point to be argued before the fifteen judges, I concur in this judgment.

KEATING, J. I quite agree that the words admit of the meaning put on them by my brother Blackburn; but that meaning is not set out in the indictment with the certainty which the law requires in criminal pleading.

MELLOR, J. The rule which governs this case has been laid down very distinctly by the Chief Baron. This case is very near the line;

1 Dears. & B. C. C. 449; *s. c.* 27 L. J., M. C. 68.

2 See, also, Regina *v.* West (Dears. & B. C. C. 575), and Regina *v.* Jennison (L. & C., p. 157), which are to the same effect.

but I am of opinion that it falls upon the wrong side of the line, and that the indictment does not allege an indictable false pretense with sufficient certainty.

PIGOTT, B. I feel some doubt, but not sufficient to induce me to dissent from this judgment.

POLLOCK, C. B. It appears to me that if the language of the indictment is susceptible of the interpretation which some of my brothers seem inclined to place upon it, it should have been left to the jury to say whether the words used by the defendants were used in the sense which would make them indictable, and that judges should not take upon themselves to say that expressions used by persons accused mean that which it is the province of the jury to find.

*Conviction quashed.*

---

FALSE PRETENSES — PROCURING NOTE BY FRAUD — FUTURE FACT

## COMMONWEALTH v. MOORE.

[99 Pa. St. 570.]

*In the Supreme Court of Pennsylvania, 1882.*

1. **A. Procured B. to Indorse** his note under the pretense that he would use the note to take up another on which B. was indorser; instead of which A. had it discounted and used the proceeds. *Held*, that A. was not guilty of false pretenses.
2. **A False Pretense must be** the assertion of an existing fact, not a promise to perform in future.
3. **A Conviction for Constructive Larceny** can not be had on an indictment for false pretenses.

*V. Gilpin Robinson*, District-Attorney, for the Commonwealth; *E. M. Hall*, for defendant in error.

PAXSON, J., delivered the opinion of the court.

The only question presented by this record is, whether the indictment sets forth an indictable offense. It contains two counts, in each of which the defendant below is charged with cheating by false pretenses. The particular act alleged was the procuring of the prosecutor's indorsement of the defendant's promissory note, and the false pretense charged consisted in his representing to the prosecutor that he would use the note so indorsed to take up and cancel another note of the same amount then about maturing, and upon which the prosecutor was liable as indorser. In other words, the note was given in renewal of another note of like amount, and the indictment charges that the defendant, instead of using it for this purpose, as he promised to do, procured it to be discounted, and used a portion of the proceeds for other purposes.

A false pretense, to be within the statute, must be the assertion of an existing fact, not a promise to perform some act in the future. The man who asserts that he is the owner of a house states a fact, and one that is calculated to give him a credit. But a mere failure to keep a promise is another and very different affair. That occurs whenever a man fails to pay his note. It is true, Chief Justice Gibson doubted in *Commonwealth* v. *Burdick*,[1] whether every naked lie by which a credit has been gained is not a false pretense within the statute. This doubt has run its course, and has long since ceased to disturb the criminal law of this State. There was nothing in *Commonwealth* v. *Burdick* to suggest such doubt, as the defendant had willfully misrepresented that he had a capital of $8,000 in right of his wife, while in all the cases cited therein there was a misrepresentation as to existing facts, by means whereof credit was obtained. The decisions upon this subject are uniform, and it would be an affectation of learning to cite the cases. Many of them may be found in the foot-note to Purdon.

In the case in hand there was no assertion of an existing fact. Now was there anything done by which even a credit was given. The credit had been obtained when the original note was indorsed; the present note was indorsed in lieu of and for the purpose of taking up the original; the failure to use it for such purpose was certainly a dishonest act on the part of the defendant, but we do not think it punishable under the statute defining false pretenses.

It was urged, however, that if it was not cheating by pretenses under the statute, it was constructive larceny, and therefore within the provision of section 111 of the act of 31st of March, 1860,[2] which is as follows: "Provided, always that if, upon the trial of any person indicted for such a misdemeanor (false pretenses), it be proved that he obtained the property in question in such manner as to amount in law to larceny, he shall not, by reason thereof, be entitled to be acquitted of such misdemeanor; and no person tried for such misdemeanor shall be liable to be afterwards prosecuted for larceny upon the same facts."

The fourth assignment of error avers that "the learned court erred in not holding that the facts set forth in the indictment, and proved on the trial, showed the defendant obtained the property in question in such manner as in law would amount to larceny, and in not giving judgment for the Commonwealth."

We do not think it necessary to discuss the line of cases cited in the able and interesting argument of the learned district-attorney, defining the distinction between the offenses of cheating by false pretenses and constructive larceny. While the distinction is a nice one, it is, nevertheless, clearly defined. The difficulty upon this head is not in the law,

1 2 Barr, 163.    2 P. L. 410.

but in the application of the law to the facts of a particular case. We are not called upon to pursue this inquiry in the present instance. It requires but a moment's reflection to see that we could not reverse the court below upon this ground. How can we, as an appellate court, say whether it was proved upon the trial below that the defendant obtained the property in question in such manner as to amount in law to larceny, when not one word of the evidence is before us? But it is said, the jury, having convicted the defendant of the offense of cheating by false pretenses, we must assume that the facts proved amounted to larceny. This does not follow. A general verdict of guilty upon the indictment is a finding only of the facts sufficiently pleaded. Neither of the counts would sustain a charge of larceny. The first count contains no averment that Horace P. Green, the prosecutor, was or ever had been the owner of the note in question, and if never the owner it could not have been stolen from him. The second count was evidently intended to cover both offenses; but such criminal pleading is rarely a success, and certainly is not so in this case. It contains an averment at the close that the said note was "then and there the property of the said Horace P. Green." Unfortunately for this averment, the prior portion of the same count shows the fact distinctly that the note in question was the note of the defendant, drawn by him in favor of the prosecutor, and by the latter indorsed for the accommodation of the defendant and handed back to him. It was, therefore, the property of the defendant, and not of the prosecutor. The second count contradicted itself upon the facts, and the finding of the jury is wholly insufficient to enable us to say the facts proved upon the trial amounted to larceny.

We are, therefore, of the opinion that the learned judge of the court below committed no error in arresting the judgment, and his ruling must be affirmed.

SHARSWOOD, C. J., concurs in the opinion, but would quash the writ.

---

## SWINDLING — REPRESENTATIONS MUST NOT BE AS TO FUTURE EVENTS.

## ALLEN *v.* STATE.

[15 Tex. (App.) 150.]

*In the Court of Appeals of Texas, 1884.*

**To Constitute the Offense of Swindling** some false representation as to existing facts or past events must be made by the accused. Mere false promises or false professions of intention, though acted upon, are not sufficient. The information in this case charged,

substantially, that defendant promised to pay one B. fifty cents for four certain fish, if said B. would deliver the same at his, defendant's, house; that B. did so deliver the fish, and that the said representations of the defendant were then and there false, etc. *Held*, that the information was insufficient to charge swindling or any other offense.

Appeal from the County Court of Palo Pinto. Tried below before the Hon. E. K. Taylor, County Judge.

The opinion states the case. A fine of fifty dollars and confinement in the county jail for a term of ten days constituted the punishment awarded by a verdict of guilty. The record brings up no statement of facts.

*J. H. Burts*, Assistant Attorney-General, for the State.

Willson, J. The charging part of the information in this case is as follows: "That heretofore, on or about the twenty-second day of June, A. D. 1883, in the county of Palo Pinto and State of Texas, one George Allen did then and there acquire and obtain, by false and deceitful pretense and fraudulent representations, with intent to appropriate the same to the use of him, the said George Allen, the party so acquiring, four certain fish, personal property of the value of fifty cents, belonging to Gnat Bradford, by then and there representing to him, Gnat Bradford, that he, George Allen, would pay him, Gnat Bradford, fifty cents in money if said Gnat Bradford would deliver said fish at George Allen's house, which he, said Gnat Bradford, did then and there, and delivered said fish at George Allen's house, and which said representations then and there by the said George Allen made were false and untrue."

We presume that this information is based upon article 790 of the Penal Code, and is intended to allege the offense of swindling. The facts alleged do not constitute the offense of swindling, or any other offense denounced by our Penal Code. To constitute the offense of swindling, some false representation as to existing facts or past events must have been made. Mere false promises or false professions of intention, although acted upon, are not sufficient.[1] The information before us charges nothing more than a promise on the part of the defendant to pay for the fish when delivered at his house. It does not even allege directly that the defendant refused to pay for the fish when so delivered.

The judgment is reversed, and, because the information does not allege any offense against the law of this State, the prosecution is dismissed.

*Reversed and dismissed.*

1 Johnson *v.* State, 41 Texas, 65; Matthews *v.* State, 10 Texas (App.) 279; 2 Bish. Cr. L., sec. 419; Tefft *v.* Windsor, 17 Mich. 486; 3 Cr. L. Mag. 838; People *v.* Blanchard, 90 N. Y. 314; Com. *v.* Moore, 99 Pa. St. 570.

## FALSE PRETENSES — REMOTENESS OF PRETENSE.

## R. *v*. Gardner.

[Dears. & B. 40; 7 Cox. 136.]

*In the English Court of Criminal Appeal, 1856*

**The Prisoner by Falsely Pretending** that he was a naval officer, induced the prosecutrix to enter into a contract with him to lodge and board him at a guinea a week, and under this contract he was lodged and supplied with various articles of food. *Held*, that a conviction for obtaining the articles of food by false pretenses could not be sustained, as the obtaining of the food was too remotely the result of the false pretense.

The following case was reserved and stated for the consideration and decision of the Court of Criminal Appeal by the chairman of the General Quarter Sessions for the county of Kent.

At the General Quarter Sessions of the Peace for the county of Kent, holden at Maidstone, on Thursday the 3d of January, 1856, before the Right Honorable Charles, Earl of Romney, James Espinasse, and Henry Shovell Marsham, Esquires, and others, her Majesty's justices of the peace for the said county, William Gardner was tried upon an indictment charging him as follows: that he did, on the 13th day of November, 1855, unlawfully, knowingly, and falsely pretend to one Ellen Henrietta Brunsden, that the name of him, the said William Gardner, was William Edgar De Lancy, and that he the said William Gardner, was paymaster of the ship called the Duke of Wellington, and that the said ship was lying at Portsmouth, and (the said William Gardner being then dressed in naval officer's uniform) that he, the said William Gardner, was the son of a half-pay officer, who was living at Chelsea, and that his brother was a lieutenant-colonel in the army, by means of which said false pretenses the said William Gardner did then and there obtain of and from the said Ellen Henrietta Brunsden twenty pounds weight of bread, twelve pounds weight of meat, three pounds weight of butter, one pound weight of cheese, three pounds weight of sugar, six quarts of beer, and ten quarts of coffee, and other articles of food, together of the value of thirty shillings, of the goods and chattels of the said Ellen Henrietta Brunsden, with intent then and there to cheat and defraud, whereas in truth and in fact the name of the said William Gardner was not William Edgar De Lancy, and whereas in truth and in fact the said William Gardner was not the paymaster of said ship called the Duke of Wellington, nor was the ship then lying at Portsmouth. And whereas in truth and in fact the said William Gardner was not the son of a half-pay officer who was residing at Chelsea, but was the son of one William Gardner, a collector of rates at Sheer-

ness; and whereas in truth and in fact the said William Gardner had not a brother, who was a lieutenant-colonel in the army; against the form of the statute, etc.

The evidence on the part of the prosecution, as far as is material for the purpose of this case was, that on the 13th day of November last the defendant wearing the dress of a naval officer, engaged a lodging of Ellen Henrietta Brunsden (the prosecutrix) at the rate of ten shillings per week; that on the 17th day of November the defendant expressed himself to prosecutrix as being comfortable, and that he should be likely to remain some time, and stated that he was paymaster of the Duke of Wellington, and his name was De Lancy, that the defendant continued a lodger till the 25th of November, and then expressed a wish to become a boarder, and an arrangement was accordingly entered into that he should become a boarder at a guinea a week, that the prosecutrix supplied the defendant with board, consisting of cooked meat, tea, sugar, bread, butter, cheese, and beer, for the six days following, but the defendant did not pay her anything for the lodging or board.

Upon the case for the prosecution being closed, it was submitted by counsel for the prisoner that the contract for board was a mere addition to the first contract for lodging, and that what the defendant in fact obtained by the false pretenses was an alteration of first contract, and not goods within the meaning of the statute.

The chairman overruled the objection, and left the case to the jury, who returned a verdict of guilty. Counsel for the prisoner then applied to the court to reserve the case for the opinion of the Court of Criminal Appeal upon the objection taken, alleging that a case similar to this was then before the court for decision. The court thereupon postponed passing sentence on the prisoner, but ordered him to be detained in custody.

The opinion of the court is requested, whether the objection taken by the prisoner's counsel is valid in law?

ROMNEY, *Chairman.*

This case was argued on 26th April, 1856, before JERVIS, C. J., COLERIDGE, J., CRESSWELL, J., EARLE, J., and MARTIN, B.

*Horn* appeared for the Crown, and *Ribton* for the prisoner.

*Ribton*, for the prisoner. The conviction was wrong. It is important to observe the dates. When the false statement was made, neither money, chattel, or valuable security was obtained by it; and obtaining lodging by a false pretense is not an offense within the statute. On the 25th November, when the contract to board was obtained, no false pretense was made.

COLERIDGE, J. Would it not be a question for the jury, whether there was not a continuing false pretense?

*Ribton.* To obtain a contract by a false pretense is not within the act. It is not obtaining goods. Here, if anything besides the lodging was obtained by the false pretense it was not food, but simply a new contract to supply board, and that would not be within the statute. The board might have been supplied, not in consequence of false pretense made when the contract for the lodging was obtained, but in consequence of the prisoner's manners and conduct after that time, and whilst he was a lodger.

COLERIDGE, J. Yes; but your point is, that there was no evidence to go to the jury, even supposing the interval between the false pretense and the contract had only been an hour.

*Ribton.* It is quite clear, that to obtain lodging alone would not be within the statute. Here the contract is for board and lodging united, and it is doubtful whether in any case obtaining board and lodging would be within the statute. It would always be difficult to separate the two so as to show that the articles of food were obtained by means of the false pretense; but here, at all events, the evidence fails altogether to connect the obtaining of the food with the false pretense.

*Horn*, for the Crown. It is indisputable law that the intervention of a contract is no answer to a charge of obtaining goods by false pretenses if the contract be part of the fraud. Here the prisoner has obtained goods by means of his false pretenses, and the fact that the contract was to pay for the board and lodging together does not make it less an obtaining of goods. In *Regina* v. *Kenrick*,[1] the money was obtained upon the sale of horses which the prosecutor was induced to buy by false pretenses.

CRESSWELL, J. That is a remarkable case. Sir F. Thesiger, who appeared for the Crown, abandoned the counts for obtaining the money by false pretenses.

JERVIS, C. J. That case is now under consideration in *Regina* v. *Burgon*,[2] and *Regina* v. *Roebuck*.[3]

*Horn.* The decision in *Regina* v. *Kenrick*, was acted upon and affirmed in *Regina* v. *Abbott*.[4] Where money was borrowed from the drawer of a bill by the acceptor for the alleged purpose of paying it, and upon a false pretense that he was prepared with the residue, it was held to be within the statute,[5] and so it was held where a baker delivered short weight to the poor, and presented tickets as if he had delivered full weight according to his contract.[6] The decision in *Regina* v. *Codrington*,[7] can not be considered law unless it can be distinguished from

[1] 5 Q. B. 49.
[2] Dears. & B. C. C. 11.
[3] Dears. & B. C. C. 24.
[4] 1 Den. C. C. 273; 2 C. & K. 630.
[5] Rex *v.* Crossley, 2 Moo. & R. 17.
[6] Reg. *v.* Eagleton, Dears. C. C. 515.
[7] 1 C. & P. 661.

the subsequent cases of *Regina* v. *Kenrick* and *Regina* v. *Abbott*, on the ground that the false pretense was not sufficiently proved.

JERVIS, C. J. The difficulty in the case of contracts, is, where the party deceives gets not the consideration which he expects, but something like it.

*Horn.* In this case the false pretense is clearly proved; it was a continuing pretense, and the prosecutrix acting upon it was eventually induced to supply the prisoner with board as well as lodging. It is objected that lodging is not within the statute. Land is not within the statute; but suppose, by a false pretense, I get an estate and a purse of gold? The articles of food which the prisoner obtained were chattels within the meaning of the statute; and the fact that the prisoner gained lodging as well as board can not make any difference. The question whether the food was obtained by the false pretense was for the jury, and they have found that it was.

*Cur adv. vult.*

*Ribton* replied.

The judgment of the court was delivered on 3d May, 1856, by

JERVIS, C. J. In this case, which was argued before us on Saturday last, the court took time to consider, principally with a view of first taking into consideration the cases of *Regina* v. *Roebuck* and *Regina* v. *Burgon*, which have just been disposed of. It was an indictment for obtaining goods under false pretenses, the circumstances being, that the prisoner represented himself to be the paymaster of the Duke of Wellington, of the name of De Lancy, upon which he made, with the prosecutrix, a contract for board and lodging, at the rate of one guinea a week, and he was lodged and fed as the result of the contract in consequence of the engagement so entered into upon that which was found to be a false pretense; and the question which was submitted to us was, whether it was a false pretense within the statute; or rather whether the conviction was right? That we have considered, and on consideration we are of opinion that the conviction was not right, because we think that the supply of articles, as it was said upon the contract made by reason of the false pretense was too remotely the result of the false pretense in this particular instance to become the subject of an indictment for obtaining those specified goods by false pretenses. We, therefore, think the conviction should be reversed.

*Conviction quashed.*

## FALSE PRETENSES — PROPERTY MUST BE OBTAINED — REMOTE CAUSE.

## MORGAN v. STATE.

[42 Ark. 131; 48 Am. Rep. 55.]

*In the Supreme Court of Arkansas, 1883.*

1. **The Object of a Felonious False Pretense** must be to obtain property, andthe property must be given in consequence of the false pretense.
2. **The Prosecutor went to Hot Springs, Ark.,** for the purpose of boarding at the same house with Dr. W., an acquaintance of his who was visiting there. He went to defendant's hotel and defendant told him he knew Dr. W. and that he had been boarding at his hotel for some time, but had left town; all of which was willfully false. By means of said representations the prosecutor was induced to take board with the defendant for a month and pay him in advance. *Held,* not a case of false pretenses.

Conviction of false pretenses.

The opinion states the case.

*A. Curl* and *W. J. Hughes*, for appellant.

*Moore*, Attorney-General, for State.

EAKIN, J. Morgan was indicted in Garland County, and upon change of venue to Hot Springs County was convicted and sentenced to a years' imprisonment in the penitentiary. This is the indictment.

"The grand jury, etc., * * * accuse M. T. Morgan of crime of false pretenses committed as follows, to wit: On the 25th day of May, 1882, one Walter Fisher, a resident of State of Kentucky arrived as a visitor in the city of Hot Springs with the purpose fixed in his mind of procuring board and lodging at the same hotel or boarding-house in said city, where one Dr. John S. Welsh, an acquaintance of the said Fisher and then in the said city, was boarding; and with such purpose the said Fisher went to the Gwinn Hotel in said city of which the said M. T. Morgan was the proprietor, for the purpose of getting breakfast and ascertaining where in said city the said John S. Welsh was stopping; and while at the said Gwinn Hotel in the County and State aforesaid, on the said 25th day of May, 1882, the said M. T. Morgan feloniously, willfully and designedly did falsely represent and pretend to the said Walter Fisher that he, the said Morgan, was acquainted with the said John S. Welsh and that the said John S. Welsh was not then in the city of Hot Springs; that the said John S. Welsh had boarded with him, the said Morgan, two or three weeks, while in the city of Hot Springs, just prior to that day; and that the said John S. Welsh had left Hot Springs for Eureka Springs a day or two before that day; by means of which said false pretenses and representations so knowingly, feloniously and fraudulently made, the said M. T. Morgan did then and there feloniously induce the

said Walter Fisher to engage board and lodging at the Gwinn Hotel for one month and did feloniously obtain from the said Walter Fisher one piece of United States paper currency, commonly called greenbacks and of the denomination and value of $10, of the money of the said Walter Fisher with the felonious intent to cheat and defraud the said Walter Fisher of the same. Whereas in truth and in fact the said M. T. Morgan was not acquainted with the said John S. Welsh; the said John S. Welsh had not at any time boarded with the said M. T. Morgan; the said John S. Welsh had not left the city of Hot Springs for Eureka Springs a day or two before that day; and the said John S. Welsh was then in the said city of Hot Springs boarding at a hotel other than the said Gwinn Hotel, against the peace and dignity of the State of Arkansas.

"J. B. Wood,
"*Prosecuting Attorney.*"

A demurrer to this indictment, and also motions for a new trial and in arrest of judgment were successfully made and overruled. A bill of exceptions was taken and the defendant appealed.

[Minor matter omitted.]

Considering first the motion in arrest with the demurrer. They are based upon the ground that the facts charged do not disclose an indictable offense.

Section 1372 of Gantt's Digest, so far as applicable to this case, provides that "every person who, with intent to defraud or cheat another, shall designedly, by color of any false token or writing, or by any other false pretense * * * obtain from any person any money, personal property, right in action, or other valuable thing or effects whatever, upon conviction thereof, shall be deemed guilty of larceny and punished accordingly."

Such has been the law of this State since the adoption of the Revised Statutes of 1838.

It was early held, in consonance with English authorities, that there could be no false pretense regarding an intention or future purpose. It could not be applied to a promise to do something, however fraudulent in design, or hurtful in effect, the promise may have been. The distinction is not based on any idea of difference in degrees of moral turpitude between the two sorts of scoundrelism, but upon the necessity of limiting in some way the broad significance of the words of the statute. To what extent that limitation is to be carried was left uncertain, but it was held in the case now referred to that it must be a pretense regarding some existing fact or condition, to be felonious.[1] It

[1] McKenzie *v.* State, 6 Eng. 594.

was remarked by Mr. Justice Scott, delivering the opinion, that it could not be supposed "that the Legislature intended to make every imaginable case of fraud an indictable offense." I may add that if it did so intend, and could enforce the intention, one or two things would result—either we would have a Utopian condition of society, or the revenues of the State would be exhausted in the building and support of penitentiaries. Seriously constituted as human nature is, in the struggles for wealth, social position, selfish indulgencies, political influence, or for food and clothing, so broad a construction, even within the letter of the statute, would be impracticable; or if practicable, more barbarous than the most shocking legislation of the early Puritans. The court in that case declined to make any effort to fix all the limits of the operation of the words of the statute, deeming it safer to leave them to be fixed from time to time in each case as they might arise. It certainly was a wise precaution, founded upon sound views of practical judicature and a true forecast of the dangers and abuses to which such statutes may lead. For in general I suppose it will be admitted that it is wiser to leave the correction of ordinary cases of fraud and deceit to the civil tribunals, and more especially the equity courts, aided by social ostracism, than to create the temptation to enforce civil claims by the terrors of criminal prosecutions, or to inflict the most crushing punishment and everlasting disgrace for every kind of violation of fair and ingenuous dealing. Human nature must be dealt with as found, and wisely corrected and restrained. The question of what would constitute a felonious false pretense had not been raised in the previous case of *State* v. *Hand*,[1] but the indictment, which passed unchallenged, set up a false pretense of an existing fact of a very material character, upon the belief in which money was advanced. Then it was faith in the fact which gave the assurance that the money would be returned.

In *Burrow* v. *State*,[2] upon the argument of the present chief justice, who was then of counsel for plaintiff in error, the court reasserted the rule in *McKenzie* v. *State*,[3] but went still further in the wary policy of guarding against the abuses to which a too literal construction of the words and too wide a scope of the intention, might lead. In that case there was an actually false misrepresentation of existing facts, or rather a false pretense which did not exist by which the defendant obtained from one Richard S. Hodge, a conveyance of a negro slave named Bill. The pretense charged in the indictment was that Burrow represented to Hodge that certain persons had conspired to seize the slave by which Hodge would be unjustly and unlawfully deprived of the value, and thereby induced him to convey the slave Burrow for safe-keeping, with

[1] 1 Eng. 165. [2] 7 Eng. 65. [3] *supra.*

the felonious intent to cheat and defraud him, and that the representations were untrue and Burrow knew it. The court conceded that this count was not liable to the objection that the pretenses were not regarding existing facts. There was no question either, but that the pretenses had been the immediate inducement to the conveyance, or had been properly alleged to have been. The court held this count bad. Chief Justice Johnson delivering the opinion of the court said that "it was not the intention of the statute to convert every fraud which might fall within the cognizance of a court of equity into a criminal offense." In that case it was considered that the representation complained of was not of so definite and plausible a character "as to drive from his propriety a man of ordinary capacity and to induce him to divest himself of his property."

He said the statute "was designed to extend no further than to embrace such representations as were accompanied with circumstances fitted to deceive a person of common sagacity and exercising ordinary caution." Another count in the same indictment was held bad upon the ground that it was not sufficient to charge false pretenses in general terms, but that they should be set out specifically and with strict certainty. The principles of construction were substantially reannounced in *State* v. *Vandimark*,[1] and supported by authorities. Upon the authority of Mr. Bishop, Justice Harrison in that case said the representation must be of such a nature as to induce the person to whom it is made to part with something of value.

In the subsequent case of *Johnson* v. *State*,[2] which was a case of obtaining goods on the false pretense of having been sent for them, Mr. Justice Harrison, delivering the opinion of the court, somewhat modified the doctrine laid down by Chief Justice Johnson in *Burrow* v. *State*,[3] and announced that it was not necessary that the pretense should be such as is calculated to deceive a person of ordinary prudence or caution, but that it would be sufficient if the person were actually deceived or defrauded. Evidently there are shades of distinction on this point, and neither position can be followed to the extreme limits of its logical consequences.

Without pausing to discuss the statutes of England, and other States of a similar character, which all seem pretty much in accord with each other, it is only necessary for the purposes of this case to say that the false pretenses must be the "inducing motive to the obtaining of the goods by the defendant."

In some States it is held that they must have been the decisive cause of the transfer, while in others it is sufficient if they have materially

[1] 35 Ark. 396. [2] 36 Ark. 242. [3] *supra*.

contributed with other motives to induce it. Acting upon the former caution of this court, and laying down nothing which this case does not require for its decision, leaving other points to be settled and determined as they arise, we proceed to examine this indictment in the light of our past decisions.

The false pretenses are all with regard to the matter of Welsh having been an acquaintance of the landlord, and a guest of the Gwinn Hotel whilst in town, and having left for Eureka. They were damning falsehoods, altogether unworthy of a respectable hotel-keeper. The object of them, however, was not to get Fisher to pay him money because of the facts represented. It is not like the case where one would go to another and say, for instance, "your family is suffering at home and I am sent to you for money to relieve them," when that is false. Then the money is given because of the actual pretense. Was there any reason in the nature of things why Fisher should give money to the defendant because he knew Welsh, and Welsh had patronized his house, and had then gone to Eureka? It is not pretended that there was or that Fisher had been himself benefited by the conduct of the defendant toward Welsh, or would be benefited by Welsh's presence. It would simply have gratified his taste and sentiment to be with Welsh. No injury was alleged to have been done to him by not getting at the same hotel with Welsh. Evidently he gave no money or property to defendant upon account of the false representations. They induced him only to make a contract for board there. But of what did that defraud him? Only of the sentimental gratification (from all the indictment shows), of being with his friend Welsh. But the result of a felonious false pretense must be to obtain property.

The money was paid for board in advance. No false pretense as to furnishing board and lodging is averred or shown. Nothing appears to show that it was not as good as any other hotel. The money was paid for value, and the defendant was willing to give value, all that he promised. Indeed, nothing more appears on a careful study of the allegations than this, that he was cheated not out of any property or thing of value, but disappointed of his anticipated pleasure in being in close connection with Welsh. If he had any remedy it seems that a civil remedy to rescind the contract might have been ample. A fraud had been doubtless perpetrated upon him, if the indictment be true, and a very reprehensible one. But whilst the contract stood, he was not cheated of his money. He could get the full value of that which he expected of it when he paid it.

The payment of the money for board is too remote a consequence of the false pretenses. They were not made directly for the purpose of having money advanced because of the facts. The object as disclosed

by the indictment was to induce Fisher to become a guest. This does not come within the inhibition of the statute. To get the custom or patronage of a guest is not to get property, but to induce a condition of things or relation of the parties out of which a contract to pay money for value may arise.

It was held in *Regina* v. *Gardner*,[1] as reported in Wharton's Criminal Law,[2] that where a person obtained food and lodging as a boarder, on the pretense that he was a naval officer, the obtaining of such food and lodging was too remotely the result of the false pretense.

We think the court erred in overruling the demurrer to the indictment, and also the motion in arrest.

Reverse with instructions to arrest the judgment and sustain the demurrer to the indictment.

*Judgment reversed.*

---

## FALSE PRETENSES — OBTAINING MONEY RIGHTFULLY DUE.

## COMMONWEALTH *v.* McDUFFY.

[126 Mass. 467.]

*In the Supreme Judicial Court of Massachusetts, 1879.*

**A Person who by False and Fraudulent** representations obtains from another a sum of money which is no more than is rightfully due him from the latter, can not be convicted of obtaining money by false pretenses, under the General Statutes,[3] and, at the trial of an indictment against him on that statute, evidence of the amount of the debt to him is admissible.

INDICTMENT on the General Statutes,[4] for obtaining money of Cornelius Sweetser by false pretenses.

At the trial in the Superior Court, before ALLEN, J., it appeared that by virtue of an agreement dated October 3, 1872, Sweetser became the trustee of certain funds for Susan R. Howard and her two daughters; that in the fall of 1874, Sweetser, by an arrangement with the *cestuis que trust*, bought a parcel or land in Lowell with a portion of the trust funds, and took a deed thereof in trust for the persons above named. It also appeared that the defendant was to build a house upon this land, and was to pay all bills for materials used in said house with money which was to be given to him by Mrs. Howard, from time to time, upon the presentation by him to her of bills for such materials; that the money was to be sent to Mrs. Howard at Lowell, by Sweetser, from Saco,

1 36 Eng. Law & Eq. Rep.
2 sec. 2122.
3 ch. 161, sec. 54.
4 ch. 161, sec. 54.

Maine, where he resided; that the final settlement for the building of the house was made on September 16, 1875; that at that time a draft, drawn by the cashier of a bank in Saco, upon a bank in Boston, for $2,000, dated November 2, 1875, payable to Mrs. Howard or order, and indorsed by her, was given by her to Sweetser, and by the latter delivered to the defendant, and a certain sum was returned to Mrs. Howard by the defendant, and his bill was thus settled.

Sweetser testified that [he had collected certain notes mentioned in the agreement of trust, and had deposited them in a bank at Saco with his own funds; that he purchased the draft above mentioned with the funds so held by him in said bank, and sent the draft to Mrs. Howard, and charged upon his book $1,000, as paid out of the trust fund; that his purpose in sending the draft was that it might be used to pay for the house, and that the balance, after the payment of the defendant's bills, was to be paid out upon other bills contracted for the house.

The defendant contended, and asked the judge to rule, that, as a matter of law, the money paid to the defendant, at the time of the settlement, was not the money of Sweetser within the allegation of the indictment; but the judge refused so to rule, and the defendant excepted.

The defendant contended that he could not be convicted upon the indictment, because, upon the settlement at which it was alleged he made the false representations set forth, he had been allowed nothing for his services in building the house; that he was entitled to recover for his personal services the sum of $650; and that, if the sum he received in fact was not more than enough to pay him for the bills actually paid and for his services, then he was not guilty of false pretenses, even if he had made untrue statements, because he had defrauded no one.

When the defendant was on the witness stand, he was asked what sums he had actually put into the house upon certain bills; but the judge ruled the inquiry immaterial. The defendant's counsel then suggested that it might be important to the defendant to prove that he only received money enough to pay him what he actually paid out, and what was actually due for labor and materials furnished at the time of the settlement. But the judge ruled that, if the defendant actually made false representations as to what went into the house as materials, he might be guilty, even if he had not received more than was due him.

The defendant asked the judge to rule as follows: "1. If the defendant only received, at the time of the settlement with Sweetser, money enough to pay what was actually due him, then this indictment can not be maintained. 2. If the defendant made representations only for the purpose of getting the money due him, and not for the purpose of obtaining money not due him, then this indictment can not be maintained."

The judge declined so to rule; but ruled that, if the defendant made the false representations for the purpose of obtaining money that he believed to be due him, and believed that he had a right so to obtain the money, the indictment could not be sustained.

The jury returned a verdict of guilty; and the defendant alleged exceptions.

*T. H. Sweetser & G. A. A. Pevey*, for the defendant.

*J. F. Brown*, Assistant-Attorney General, (*C. R. Train*, Attorney-General, with him) for the Commonwealth.

LORD, J. The only question in this case upon which we feel called to give an opinion is, whether the instructions, requested by the defendant or either of them, should have been given.

It is not easy to understand why, in the view of the law as stated by the presiding justice, evidence of the exact amount of indebtedness to the defendant was excluded; for such evidence would be apparently competent upon the issue of the defendant's belief. Nor do we see how the question whether the defendant believed that he had a right so to obtain the money can of itself be a decisive test of his guilt or innocence. We understand the use of the word "right" to signify legal right, and not moral right, although its use might perhaps tend to mislead the jury, and lead them to suppose that, in order to acquit the defendant, he must have believed that he had a moral right to lie and deceive for the purpose of obtaining what was justly due him. We do not however, decide the case upon any criticism of the particular form of language in which the instruction was given, nor upon any apparent inconsistency between the instructions as given and the rules previously laid down as to the admissibility of evidence.

We understand the broad and naked question to be presented, whether the offense of obtaining property by false pretenses can be committed when the party charged obtains no more than is rightfully due him, by whatever fraudulent means or devices he thus obtains it. This leads to an inquiry into the essential elements of the offense. In *Commonwealth* v. *Drew*,[1] MORTON, J., says that to constitute the statute offense four things must concur: (1.) There must be an intent to defraud; (2) there must be actual fraud committed; (3) false pretenses must be used for the purpose of perpetrating the fraud; and (4) the fraud must be accomplished by means of the false pretenses made use of for the purpose. And in *Commonwealth* v. *Jeffries*,[2] Bigelow, C. J., says that the intent to defraud is part of the substance of the issue, and must be proved. We are not aware that the precise question now presented has ever been considered by this court; and we

[1] 19 Pick. 179.

[2] 7 Allen, 548, 568.

have not been able to find any decision in any court of last resort that a party may be convicted of the crime of obtaining property by false pretenses, when he has obtained no thing in value which he would not be entitled to as of right. In *Rex* v. *Williams*,[1] a servant of B., obtained property belong to A. by means of falsehood, to enable B. to obtain payment of a debt owed by A.; and it was held that if C. did not intend to defraud A., but only to enable B. to obtain what was due to him, he could not be convicted; and Coleridge, J., in that case told the jury, that if the prisoner did not intend to defraud the prosecutor, but only to put it in his master's power to compel him to pay a just debt, they ought not to convict, and added, that it was not sufficient that the prisoner knowingly stated that which was false, and thereby obtained the property, but they must be satisfied that the prisoner at the time intended to defraud the prosecutors.

In *People* v. *Thomas*,[2] the defendant was charged with obtaining property by false pretenses, the fraudulent pretense being that a note of the prosecutor which he had for the amount had either been lost or burned, which was known by him to be false, and afterward he negotiated the note to a third person. The court held that a false representation tending merely to induce one to pay a debt previously due from him was not within the statute against obtaining property by false pretenses; the court saying, "a false representation, by which a man may be cheated into his duty, is not within the statute," and in *Commonwealth* v. *Henry*,[3] Woodward J., makes use of almost precisely the same language.

In *People* v. *Getchell*,[4] the defendant was charged with procuring the indorsement of the prosecutor to a promissory note by fraudulently pretending that a former note for the same amount so indorsed was destroyed; and in his defence, he offered to show that the prosecutor was bound by an agreement with him to indorse for him to an amount larger than both of the notes, and that the money obtained on the notes was used for the purposes contemplated by the agreement. It was held that such evidence should be received as tending to disprove the presumption of an intent to defraud.

We are, of course, not to be understood as deciding that a mere pretense of indebtedness by the person from whom the property is obtained is sufficient; nor is anything which we decide to be construed as in conflict with the well established rule of law that a party is to be presumed to intend all the natural and ordinary consequences of his acts; and fraud and falsehood are always evidence tending to show that the party had a dishonest purpose; and the question for the jury

1 7 C. & P. 354.
2 3 Hill, 169.
3 22 Pa. St. 253.
4 6 Mich. 496.

to decide is whether, upon all the facts and circumstances, the defendant had an intent to defraud, and effected that purpose, and whether, in order to accomplish it, he made use of fraudulent representations, and succeeded by means of such representations.

The defendant should, therefore, have been allowed to offer evidence in support of the facts upon which his prayers are predicated, and the jury should have been instructed that, if proved, the defendant was entitled to an acquittal; and for this reason the exceptions must be sustained. Upon the other point in the case we make no decision. Under the provisions of the General Statutes,[1] the indictment might be supported if either the actual or constructive possession of the money, or the general or special property in the whole or part of it was in the person named in the indictment. We do not think the facts upon this point are so fully and carefully stated in the bill of exceptions as to require us to say, as matter of law, that neither the actual nor constructive possession, nor the general nor special property in the money obtained, was not in Sweetser. That question will be open upon another trial, where the evidence relating to it may be varied, or may be more fully developed.

*Exceptions sustained.*

---

## FALSE PRETENSES — ORDINARY PRUDENCE REQUIRED OF PROSECUTOR.

### Commonwealth *v.* Grady.

[13 Bush. 285.]

*In the Court of Appeals of Kentucky, 1877.*

**A False Statement that a House and Lot were Unincumbered,** when, in fact, they were subject to a recorded mortgage, is not a false pretense within the statute, because the party defrauded had the means of detecting it at hand, and might have protected himself by the exercise of common prudence.

Elliott, J., delivered the opinion of the court.

This is an indictment charging the appellee with having obtained the money and property of Presley O'Bannon by the false pretense of fraudulently representing to O'Bannon that he was the owner of a house and lot in Owen's addition to the town of Eminence, and that the house and lot so owned were free from lien or mortgage to any one.

By these misrepresentations it is charged that appellee obtained from

[1] ch. 172, sec. 12.

O'Bannon $125 in money and some promissory notes for the house and lot; and that it turned out, on investigation, there was a recorded mortgage on the property, which had been executed by appellee to Lotty Kelso.

The indictment fails to state the amount of the mortgage lien of Mrs. Kelso, for if it was merely nominal the appellee may have made the representations charged with no intention of defrauding O'Bannon, but wlth the intention of removing the incumbrance with a part of the money received from him. But we agree with the opinion of the lower court, that the indictment was insufficient for several reasons.

In the case of the *Commonwealth* v. *Haughey*,[1] it was charged that Haughey obtained credit on a note he owed R. R. Jones, upon the false and fraudulent pretense and representation that a large quantity of tobacco which Jones then purchased would average in quality with a sample which Haughey then and there exhibited to said Jones.

This court affirmed the judgment of the lower court dismissing the indictment, and say that a common caution on the part of Jones would have protected him from any injury; he could, without trouble, have retained his note till the tobacco was delivered; and if, upon an offer to deliver it to Haughey, it was not equal in quality to the sample exhibited, he could have rejected it.

So in this case, O'Bannon could have refused to execute and deliver his note to appellee, or even to pay him the $125 in money, till he stepped to the clerk's office and ascertained from the records of the Henry County Court whether the title to the house and lot was such as represented.

In Wharton's Criminal Law,[2] the doctrine is laid down that a "representation, though false, is not within the statute (meaning the statute against obtaining money and property by false pretenses), unless calculated to deceive persons of ordinary prudence and discretion;" and this author further says that the statutes against obtaining money, etc., by false pretenses, ought not to be so interpreted as to include a case where the party defrauded had the means of detection at hand.

Here O'Bannon had the means of detection at hand; for, by a visit to the clerk's office, he could have ascertained whether the appellee had the unincumbered title to the house and lot as represented by him.

*Wherefore the judgment is affirmed.*

[1] 3 Met. 223.

[2] vol. 2, sec. 2129.

## FALSE PRETENSES — MONEY MUST BE PARTED WITH — PARTNERSHIP.

## R. *v.* WATSON.

[Dears. & B. 348.]

*In the English Court of Crown Cases Reserved, 1857.*

1. **To Constitute the Crime of False Pretenses** the money of the injured party must be parted with.
2. —— **Partnership — Inducing one to Enter.** — W. by false and fraudulent representations made to B. as to his business, customers and profits induced B. to enter into a partnership with him and to advance $500 as part of the capital of the concern, and B. afterwards recognized and acted upon such partnership. *Held*, that this was not obtaining money by false pretenses, as the money was still under the control of B.

The facts of this case were as in the syllabus above. The prisoner was convicted below, but his case was reserved for this court. It was argued on the 21st of November, 1857, before COCKBURN, C. J., ERLE, J., WILLIAMS, J., CROMPTON, J. and CHANNELL, B.

*Bulwer* appeared for the prisoner; no counsel appeared for the Crown.

*Bulwer*, for the prisoner. The question is raised on the three first counts of the indictment.

COCKBURN, C. J. How was it put to the jury? The aggregate of the pretenses alleged in these counts may have induced the prosecutor to part with his money; but instead of being put into one count they are subdivided and split up. Each pretense forms the subject of a distinct and separate count and in each count the money is alleged to have been obtained by the particular pretense mentioned therein; and as these pretenses are all made in the course of one transaction it is difficult to say on which the jury believed the prosecutor acted.

*Bulwer.* The chairman after reading the evidence and making some observations to the credit of the witnesses, told the jury that if they believed the account given by the prosecutor they would find the prisoner guilty on the three first counts.

CROMPTON, J. If the money was obtained by a mere fraud and not received by the prisoner as a partner in the concern the conviction might be right; but that question was not left to the jury.

*Bulwer.* The general effect of the evidence is that the prisoner exaggerated the nature and extent of the business, and thereby induced the prosecutor to enter into partnership with him; and this raises the question whether it can be said that the money which the prosecutor thereupon advanced to the capital of the concern was obtained by the prisoner by false pretenses. It is contended that there has been no

obtaining of the money within the meaning of the statute, for the prosecutor did not part with the control over the money.

Cockburn, C. J. If there were a partnership the prosecutor never parted with the money in the sense contemplated by the statute, for he still had a joint interest in it; and there certainly is a *prima facie* case of partnership.

Crompton, J. The question should have been put to the jury whether the representations of the prisoner were merely an exaggeration of the amount of business he was doing or a total fiction. I should be unwilling to hold that the mere exaggeration of the profits of a business by a seller is indictable.

*Bulwer*, read some letters which were not inserted in the case, but which were admitted by *Dasent*, who was counsel for the prosecution at the Sessions, and was now in court, to have been given in evidence at the trial. The effect of the letters was to show that the prosecutor recognized and acted upon the partership by endeavoring to dispose of his interest in the concern.

Cockburn, C. J. The question submitted to us is, whether the jury, if they believed the evidence, were bound to find the prisoner guilty. We are of opinion that they were not, and consequently that this verdict can not stand. It appears that the prosecutor, by certain representations made to him by the prisoner as to his business, customers, and profits, was induced to enter into partnership with the prisoner, and to advance the sum of £500 as part of the capital of the concern. Now I am far from saying that where a party is induced by false pretenses to enter into a partnership and to advance money, the allegations being altogether fraudulent and false, or colorable merely, he might not have ground for maintaining an indictment for obtaining the money by false pretenses, or from saying that he might not rescind a contract. obtained by fraud. But I am clearly of opinion, that if he does enter into the contract of partnership and does not rescind it, and advances money as part of the capital of the concern, he has not parted with his money within the meaning of the statute; because, being a partner, he is still interested in that money. Whether, in this case, Mr. Irving might or might not have rescinded this partnership is another question; but instead of doing so, he treated it as an existing partnership, advanced money as part of the capital, and afterwards endeavored to dispose of his interest in the concern.

Erle, J. I concur in the opinion expressed, and on the same grounds. I am obliged to conclude, upon the evidence before us, that there was a real partnership, which was assented to for some time by the prosecutor. I am not aware of any cases in which it is held that money advanced to a concern by one of the partners in it can be treated

as money obtained by another partner by false pretenses. I wish to guard myself against the notion, that in no case of a partnership obtained by fraud and money advanced, as where, for instance, the whole thing was a pretense and the party always intended to obtain and appropriate the money, an indictment under the statute might not lie; and on the other hand, I would guard myself against being supposed to say that such an indictment could be sustained upon mere exaggerated representations as to the profits of a concern. I am aware of the difficulty of drawing the line; but, at all events, in this case there was no obtaining of the money, within the meaning of the statute.

WILLIAMS, J. I am of the same opinion. The only point of law reserved for our consideration is, whether in every possible and conceivable view of the evidence by the jury, they were bound to return a verdict of guilty, and I think they were not.

CROMPTON, J. I quite agree with my brother WILLIAMS, that the question put to us is as he has stated it. No doubt other questions might have been raised in this case, but the direction to the jury was, that if they believed the evidence of Irving they must find the prisoner guilty. There were grave matters which might have been submitted to the jury. They might have been asked whether the defendant carried on any real trade; but, if the whole story of the trade was not a fiction, I should be strongly inclined to think a mere misrepresentation as to the number of barrels of beer sold would not be within the statute.

CHANNELL, B. I also think that this conviction can not be sustained. There was evidence to show that there was a partnership, not repudiated but affirmed. Assuming there to be a partnership, the money was paid as part of the capital.

*Conviction quashed.*

---

## INDICTABLE FRAUDS AT COMMON LAW.

### PEOPLE *v.* BABCOCK.

[7 Johns. 201; 5 Am. Dec. 256.]

*In the Supreme Court of New York, 1810.*

1. **A Cheat or Fraud to be an Indictable** offense at common law must be such as would affect the public; such a deception that common prudence can not guard against, as by using false weights and measures or false tokens or where there is a conspiracy to cheat.
2. **No Indictment will lie** where one obtained a release of a judgment, falsely pretending he had ability to discharge it.

Indictment for a cheat, setting forth that Babcock did falsely, fraudulently and deceitfully and by false acts, colors, and pretenses, obtain,

acquire and get into his possession from one R. Brown, the partner of I. Dickinson, a receipt and full discharge of judgment obtained by Brown and Dickinson against Babcock, under color and pretense that he would pay a sum of money on such judgment and give his note for the residue, with intent to deceive and defraud, etc. The defendant was convicted.

*Gold* moved in arrest of judgment on the ground that the offense was not indictable at common law.[1]

*Van Vechten*, Attorney-General, and *N. Williams*, *contra*, contended that indictments in cases like the present were to be found;[2] that cheating was classed among offenses against public trade;[3] and that an indictment has been held to lie for tearing an account after it had been signed and settled;[4] also for selling wine as Lisbon wine, when it was not.[5]

BY THE COURT. Lord Kenyon said that the case of *King* v. *Wheatley*,[6] established the true boundary between frauds that were and those that were not indictable at common law. That case required such a fraud as would affect the public; such a deception that common prudence and care were not sufficient to guard against, as the using of false weights and measures, or false tokens or where there was a conspiracy to cheat. Thus in the case of *Jones*,[7] who obtained money of A. pretending to have a command from B., whereas B., did not send him; but as he came with no false token, it was held not to be indictable. The offense was nothing more than telling a lie. So in the case of *King* v. *Lara*,[8] the defendant got possession of certain lottery tickets the property of A. pretending that he wanted to purchase them, and he delivered to A., a fictitious order on a banker, knowing that he had no authority to draw it, by means of which he got possession of the lottery tickets. On the argument in arrest of judgment, it was admitted as this was a fraud upon a private individual, the prosecutor must show that the fraud was affected by means of a false token, as well as of a false pretense, and one of such a nature as that ordinary prudence could not guard against it. The counsel for the Crown contended that the false pretense was the alleged wish to purchase, and the false token was the order. But the court said that there was no false token; that it would be ridiculous to call the check a false token, and that all depended upon the credit due to the defendant's assertion, and the judgment was arrested.

1 King *v.* Wheatley, 2 Burr. 1125; Rex *v.* Young, 3 T. R. 104; 6 Mod. 42; Say. 146; 1 East, 185; 2 Str. 866; 6 L. R. 565; 2 East's C. L. 816-834.

2 Hawk. P. C., ch. 71, p. 1; King *v.* Jones, 1 Leach, 161.

3 4 Bla. Com. 157; 4 Com. Dig. 554; Justices B. 32, 33; Comb. 16.

4 Queen *v.* Crisp, 6 Mod. 175.

5 Queen *v.* Mackerty, 2 Ld. Raym. 1179.

6 2 Burr. 1125.

7 1 Salk. 379.

8 6 T. R. 565.

In the present case we search in vain for the false token. There was nothing beyond the defendant's false assertion that he was ready to pay the judgment. There was not even the production of either note or money, and common prudence would have dictated the withholding of the receipt until the money was paid and the note drawn. To support this indictment would be to overset established principles.

The judgment must, therefore, be arrested.

*Judgment arrested.*

---

INDICTABLE FRAUDS—NEW YORK STATUTE—FALSE PRETENSES.

## RANNEY *v.* PEOPLE.

[22 N. Y. 414.]

*In the Court of Appeals of New York, 1860.*

1. **Under the Act of 1853,**[1] no other frauds are punishable, than such as are indictable at common law, with the single exception of mock auctions.
2. **The Obtaining of Money** by a false representation, essentially promissory in its nature, though with no intention of performance, is not indictable under the statute of false pretenses.[2]

Writ of error to the general term of the Supreme Court, in the first district, where a conviction of the plaintiff in error, in the New York General Sessions upon an indictment for a fraud, had been affirmed.

The indictment charged that the defendant obtained from one John Hock the sum of one hundred dollars, by falsely pretending that he would give him certain employment in the City of New York and the State of New Jersey; and averred that the defendant had no intention of employing Hock or of paying him the stipulated wages.

The court charged the jury that the prisoner was not guilty of the offense of obtaining money by false pretenses, but that if they believed he had obtained the prosecutor's money by a gross cheat or fraud he might be convicted under the act of 1853. The prisoner's counsel excepted to the latter part of the charge, and the conviction having been affirmed by the Supreme Court the defendant sued out this writ.

*Brady*, for the plaintiff in error.

*Sedgwick*, for the People.

COMSTOCK, C. J. The offense charged consisted in a false representation made by the prisoner to Hock, that he could give to him a certain employment, and in a false and fraudulent promise that he would employ him and pay him fifty dollars a month for his services. Hock, believing the representation and relying on the promise deposited $100

[1] ch. 138.

[2] 2 Rev. Stats. 677.

as a security on his part for the faithful performance of the contract. The question is whether the prisoner obtained this money by means which are denounced and punished by the criminal law.

It is conceded that such a cheat as this was not indictable at the common law because no false tokens were used and because the fraud in respect to the instrumentality by which it was accomplished had no special reference to the public interest. The transaction was simply a private cheat without a conspiracy and having certainly no extraordinary circumstances of art or contrivance.[1]

But the offenses belonging to this general class which are punishable criminally, have been considerably extended by legislation, both in England and this country. The English statute of 30 George II.,[2] introduces a new rule by declaring that, if any person shall knowingly and designedly by false pretense, obtain any money, goods or chattels, etc., with intent to cheat or defraud any person, he shall be punished, etc. This statute was repealed; but the act of 7 and 8 George IV.,[3] which is now the law of England, provided in similar language, that "if any person shall by any false pretense, obtain from any other person any chattels, money or valuable security, with intent to cheat or defraud any person of the same, such person shall be guilty of a misdemeanor" and punished as therein required.

The language of the statute of George II. was transcribed into the criminal code of this State at an early day.[4] In the revision of 1830, the means by which criminal cheats and frauds can be perpetrated are described in the words "by color of any false token or writing or by any other false pretense," and the offense is raised to the grade of a felony, by declaring that the offender may be punished by imprisonment in a State prison.[5]

We come next to the act of 1853 "to punish gross frauds and to suppress mock auctions."[6] From the preamble of this act it is evident that the suppression of mock auctions in the city of New York was the object chiefly aimed at.[7] But in the enacting part it is made a criminal offense to obtain money or property, not only by that particular instrumentality but by "any other gross fraud or cheat, at common law;" and the punishment prescribed is imprisonment in the State prison, or in the county jail or by a fine not exceeding $1,000. Under this statute it is claimed that the indictment and conviction in the present case can be sustained.

But putting aside such frauds and cheats as are consummated by means of mock auctions, we think the act of 1853 has not created any

[1] People *v*. Babcock, 7 Johns. 201; Rex *v*. Wheatley, 2 Burr. 1125; Rex *v*. Lara, 6 T. R. 565.

[2] ch. 24.

[3] ch. 229, sec. 53.

[4] 1 R. L. 410.

[5] 2 Rev. Stats. 677; *Id*. 702, sec. 30.

[6] Laws of 1853, ch. 163.

[7] sec. 2.

new offense. In the previous legislation of England and this State, the words "false pretense," were used, as descriptive of indictable cheats; the nature of the pretense has never been defined by the law-making power, except that it must be false. We suppose, and so it has been often held, that it may include any artfully contrived misrepresentation or falsehood, although no false tokens are used, and although the cheat is not of a kind which affects the public at large. In the act of 1853 the descriptive words are, "other gross fraud or cheat at common law." There is some reason for saying that these words include only such frauds and cheats as were indictable at common law; and this construction is preferable to one which would indiscriminately convert into crime every fraudulent dealing or practice which might be a cause of action for damages in the civil courts.

If we were to adopt that construction, then a fraudulent warranty in a horse trade would be a felony, and the offender might be punished in the State prison. The cheat, it is true, must be a "gross" one; but that term suggests no legal standard or test. One court and jury might think the fraudulent representation to be slight and venial, and another might consider it gross or criminal; there would be no certainty or rule in the administration of the law. Even a mere suppression of the truth may be, in many circumstances, a very gross fraud, according to a popular acceptation of those terms, yet we can not suppose that the Legislature intended it should be indicted and punished as a crime. Great insecurity to the citizen would be the result of such a construction, and we must, therefore, look for a milder one. If, besides the main purpose of the act, which was to punish and suppress mock auctions, we do not confine its operations to such other frauds as were indictable at common law, we certainly ought not, in the absence of a plain expression of the legislative will, to give it a broader scope than the courts have allowed to previous statutes, which punished as criminal certain frauds under the name of false pretenses. If it may be thought an objection to this view, that the Legislature would not re-enact in substance what had already been enacted, the answer is that statutes are not unfrequently passed containing such provisions. It is only too true that laws are often enacted without attending to the existing rule on the subject to which they relate. In respect to the act of 1853, it may be further observed that the punishment provided is quite different from that prescribed in the previous statute of 1830. We may, therefore, impute an intelligible purpose to the Legislature, without supposing that anything new was intended in the definition of the crime.

Assuming, then, as we do, that false pretenses in former statutes or gross fraud or cheat, in the more recent act, mean essentially the

same thing — or, certainly that there is no difference which is favorable to the indictment in this case — can the judgment be sustained? We think it can not. There are numerous cases in the books of indictments under the statutes against fraud by false pretenses, and they are not all agreed in principle or result, but I think there are none which sustain this indictment. Some of them seem to require more, and others less of art or contrivance in the means of accomplishing the fraud; but according to all of them there must be at least a direct and positive false assertion as to some existing matter by which the victim is induced to part with his money or property.

In this case the material thing was the promise of the accused to employ the person defrauded and to pay him for his services. There was a statement, it is true, that the prisoner had employment which he could give to Hock, but this was obviously of no importance without the contract which was made. The false representation complained of was, therefore, essentially promissory in its nature, and this has never been held to be the foundation of a criminal charge. Undoubtedly the accused, in performance of his contract, could have taken Hock into his employment, even if he had nothing for him to do at the time the contract was made, but this he did not do and doubtless never intended to do. In morals, the imposition was gross and detestable; but in logic and law the offense consisted in making a false and delusive promise, with no intention of performing it; this is not indictable. The judgment should be reversed and the prisoner discharged.

*Ordered accordingly.*

---

## FALSE PRETENSES — NOT INDICTABLE AS "OTHER FRAUDULENT, SWINDLING OR DECEITFUL PRACTICES."

## STATE *v.* SUMNER.

[10 Vt. 587; 33 Am. Dec. 219.]

*In the Supreme Court of Vermont, 1838.*

**A Person Obtaining Goods of Another** by false and fraudulent declarations respecting his estate and circumstances, is not indictable.

Information filed against the defendant by the State's attorney. The defendant, after having pleaded guilty, moved in arrest of judgment for the insufficiency of the information. The other facts sufficiently appear from the opinion.

*E. L. Ormsbee* and *M. Strong, Jr.*, for the defendant.

*S. Foot*, State Attorney, for the prosecution.

*By the Court*, ROYCE, J. The information charges in substance that the respondent, by certain false and fraudulent declarations, respecting his estate and circumstances, obtained the property of one Anthony, with intent to defraud him of the same, and the question is whether such declarations made with such intent and operating successfully, constitute the offense for which our statute provided. It was never solemnly decided that the assertion of a bare falsehood occasioning injury to another and made with that view, furnished the ground even of a civil action until the case of *Pasley* v. *Freeman.*[1] The early English statutes limited the criminal offense to the use of false tokens, but that of 30 George II. extended it to false pretenses, and under this act mere false and fraudulent declarations were held to be sufficient.

By the thirtieth section of our statute for the punishment of high crimes and misdemeanors, the offense in question is described in the following terms: "That if any person shall by false tokens, messages, letters, or by other fraudulent, swindling or deceitful practices, obtain or procure from any person or persons, any money, goods or chattels," etc. As the offense charged upon the respondent is evidently not within the former or specific part of this description, the question arises upon the terms "other fraudulent, swindling or deceitful practices." From the impossibility of anticipating every device which art and wickedness might resort to, the statute has properly added these general words. And for this reason they are not to be rejected, though part of a highly penal statute. It is the duty of the court to construe them. In doing this, it must be remembered that penal statutes should be construed strictly. They are never to be carried beyond the letter for the purpose of effectuating the supposed intent; nor beyond the obvious spirit and intention, though the words may admit of a more extended construction. Now, we find these expressions employed in immediate connection with certain acts, which are described and made punishable by the statute; and such acts constitute fraudulent, swindling and deceitful practices within the statute. Hence, we consider that the words in question were added not for the purpose of enlarging the definition of the offense from positive acts to mere declarations, but from the difficulty of extending the description to all other acts or practices of a like nature, which might be resorted to as means for effecting the same criminal object. Besides a well known distinction between swindling practices and swindling pretenses or declarations had been made and long settled under the English statutes; and had the Legislature designed to abrogate that distinction, they would doubtless have spoken in terms more clearly adapted to such purpose.

*Judgment arrested.*

[1] 3 T. R. 51.

## FALSE PRETENSES — PROSECUTOR MUST BE INFLUENCED BY REPRESENTATION — NO INFERENCE OF THIS FROM OTHER FACTS.

## THERASSON *v.* PEOPLE.

[82 N. Y. 238.]

*In the Court of Appeals of New York, 1880.*

1. **To Convict of Obtaining Money or a Signature to an Obligation by False Pretenses,** it must be shown by the prosecution that the parting with the property or the signing of the instrument was by reason of the false pretenses charged or that they materially influenced the action of the party complaining.
2. **Case in Judgment.** On the trial of an indictment for obtaining the signature of Z. to the discharge of a mortgage by false pretenses, Z. was examined as a witness for the prosecution, but was not asked whether she was induced to sign by the representations proved. The prisoner's counsel asked the court to charge that although the jury might find the false pretenses and the fraudulent intent as charged, yet they had no right to consider these on the question of influence, which the court refused. *Held,* error.
3. **While the Falsity of the Pretense and the Fraudulent Intent** are necessary elements of the crime, the question whether the prosecutrix was influenced by them can not be answered by them.

Error to the General Term of the Supreme Court in the first judicial department, to review a judgment affirming a judgment of the court of Oyer and Terminer in and for the city and county of New York entered upon a verdict convicting the plaintiff in error of the crime of procuring the signature of one Sarah J. Zabriskie to a satisfaction-piece of a mortgage held by her, by means of false pretenses.[1]

The facts material to the questions discussed appear in the opinion.

*William A. Beach,* for plaintiff in error.

*Benjamin K. Phelps,* District Attorney, for defendant in error.

ANDREWS, J. In order to justify a conviction upon the trial of an indictment for false pretenses it must appear that the prosecutor parted with his property or signed the written instrument, as the case may be, by reason of some of the pretenses laid in the indictment, or if not solely by reason of such pretenses, that they materially influenced his action. In the absence of evidence that the prosecutor relied upon the pretenses charged, the essential averment in such an indictment, that the defendant obtained the property or signature by means thereof, would not be supported.[2] It is not necessary that this fact should be shown by direct proof. It is indeed competent to establish it by direct interrogation of the prosecutor,[3] but in the absence of direct proof it may be inferred by the jury from the facts and circumstances proved, provided the inference could legitimately be drawn there-

[1] Reported below, 20 Hun, 55.

[2] People *v.* Haynes, 11 Wend. 557; 14. *Id.* 546.

[3] People *v.* Herrick, 13 Wend. 87.

from. If, for example, upon the trial of an indictment against a vendee for obtaining goods by false pretenses it should appear that the representation laid in the indictment was made when the goods were sold and was calculated to induce the sale, the jury might naturally infer that the representation was a materially operating and inducing motive thereto. The same would be true where the defendant was charged with obtaining the signature of the prosecutor to a written instrument. The other elements of the offense being shown, the jury might reasonably find that a pretense calculated to influence the prosecutor did in fact influence him, where the act of signing the instrument charged to have been fraudulently obtained followed proximately the making of the representation. But it is certainly possible that in the cases supposed, the prosecutor might notwithstanding have acted independently of and without reliance upon the representation. It is quite conceivable that the prosecutor in the one case may have sold the goods and in the other have signed the instrument for reasons wholly disconnected with the false pretense, paying no regard to the representation and placing no reliance thereon. This in most cases would be an unnatural inference; but if special facts appeared it would be for the jury to say, whether the representation was an efficient operating cause, influencing the prosecutor's action, or whether he acted from other and wholly disconnected considerations.

The prosecutrix in this case was examined on the trial as a witness for the People, but was not asked whether in signing the satisfaction-piece, she relied upon the statement of the defendant that a mortgage was not a good investment; but the character of the representations proved and the circumstances under which the satisfaction-piece was executed, would have fully justified, although it can not be said to have required, the finding, that it was executed in reliance upon the representation, and that question was submitted to the jury.

But we think the learned trial judge committed an error in charging the jury upon this question and in his ruling upon the request of the defendant's counsel in respect thereto. The judge, after explaining to the jury the other elements constituting the offense, correctly stated that the representation made should not only be false, and made with intent to cheat and defraud, but that it should be a materially controlling and operating cause leading to the act of the party who is deceived and that it was not necessary that the prosecutrix should have been asked the direct question whether she was influenced or induced to sign the satisfaction-piece by the representation proved, and that in the absence of such a direct question the fact might be found by the jury if the surrounding circumstances justified it. The judge then proceeded as follows: "When the party states that such a representation was made

and that he acted upon it and the object has been acomplished and the jury see as a result that he was cheated and defrauded, and they find evidence of an intent to cheat and defraud and that the representation made was false, from these and surrounding circumstances they would be justified in concluding that the party was induced to act upon such representation."

On the conclusion of the charge the defendant's counsel stated that he understood the court to have charged that in determining the question whether the prosecutrix relied upon the alleged or proven false pretense or whether it exerted a material influence over her mind the jury were at liberty to consider, upon that question, the evidence showing the fraudulent intent of the defendant, and he thereupon asked the court to charge "that although the jury may find the false pretense to have been made, and although they may find the necessary fraudulent intent, that in determining the question whether the pretense exerted a material influence over the mind of Mrs. Zabriskie they have no right to consider the question or the evidence as to the fraudulent intent or as to the false representation." The judge in response to this request said: "I charge that they have a right to consider all the evidence in the case bearing upon the subject directly or indirectly." The defendant's counsel excepted to the refusal of the court to charge as requested.

We think the exception was well taken. The prosecutrix could not have been deceived by a representation which she at the time knew to be false, and it must be assumed in disposing of the exception (as was doubtless the truth), that she was then ignorant of the falsity of the pretense and of the fraudulent intent of the defendant. It is manifestly impossible that the fact that the representation was false or that the defendant in making it intended to cheat and defraud, could have influenced the conduct of the prosecutrix. Such an assumption supposes knowledge on her part, which if it existed, would have entitled the defendant to an acquittal. The falsity of the alleged pretense and the fraudulent intent of the defendant were both elements in the crime, and the prosecution was bound to show that they existed in the case, but the question whether the prosecutrix was influenced by the representation was a distinct one, having no necessary connection with the others, and proof that the representation was false to the knowledge of the defendant reflected no light upon the point whether the prosecutrix acted upon it. The charge was susceptible of the construction placed upon it by the defendant's counsel, and justified his request to the court. The answer made by the court stated, what is undoubtedly the case, that all legitimate evidence bearing directly or indirectly upon a particular fact may be considered by the jury in determining that fact, but it did not meet the point of the request that the particular facts al-

luded to were irrelevant to the inquiry whether the prosecutrix was deceived by the representation made. The defendant was entitled to the explicit instruction of the court upon the point suggested.

The subsequent statement of the defendant's counsel can not be construed as an abandonment of the exception. That simply called the attention of the court to the claim made by him, that in the absence of direct testimony by Mrs. Zabriskie that she was influenced by the representation, that fact could not be found by the jury from the other evidence. This claim was unfounded, but by making it, the defendant did not waive the exception to the refusal to charge, to which we have referred. For this error the judgment and conviction should be reversed and it is unnecessary to consider the other questions the case.

All concur, except FOLGER, C. J., and RAPALLO, J., not voting; MILLER, J., concurring in result.

*Judgment reversed.*

---

## FALSE PRETENSES—MONEY OBTAINED BY PARTNER FROM FIRM BY WILLFUL MISREPRESENTATIONS.

## R. *v.* EVANS.

[9 Cox, 238.]

*In the English Court of Criminal Appeal, 1862.*

**A. Having Invented an Improved Lamp,** entered into a partnership deed with B. and C. for carrying out and vending the subject of the invention. By a subsequent verbal agreement with his copartners he was to travel about to obtain orders for the lamps upon a commission. On all orders received by him such commission (besides his traveling and personal expenses) was to be paid to him as soon as he received the orders, and to be payable out of the capital funds of the partnership before dividing any profits. By falsely representing to his copartners that he had obtained orders upon which his commission would be £12 10s, he obtained from them that amount: *Held*, that, as the subject-matter of the misrepresentation would come under consideration in the partnership accounts, such misrepresentation was not sufficient to sustain an indictment for false pretenses against A.

Case reserved by the Recorder of Chester.

The prisoner, Isaac Mark Evans, was tried before me at the Quarter Sessions for the city and borough of Chester, held on the 4th July, 1862, on an indictment charging him with having unlawfully obtained from David Williams and Henry Wadkin certain sums of money by falsely pretending to them that he had obtained an order from the Wynn Hall Colliery Company, near Ruabon, for the sale to them of one hundred patent lamps called "Miner's Lamps," with intent to defraud.

It appeared in evidence that the prisoner having invented an improved lamp for the use of miners, on the 16th November, 1861,

David Williams, Henry Wadkin, and the prisoner, entered into partnership together, by a deed which, after reciting that the prisoner claimed to be the inventor of an improved miner's lamp, and had applied for letters patent granting to him the sole use, benefit, and advantage of the said invention within the United Kingdom, and that the prisoner, Williams and Wadkins had agreed to become partners for the purpose of working the said patent, and bringing the said invention into use, and manufacturing and vending the said improved miner's lamp, upon the terms and under the stipulations thereinafter mentioned, witnessed that it was thereby agreed, and each of them the said parties did thereby for himself, etc., covenant with the others of them, etc., in manner following (that is to say, amongst other things): —

1. That the said Isaac Mark Evans, David Williams, and Henry Wadkin shall be partners in the trade or business of working and carrying out the said patent and bringing the said invention into use, and manufacturing and vending the said "Improved Miner's Lamp," from the day of the date of these presents for the term of fourteen years.

2. That the firm or style of the said partnership shall be Williams, Wadkin and Evans, and that the said trade or business shall be carried on in such place of business as the said partners shall from time to time agree upon.

3. That the said I. M. Evans shall forthwith take all necessary and proper steps for obtaining the said letters patent, and for perfecting and completing the said invention.

4. That the expense of obtaining the said letters patent, and of all drawings and models, and other things which may be necessary for bringing the same and the said invention to perfection, shall be paid and borne by the said partners equally.

5. That the said letters patent, as soon as the same shall be obtained, shall be and become the property of the said partners in equal shares.

6. That the said I. M. Evans shall, when called upon by the said D. Williams and H. Wadkin so to do, and at the cost of the person or persons requiring the same, by a proper deed and assurance, or proper deeds and assurances well and effectually assign one equal and undivided third part or share of the said letters patent, and the rights and privileges thereby granted, to the said E. Williams, his executors, administrators, and assigns, and one other equal, undivided third part or share thereof unto the said H. Wadkin, his executors, administrators and assigns.

7. That the capital of the said partnership shall consist of the sum of £300, and that the same sum of £300 shall be advanced and lent to the said copartnership by the said D. Williams and H. Wadkin, in equal

shares, in such sums as may from time to time be required for carrying on the said trade or business.

8. That the said sum of £300, together with interest thereon at the rate of five per cent per annum, from the time the money is advanced until the same is repaid, shall be repaid to the said D. Williams and H. Wadkin out of the first profits to arise from the said trade or business before any profits are divided between the said copartners.

9. That the said sum of £300 is not to include the sums expended or incurred in obtaining the said letters patent, or of the drawings, models, and other things which may be necessary for bringing the said invention to perfection, but that the sums so expended and paid by the parties hereto in the shares mentioned in the fourth paragraph of these presents shall not be repaid to them, or any of them, out of the capital or profits of the said copartnership.

14. That the net profits, after the payment thereout of all costs and expenses, and after payment of the said sum of £300, shall be received by the partners equally.

After the execution of the deed, Williams and Wadkin advanced the prisoner money to pay the expenses of going to London in order to exhibit the lamp, and of obtaining the patent. After he returned, he on several occasions obtained from them further advances of money until at length, in February, 1862, they refused to give him any more money unless he agreed to go out as an agent to sell the lamps on commission.

A verbal agreement was thereupon made between Williams, Wadkin, and the prisoner that the prisoner should travel about the country to obtain orders for the lamps upon the terms that Williams and Wadkin should pay him a commission of fifteen per cent on all orders received by him; that is to say, 2s 6d on each lamp, the price of the lamp being 15s, besides his traveling and personal expenses, such commission to be paid to him as soon as he received the orders, and to be payable out of the capital funds of the partnership before dividing any profits.

On the 14th of March, 1862, the prisoner came to Williams and Wadkin and stated that he had got an order from the Wynn Hall Colliery Company, near Ruabon, for one hundred lamps, to be made in a month, and paid for in a month after delivery.

In the faith that this statement was true, Williams and Wadkin gave the prisoner several sums of money, amounting in all to the sum of £12 10s, the commission which would be due to him under the agreement above mentioned on the sale of one hundred lamps.

No such order, nor any order, except for one specimen lamp, had in fact been given by the Wynn Hall Colliery Company to the prisoner.

It was objected for the prisoner that the indictment could not be sustained, on the ground that the money obtained by him from Williams and

Wadkin was money in which he was interested as a partner, under the provisions of the deed of partnership; and further, that the intent to defraud was negatived by the fact that the money payable to the prisoner for commission came out of the partnership funds.

I reserved the questions for the consideration of the Court for Crown Cases Reserved, and left it to the jury to say whether the prisoner obtained the money by means of the false statement made by him with intent to defraud.

The jury found the prisoner guilty, and I respited the judgment, admitting the prisoner to bail.

The question upon which I respectfully request the decision of the court is, whether the prisoner was entitled to be acquitted on either of the grounds above stated.

No counsel appeared on either side.

POLLOCK, C. B. The facts in this case appear to be that the defendant entered into partnership with two other persons, and by a verbal agreement, made subsequently, they agreed to make him an agent for a particular purpose connected with the business of the partnership, as to which his commission, traveling, and personal expenses were to be paid out of the partnership funds before any division of the profits took place. The indictment was for obtaining money by false pretenses, in respect of charges for which there was no foundation. As, before any division of the profits took place, it was specifically agreed that such charges were to be paid out of the capital funds of the partnership, it was necessarily a matter of account between them, and such charges would, if there was a real foundation for them, come into the accounts and be deducted from the profits before any division was made. The defendant's misrepresentation (and it was nothing more) to his partners would be overhauled when the accounts were gone into, and therefore we think that the defendant was not guilty of obtaining money by false pretenses. I, speaking for myself, and I beg to say that no other member of the court is responsible for this opinion, — entertain a confident opinion that the statute was never intended to meddle with the real business of commerce, unless the falsehood really amounted to a piece of swindling; but when it was a mere fraudulent statement made in the course of a commercial transaction, it was never intended to visit it with an indictment. I wish to express my own opinion on this point very strongly, because I think that a departure from the rule would make every knavish transaction in commercial matters the subject of indictment, which would be going far beyond what was intended by the Legislature when obtaining money by false pretenses was made punishishable by indictment.

The rest of the court concurring.

*Conviction quashed.*

## FALSE PRETENSES — OBTAINING MONEY — "FALSE OR BOGUS CHECKS" — CONFIDENCE GAME.

## PIERCE v. PEOPLE.

[81 Ill. 98.]

*In the Supreme Court of Illinois, 1876.*

1. **A Note or Order Given by a Defendant** which is signed by himself does not come within the meaning of the words "false or bogus check," as used in the Criminal Code, defining the confidence game, as it is genuine. Any one taking either, does so upon the faith of the defendant's signature alone. If they contain forged or fictitious signatures or indorsements, a different question would be presented.
2. **Where a Party After Having** obtained money and credit gives his note for the sum due, and afterwards an order for the sum he owed, it can not be said he obtained money or property by the use of the note or order.
3. **The Exhibition of Letter Heads** of a firm with which defendant is connected, business cards, a draft, or copy of one, and the making of a note, payable at a particular bank, and the drawing of an order for money, are means to inspire confidence in the party's ability to pay, precisely as declarations of his credit and standing, and are, at most, but false representations of his solvency, but do not make out a case of confidence game.
4. **The Language of the Statute** does not expressly extend to cases of property or money obtained on the belief of the ability and disposition of the defendant to pay, but it contemplates a transaction in which the "means or device," instead of being the cause of the cause, is the direct and proximate cause of obtaining the money or property.

Writ of error to the Circuit Court of St. Clair County; the Hon. WILLIAM H. SNYDER, Judge, presiding.

*Messrs. Koerner & Turner*, for the plaintiff in error.

*Mr. Charles P. Knispel*, States Attorney, for the People.

Mr. Justice SCHOLFIELD delivered the opinion of the court.

The defendant was indicted and, on trial, convicted and sentenced to the penitentiary for one year for obtaining property of one Phillips, "by the confidence game." Philips was the proprietor of a hotel in East St. Louis, and on the 4th of August, 1875, the defendant became a guest of his — informing his clerk that he wanted a room for a few days, and other accommodations — that he wanted his meals at the restaurant, so that he could take what he wanted and pay for it. He represented himself as being of the firm of D. Pierce & Sons, who were merchants doing business on Broadway and Fifth Streets in St. Louis, Missouri, and had letter-heads and cards with him showing the firm name and place of business; and the hotel clerk swears that, on this representation, and from having seen the letter-heads and cards, and observing that he had to write letters once in awhile, he gave him one of the best rooms in the house. After the defendant had remained at the hotel seven days, the defendant showed the hotel clerk what the latter understood to be a draft on Taylor & Sons, of Newport, Kentucky, for $4,000, and informed him that he had funds in the hands of Taylor

& Sons, which he had ordered them to forward to St. Louis, and that the draft shown was for the funds. But the clerk says, what was shown to him as a draft afterwards turned out to be but a copy of a draft. The defendant remained at the hotel, getting his meals, drinks, etc., and a small amount of money from the clerk, to pay the barber for shaving him, and a boy to go to the post-office for his letters, until his bill amounted to some $18, when the clerk demanded payment. The defendant gave his promissory note for $25, payable at the bank of St. Louis, Missouri, one day after date, saying that he wanted to stay there a few days longer, and would make the note large enough to cover the additional charges. He also observed to the clerk, that he could give him the note, but that he had a draft on Sherman & Co., of New York, who had failed, and he did not know whether it would be met, and that he had funds at the bank at which he made the note payable. The note was disposed of by the proprietor of the hotel, in St. Louis, for goods; but was finally returned protested. The defendant had, meanwhile, remained at the hotel, and when notified of the protest of his note, remarked "that it was strange," and that "there ought to be money there in the bank." He then gave an order on another bank for $50, upon which nothing was received; and upon this failing, he gave an order on his son William for $54.15, which included his account and the costs of protesting his paper. This was carried to the place indicated as the business place of the defendant's firm, of which his son was represented to be a member, and it was found that it was closed, and that his son was gone and could not be found. The defendant then gave the proprietor of the hotel an order on the Yeager Milling Company for seven barrels of flour, which was not honored, and after this he was arrested.

There was a firm of D. Pierce & Sons, who had been doing business on Broadway and Fifth Streets, in St. Louis, Missouri, at the place indicated by the defendant, as commission merchants; and there is no reason to doubt but that the defendant was the senior member of that firm. When it ceased to do business does not appear any further than that it was closed when the draft was taken there which had been drawn by the defendant on his son William. The firm had, also, had transactions with the Yeager Milling Company, but that company gave as a reason for refusing to honor the draft for the seven barrels of flour, that D. Pierce & Sons owed them $350, and they had taken their goods out of their store, and they would still be losers by at least $200.

As to the genuineness of the draft on Taylor & Sons, of Newport, Kentucky, or the other matters represented by the defendant, there is no evidence, except that of defendant, which, if entitled to credit, exonerates him from falsehood in that respect.

The only question is, do these facts make a case under the ninety-eighth section of the criminal code, entitled, "Confidence Game?"[1]

That the defendant acted fraudulently may be conceded; but every fraud is not a "confidence game" within the meaning of the statute. The language of the statute is: "Every person who shall obtain, or attempt to obtain from any other person or persons, any money or property, by means of the use of any false or bogus checks, or by any other means or device commonly called the confidence game, shall be imprisoned in the penitentiary not less than one year nor more than ten years."

The position that the note and orders given by the defendant, came within the meaning of the words "false or bogus checks," as used in this section, can not be maintained. Had they contained forged or fictitious indorsements, there would be reason for calling them false or bogus; but they contained no indorsements, whatever, and it is not disputed the defendant's signature to them was genuine. Any one taking them, therefore, would necessarily do so upon the faith of the defendant's signature alone, and of however little value they were, this was solely because of the defendant's insolvency, and not because of any false or bogus character of the instruments. Nor can it be said money or property was obtained by the use of the note or orders. Money and property were obtained by the defendant, on the belief which he had inspired, of his ability and disposition to pay, and the note and orders were given by him, and received by the party from whom the money and property were obtained, as an evidence of the indebtedness, and when and how it was agreed to be paid, and nothing more. The whole case, in our opinion, is narrowed down to this: is obtaining credit, by false representations, in regard to the party's solvency, within the contemplation of the statute? The exhibition of the letter-heads, business cards, draft, or copy of draft, and the making of the note, payable at a particular bank, as well as the drawing of the orders on the different firms, were intended to inspire belief of the defendant's ability to pay, precisely as were his oral declarations. They were, at most, but false representations, designedly made, of his solvency, for the purpose of obtaining credit. Their only effect was to inspire confidence in his financial integrity, and the money and property were given him, not simply because of these documents or representations, for there was no exchanging of the one for the other, but because of this confidence which he had inspired.

The language of the statute does not expressly extend to cases of money or property, obtained on the belief of the ability and disposition

[1] Rev. Stats. 1874, p. 366.

of the party to thereafter make payment; but it contemplates a transaction in which the "means or device" instead of being the cause of the cause, is the direct or proximate cause of obtaining the money or property; and, being a highly penal statute, we are not authorized to extend its meaning by implication. Any doubt which we might otherwise have entertained, as to the correctness of this construction, is excluded by reference to other legislation on the same subject. By the one hundred and fifty-second section of the Criminal Code, as revised in 1845,[1] it was enacted, "If any person, by false representations of his own respectability, wealth or mercantile correspondence and connections, shall obtain a credit thereby, defraud any person or persons of money, goods, chattels or any valuable thing, or if any person shall cause or procure others to report falsely of his honesty, wealth or mercantile character, and by thus imposing upon any person or persons, obtain credit, and thereby fraudulently get into possession of goods, wares, or merchandise, or any valuable thing, every such offender shall be deemed a swindler, and, on conviction, shall be sentenced to return the property so fraudulently obtained, if it can be done, and shall be fined not exceeding $1,000, and imprisoned not exceeding six months." In consequence of abuses, as was supposed, resulting from prosecutions under this section, the General Assembly, in 1857, enacted that it should only apply to representations "which shall have been reduced to writing and signed by the party to be charged thereby, prior to obtaining such credit."[2] And in the revision of 1874, the main features of the section, as thus amended, are retained, with the addition to the penalty of allowing the fine to be $2,000, instead of $1,000, and the confinement in the county jail one year instead of six months.[3] In our opinion if any part of the criminal code has been violated by the defendant, it is this, and not the section relating to the confidence game.

The judgment is reversed, and the defendant discharged.

*Judgment reversed.*

[1] Rev. Stats. 1845, p. 178.

[2] Laws of 1837, p. 103, sec. 2.

[3] See Rev. Laws of 1874, p. 366, sec. 97.

## FALSE PRETENSES—ACT MUST WORK PREJUDICE TO SOME ONE.

### PEOPLE *v.* GALLOWAY.

[17 Wend. 540.]

*In the Supreme Court of New York, 1837.*

1. **To Bring a Case Within the Statute** punishing the obtaining of the signature of a person to a written instrument by false pretenses, the instrument must be of such a character as that it may work a prejudice to the property of the person affixing the signature, or of some other person.
2. **A Deed of Lands by a Wife,** conveying real estate belonging to her in her own right, executed by her with her husband, at the solicitation of the husband, under the pretense that it was a deed of lands belonging to him, but not acknowledged by the wife in the mode prescribed by law for passing the estate of a *feme covert,* is not such an instrument as is contemplated in the statute.

ERROR from the Wayne General Sessions.

Archer Galloway was indicted for having obtained the signature of his wife, Rosanna Galloway, to a deed of certain lands in the county of Wayne, in this State, whereof she was seized in her own right in fee, by the false pretense that the deed to which he desired her to affix her signature was a deed of lands belonging to him in the State of Illinois. The deed was executed by the wife, but was not acknowledged by her before any officer authorized to take the acknowledgment of deeds. The deed bore date November 25, 1834; the wife died August 7, 1835, and September 12, 1836, the husband was indicted. He was tried, convicted and sentenced to three years' imprisonment in one of the State prisons. A bill of exceptions was tendered and signed, and a writ of error was sued out, which brought up the record of conviction and the bill of exceptions. The case was argued by,

*J. M. Holley*, for the prisoner.

*S. Beardsley*, Attorney-General, for the People.

*By the Court*, BRONSON, J. It is objected that the indictment is insufficient because it does not allege that the deed was acknowledged by the wife at or after the time that her signature was obtained. At the common law a *feme covert* could only alien her lands by fine or common recovery; but in this State she may alien by deed, acknowledged before a public officer, on a private examination apart from her husband. The statute expressly provides that no estate of a married woman shall pass by any conveyance not so acknowledged.[1] That an instrument purporting to be the deed of *feme covert* is, before acknowledgment utterly void, has been repeatedly adjudged. It is not her deed.[2]

[1] 1 Rev. Stats. 758, sec. 10.

[2] Jackson *v.* Stevens, 16 Johns. 110; Jackson *v.* Cairns, 20 Johns. 301.

The statute under which the defendant was indicted provides that every person who, with intent to cheat or defraud another, shall designedly, by color of any false token or writing, or by any other false pretense, obtain the signature of any person to any written instrument or obtain from any person any money, personal property, or valuable thing, shall, upon conviction thereof, be punished by imprisonment, etc.[1] That part of the section which makes it an offense to obtain the signature of a person by a false pretense, is a new provision, and the question now presented has never been considered by this court. Although the language is general, "any written instrument" the writing to which the signature is obtained must, I think, be one which is not utterly worthless. This statute, like that against forgery, was made to protect men in the enjoyment of their property, and if the instrument obtained can by no possibility prejudice any one in relation to his estate, it will not be an offense within the statute. If the rule were otherwise, a man might be punished criminally for obtaining the signature of another to an idle letter, or any other writing of legal importance. Although it is not necessary to the offense that the party signing should actually suffer loss or injury,[2] yet the instrument signed must be one which could work an injury to the person from whom it is obtained.

In prosecuting for forgery, it is material that the instrument should not upon its face appear to be illegal or void. In *King* v. *Moffat*,[3] the defendant was indicted for forging a bill of exchange. The instrument was not drawn or attested in the manner prescribed for bills of that particular description; and under such circumstances the statute had declared the instrument void. The question whether the defendant was properly convicted of the forgery having been reserved, the unanimous opinion of the twelve judges was delivered by Mr. J. Ashurst, that the bill of exchange, if real, would not have been valid or negotiable, and, therefore, the forging of it was not a capital offense. There is a distinction between the case of an instrument apparently void and one where the invalidity is to be made out by the proof of some intrinsic fact. In the former case the party who makes the instrument can not, in general, be convicted of forgery, but in the latter he may. In *King* v. *Sterling*,[4] the defendant was convicted of forging a will, although the supposed testator was still living, and appeared as a witness on the trial. Mr. J. Foster, in delivering the opinion of the judges, says that an instrument may be the subject of forgery, although, in fact, it should appear impossible for such an instrument to exist, provided the instrument purports on the face of it to be good and valid, as to the purposes for which it was intended to be made. See, also,

[1] 2 Rev. Stats. 677, sec. 53.

[2] People *v.* Genung, 11 Wend. 18.

[3] 2 Leach, 483 (case 190).

[4] 1 Leach. 117 (case 57).

*Rex* v. *Cogan*,[1] and Case of *James McIntosh*.[2] In the case of *Thomas Wall*,[3] the invalidity of the instrument was apparent upon its face. The prisoner was convicted of forging a will of land, attested by only two witnesses; but the judges on conference held the conviction wrong. So a man can not be convicted of forging a note or bill which is apparently incomplete for want of a signature, or the name of a payee.[4] Where the instrument forged is apparently void, there is little probability that any one can be defrauded, but it is otherwise where the invalidity of the instrument depends on some collateral fact not appearing on its face. This seems to be the reason for the distinction which has been mentioned.

If the defendant could not have been convicted of forgery had he affixed the name of his wife to this instrument without her consent, I think he should not have been convicted of the offense of obtaining her signature to the instrument by a false pretense. As the indictment is insufficient, it is unnecessary to look into the various questions which arose on the trial.

*Judgment reversed.*

---

FALSE PRETENSES — INDICTMENT — EXISTING AND FUTURE FACT.

## COMMONWEALTH *v.* STEVENSON.

[127 Mass. 446.]

*In the Supreme Judicial Court of Massachusetts, 1879.*

1. **An Indictment Alleged** that the defendant to induce M. to sign a lease to C., falsely represented that C. was a liquor-dealer doing business as such in B.; that C. was a man worth ten thousand dollars; and that a certain person whom the defendant pointed out to M. was C. *Held*, that the first allegation was of a representation of a material fact; that the second was not; and *semble* that the third was not.
2. **An Indictment Charging that the Defendant Falsely** represented to A. that he had then and there in his possession a check for the payment of money drawn by him in favor of A. from the proceeds of which he intended to pay certain bills due from A. to other persons, does not set out a false pretense within the statute.

Indictment on the General Statutes,[5] in two counts.

The first count charged that the defendant on June 8, 1877, at Boston, "with intent to cheat and defraud one Eliza D. Mayo, and with the view and intent to obtain the signature of said Mayo to a certain written instrument and lease hereinafter described, and to induce

[1] 2 Leach, 503 (case 197).
[2] 2 East's P. C. 942, 956.
[3] 2 East's P. C. 953.
[4] Rex *v.* Pateman, Russ & R. 455; Rex *v.* Richards and Rex & Randall, *Ib.* 193, 195.
[5] ch. 161, sec. 54.

the said Mayo to lease, demise, and let then and there, to one T. F. Conlin, under and according to the provisions of said instrument, the dwelling-house belonging to said Mayo, situate and numbered two on Dover Street in said Boston, did then and there, unlawfully, knowingly and designedly, falsely pretend and represent to said Mayo, that said T. F. Conlin, was then and there a liquor dealer, then doing business as such dealer in Broad Street in said Boston, and that said Conlin was then and there a man worth ten thousand dollars, and that a certain person whom the said Stevenson then and there pointed out and designated to said Mayo was then and there the said T. F. Conlin. And the said Stevenson then and there asked and requested the said Mayo to then and there put and sign the name and signature of her, the said Mayo, to the said written instrument and lease. And the said Mayo, then and there believing the said false pretenses and representations, so made as aforesaid by the said Stevenson, and being deceived thereby, was induced, by reason of the false pretenses and representations, so made as aforesaid, to put and sign, and did then and there put and sign, the name and signature of her, the said Mayo, to the said written instrument and lease, the false making whereof would be punishable as forgery, and to deliver, and did then and there deliver to the said person so as aforesaid designated by the said Stevenson to be the said T. F. Conlin, the said written instrument and lease, with the signature of the said Mayo, so as aforesaid obtained and affixed thereto. And the said Stevenson did then and there receive and obtain the said signature of said Mayo to the said written instrument and lease by means of the false pretenses and representations aforesaid, and with intent to cheat and defraud the said Mayo." The count also set forth the lease; negatived the truth of the representations; and concluded in the usual manner.

The second count charged that the defendant, on June 8, 1877, at Boston, "with intent to cheat and defraud, did then and there, unlawfully, knowingly and designedly, falsely pretend and represent to one Eliza D. Mayo, that he, said Stevenson, then and there had in his possession a check and order for the payment of money, for a large sum of money, to wit, the sum of thirteen hundred and forty-three dollars; that said check was then and there drawn to the credit of her, said Mayo, by him, said Stevenson; that said Stevenson then intended to immediately pay with the proceeds of said check, for her, said Mayo, certain bills then due, and to be paid from her, said Mayo, to wit" (setting forth the bills); that "said Stevenson then and there asked and requested said Mayo to sign, seal and deliver to him, said Stevenson, among other papers, a certain instrument, to wit, a deed of the tenor following" (setting it forth). "And the said Mayo, then and there

believing the said false pretenses and representations so made as aforesaid by him, the said Stevenson, to be true, and being deceived thereby, was induced, by reason of the false pretenses and representations so made as aforesaid, to sign, seal and deliver, and did then and there sign, seal and deliver to the said Stevenson, said deed hereinbefore set forth. And the said Stevenson did then and there receive and obtain said signature of the said Mayo to said deed, by means of the false pretenses and representations aforesaid, and with intent to cheat and defraud." The indictment then negatived the truth of the representations; and concluded in the usual manner.

In the Superior Court, before the jury were impaneled, the defendant moved to quash the indictment for reasons which sufficiently appear in the opinion. ALDRICH, J., overruled the motion.

The defendant was then tried; and at the trial offered in evidence for the purpose of affecting the credibility of Eliza D. Mayo as a witness the record of a proceeding for divorce in the Supreme Judicial Court, in which she was found by the jury to have committed adultery with James M. Huse. The judge excluded the evidence. The jury returned a verdict of guilty on both counts; and the defendant alleged exceptions.

*C. B. Southard*, for the defendant.

*C. R. Train*, Attorney-General, for the Commonwealth.

MORTON, J. The first question in this case arises upon the defendant's motion to quash. The indictment contains two counts, setting forth different offenses. As to the first count we are of opinion that the motion to quash was rightly overruled.

A false pretense, within the statute, is a representation of a material fact, calculated to deceive, which is not true.[1] The first count alleges that, in order to induce Mrs. Mayo to sign a lease to Conlin, the defendant falsely represented that said Conlin "was then and there a liquor-dealer, then doing business as such dealer in Broad Street in said Boston, and that said Conlin was then a man worth ten thousand dollars, and that a certain person whom the said Stevenson then and there pointed out and designated to said Mayo was then and there the said T. F. Conlin."

The representation that Conlin was a man worth ten thousand dollars might have been intended and understood as the expression of an opinion or judgment, and not as the representation of a fact.[2] As it is not aided by any other averments in the indictment, it is not as set out a false pretense within the statute. So the pointing out of a person as Conlin would not seem to amount to the representation of a material fact which was cal-

[1] Com. *v.* Drew, 19 Pick. 179.

[2] Morse *v.* Shaw, 124 Mass. 59; Homer *v.* Perkins, 124 Mass. 431.

culated to deceive Mrs. Mayo and induce her to sign a lease to Conlin. But it is no ground for quashing an indictment for obtaining money by false pretenses, that it contains some immaterial allegations, or that some of the pretenses charged may not be properly charged, if upon its face there is an offense stated with precision and formality.[1] A majority of the court are of opinion that the representation that "Conlin was then and there a liquor dealer, then doing business as such dealer in Broad Street, in said Boston," is a false pretense within the statute; and, therefore, that the first count is sufficient. It is the representation of a fact calculated to deceive. It imports that Conlin was established in business in Boston, a fact which, if believed, would naturally be influential in inducing Mrs. Mayo to make the lease to him. The objection that the false pretense is not alleged to be in writing can not prevail. The statute does not require that, in cases like this, the false pretense should be in writing.[2]

As to the second count, we are all of opinion that it is insufficient. The only allegation in that count is that the defendant falsely represented to Mrs. Mayo that he had then and there in his possession a check for the payment of money drawn by him in favor of Mrs. Mayo, from the proceeds of which he intended to pay certain bills due from her to other persons. There is no allegation that he had or pretended to have money in the bank on which the check was drawn, or that he showed or offered the check to her, or that she had any control over it. And the only proper legal construction of all the allegations is that the defendant agreed to take his own money and pay the bills due to the several persons by Mrs. Mayo, if she would sign the deed. This was a promise to do something in the future with no representation of any existing material fact.[3] The mere representation that he had drawn a check, without stating that he had money in the bank, was immaterial; and if it could be treated as a representation that he had money in the bank, the indictment is still fatally defective in not negativing that fact. For aught that appears, he may have had the money subject to such a draft.

The only other exception is to the exclusion by the court of the record of the divorce proceedings in which Mrs. Mayo was a party, and in which the jury found that she had committed adultery. Such record did not show the conviction of the witness of any crime, which, under the statute, would be admissible to effect her credibility.[4]

The result is that the second count should be quashed, and, as to it, the exceptions are sustained; but, as to the first count, the exceptions are overruled.

1 Com. *v.* Parmenter, 121 Mass. 354.

2 Gen. Stats., ch. 161, sect. 54; Com. *v.* Parmeter, *ubi supra.*

3 Com. *v.* Drew, *ubi supra.*

4 Stats. 1870, ch. 393, sec. 3.

## FALSE PRETENSES — "VALUABLE SECURITY" — PROPERTY IN CHATTEL.

## R. *v.* DANGER.

[Dears. & B. 307.]

*In the English Court for Crown Cases Reserved, 1857.*

**The Prisoner was Convicted** upon an indictment founded upon section 53 of 7 and 8 George IV.[1] for obtaining a valuable security by false pretenses. The facts were, that the prisoner falsely represented to the prosecutor that a third person was baling up for him a quantity of leather which was to come into his warehouse that afternoon, and the prosecutor, relying on such false statement, at the request of the prisoner, agreed to purchase the leather, and to accept a bill for the amount of the purchase-money. The prisoner shortly afterwards produced and handed to the prosecutor a bill duly stamped, signed by himself as drawer, addressed to the prosecutor, and made payable to the prisoner's own order; and the prosecutor accepted the bill and returned it to the prisoner, who subsequently indorsed and negotiated it, and appropriated the proceeds to his own use. *Held*, that the conviction could not be supported, as the bill, whilst in the hands of the prosecutor, was of no value to him nor to any one else unless to the prisoner; and as the prosecutor had no property in the bill as a security, or even in the paper on which it was written.

The following case was reserved and stated for the consideration and decision of the Court of Criminal Appeal by the Recorder of Bristol.

The prisoner, John Danger, was tried before me at the Quarter Sessions of the Peace in and for the city and county of Bristol, held on the 7th day of April, in the year of our Lord one thousand eight hundred and fifty-seven, on an indictment under the statute 7 and 8 George IV.[2] for obtaining a valuable security by false pretenses. The indictment contained two counts, a copy of which is annexed to this case.[3] The false pretenses were proved as alleged in the indictment. It was also proved, that Richard Latham, the prosecutor, relying on such pretenses, agreed to become the purchaser of a quantity of leather, called butts, of and from the prisoner John Danger, at the price of one hundred and eighty-four pounds and sixteen shillings; that the prisoner then asked Richard Latham to accept a bill of exchange for the amount of the purchase-money; that Richard Latham agreed to do so; that, soon after, the prisoner produced a bill of exchange duly stamped, signed by himself as drawer under the name of John Danger & Co., payable to the drawer's own order, and addressed to Richard Latham, for one hundred and eighty-four pounds, sixteen shillings, four months after date, and handed the same to Richard Latham; that Richard Latham accepted the bill by writing his name across it, and made it payable at Messrs. Stuckey's Bank, Bristol, and then delivered the same so accepted to the prisoner; that the prisoner

[1] ch. 29. [2] ch. 29, sec. 23. [3] marked A.

took possession of the bill, and afterwards indorsed and discounted the same, and applied the proceeds to his own use. At the close of the case for the prosecution, it was objected by the prisoner's counsel that there was no evidence that the prisoner had obtained from Richard Latham a valuable security within the meaning of the statute 7 and 8 George IV.,[1] so as to sustain either count of the indictment, on the ground that the evidence showed that the prisoner had obtained from Richard Latham either an acceptance only, or an instrument which was not an available security or of any value to Richard Latham. I refused, on this objection to direct an acquittal, but left the case to the jury, who found the prisoner guilty; but I reserved the question for the opinion of the Court of Criminal Appeal, whether there was evidence that the prisoner obtained from Richard Latham a valuable security so as to sustain either count of the indictment. After the verdict it was objected, in arrest of judgment, that each count of the indictment was bad for not alleging that the valuable security obtained by by John Danger was the property of Richard Latham, and the case of *Regina* v. *Lill*,[2] was cited. I also reserved that question, and I have to request the opinion of the Court of Criminal Appeal upon the above matters. I postponed the sentence, and admitted the prisoner to bail until the next Quarter Sessions for the said city and county of Bristol.

JOHN A. KINGLAKE,
*Recorder of the City and County of Bristol.*

A.

CITY AND COUNTY OF BRISTOL, TO WIT: } The jurors for our Sovereign lady the Queen, upon their oath present that before and at the time of the committing of the offense hereinafter named one Richard Latham was a currier, carrying on business at Redcliff Street in the parish of Saint Mary Redcliff in the city and county of Bristol, and one George Jenkins, was a tanner, carrying on business at that part of the parish of Bedminster which lies within the city and county of Bristol, and that John Danger, late of the parish of Saint Nicholas in the city and county aforesaid, leather factor, on the 27th day of December, in the year of our Lord, 1856, being an evil-disposed person and contriving and intending unlawfully, fraudulently, knowingly and designedly to cheat and defraud, then and there, to wit, on the day and year aforesaid at the parish last aforesaid, did ask the said Richard Latham if he the said Richard Latham would buy some of George Jenkins' (meaning the said George Jenkins) butts, whereupon the said Richard Latham then and there told the said John Danger that

[1] ch. 29, sec. 53.

[2] Dears. C. C. 132.

he the said Richard Latham had been speaking to Mr. Jenkins (meaning the said George Jenkins) and he (meaning the said George Jenkins) said he had no butts to sell, and the said John Danger thereupon unlawfully, knowingly and designedly did falsely pretend and say to the said Richard Latham: You (meaning the said Richard Latham) don't know George Jenkins (meaning the said George Jenkins) as well as I do, for he (meaning the said George Jenkins) is now baling up three hundred butts for me (meaning himself, the said John Danger) to come into my warehouse (meaning the warehouse of the said John Danger) this afternoon, and that he, the said Richard Latham, should have them at the price of twenty-one pence per pound, and that the said Richard Latham then and there agreed to become the purchaser of to wit, a certain part of the said butts of and from the said John Danger, at that price, whereupon the said John Danger asked the said Richard Latham to accept a bill for £184 16s, and then and there produced a bill of exchange drawn by him the said John Danger upon him the said Richard Latham for the said sum of £184 16s, and the said John Danger then and there stated to the said Richard Latham that he, the said Richard Latham, should have the worth of it (meaning the said bill of exchange for £184 16s) in these butts (meaning the said butts which the said John Danger had as aforesaid unlawfully, knowingly and designedly falsely pretended and said that the said George Jenkins was baling up for him, the said John Danger, and which said butts were to come into his, the said John Danger's, warehouse that afternoon). By which, the said false pretense, he, the said John Danger, on the day and year aforesaid at the parish of Saint Nicholas, in the city and county aforesaid, did unlawfully obtain from the said Richard Latham a certain valuable security, to wit, the said bill of exchange which the said John Danger had so drawn upon the said Richard Latham as aforesaid and which the said Richard Latham then and there accepted for the said sum of £184 16s and of the value of £184 16s with intent to cheat and defraud. Whereas in truth and in fact the said George Jenkins was not, on the said 27th day of December, in the year of our Lord, 1856, in the possession of three hundred butts or any butts the property of the said John Danger, nor was the said George Jenkins on the 27th day of December, 1856, baling up three hundred butts or any butts for the said John Danger, against the form of the statute in such case made and provided and against the peace of our said lady, the Queen, her Crown and dignity.

2d Count. And the jurors aforesaid, upon their oath aforesaid, do further present that the said John Danger on the day and year aforesaid, in the parish of Saint Nicholas, in the city and county aforesaid, unlawfully, knowingly and designedly did falsely pretend to the said Richard

Latham that one George Jenkins had sold to and was then baling up for him the said John Danger, three hundred butts of leather, and which the said John Danger then and there unlawfully, knowingly and designedly falsely pretended and stated to the said Richard Latham were to come into his, the said John Danger's, warehouse on the afternoon of the said day and that he the said John Danger could and would then sell the same or any part thereof to the said Richard Latham at a certain price, to wit, the price of twenty-one pence per pound. By means of which said false pretenses the said John Danger did then and there unlawfully obtain from the said Richard Latham a certain valuable security to wit a bill of exchange for the sum of £184 16s and of the value of £184 16s of and from the said Richard Latham as and for the sum to be paid by him in payment for certain of the said three hundred butts aforesaid, with intent then and there to cheat and defraud the said Richard Latham of the same. Whereas in truth and in fact the said George Jenkins had not sold to the said John Danger, nor was the said George Jenkins then bailing up for him, the said John Danger, three hundred butts of leather or any butts of leather whatsoever, nor were the said three hundred butts to come into his the said John Danger's warehouse on the afternoon of the said day, nor could the said John Danger then sell the same or any part thereof to the said Richard Latham, against the form of the statute in such case made and provided, and against the peace of our said lady the Queen, her Crown and dignity.

This case was argued on 30th May, 1857, before Lord CAMPBELL, C. C., ERLE, J., WILLIAMS, CROWDER, J., and BRAMWELL, B.

*H. T. Cole*, appeared for the Crown, and *C. G. Prideaux*, for the prisoner.

*C. G. Prideaux*, for the prisoner. First, the indictment is bad in arrest of judgment. The second count is not distinguishable from those in *Lill* v. *Queen in error*;[1] it will only be necessary, therefore, to consider the first, which is open to the same objection, and is, I contend, also bad, because it does not allege the valuable security to have been the property of the prosecutor. This defect is clearly fatal.[2]

Lord CAMPBELL, C. J. There has been no subsequent statute altering the law.

*Prideaux*. No. The case of *Lill* v. *Queen* was decided after the passing of the 14 and 15 Victoria,[3] and it was held that the defect was not a formal one, and was not caused by that statute.

Secondly. The evidence does not disclose any offense within section 53 of 7 and 8 George IV.[4] First. I contend that upon the facts proved

[1] Dears. C. C. 132, *s. c.* 1 El. & Bl. 553.

[2] Reg. *v.* Martin 8 Ad. & E. 481; Reg *v.* Parker, 3 Q. B. Rep. 392; Lill *v.* Queen in Error, Dears C. C. 132; *s. c.* 1 El. & Bl. 553.

[3] ch. 100.

[4] ch. 29.

the bill never was the property of the prosecutor, and never was in his possession; and secondly, I submit, that it was not a valuable security within the meaning of the statute.

ERLE, J. The same question is raised upon the merits and upon the indictment, as the facts are correctly stated in the first count.

*Prideanx.* Yes. The paper on which the bill was written was the property of the prisoner — the stamp was his — and no property was acquired by the prosecutor by reason of his writing his name as acceptor. The bill was handed to the prosecutor merely for the purpose of his so writing his name, and when that was done the property and right of possession were in the prisoner, and the prosecutor had no right to detain it. When the acceptance is complete, the bill becomes the property of the drawer, even if not so before, and if the acceptor improperly detains the bill in his hands after acceptance, the drawer may nevertheless sue him on it and give him notice to produce it, or on his default give parol evidence of it.[1] That case goes almost the whole length of supporting my position. In *Johnson* v. *Windle*,[2] a promissory note delivered by defendant to plaintiff, payable to the plaintiff's order, was stolen from plaintiff by his clerk, who, after forging plaintiff's indorsement, obtained payment of the defendant's banker, and the banker handed the note to the defendant; and the court held that the plaintiff was entitled to recover the amount at the hands of the defendant in an action of trover, notwithstanding six weeks had elapsed before the plaintiff discovered and gave the defendant notice of the loss of the note. I refer to this case mainly to call attention to the language of Bosanquet, J., who said: "This instrument on the face of it was marked as the property of the plaintiff." So in this case, the bill when accepted was marked as the property of the prisoner, and the prosecutor had no property therein.

In *Morrison & Gray* v. *Buchanan*,[3] by the negligence of a clerk of the drawer of a bill, it was delivered out by a banker after acceptance to a wrong person; and Littledale, J., held, that under those circumstances the drawer could not maintain trover for the bill against the party who so delivered it out; but it was not disputed that the bill was, after acceptance, the property of the drawer; and, although in *Evans* v. *Kymer*,[4] the property in a bill was held to be in the acceptor, the ground of the decision was that the bill had been deposited with the drawer to hold for the acceptor's use.

Here the prosecutor never had such a possession of the bill as would have enabled him to maintain trespass. All the cases show that *de facto*

[1] Smith *v.* McClure, 5 East, 475.

[2] 3 Bing, N. C. 225.

[3] 6 C. & P. 18.

possession is not sufficient. In *Regina* v. *John Smith*,[1] the prisoner having led the prosecutor to believe that he was about to pay him a debt due to him from a third person, took out of his pocket a piece of blank paper stamped with a six-penny stamp and put it upon the table, and then took out some silver in his hand and mentioned the amount for which the prosecutor was to give a receipt. The prosecutor wrote and signed a receipt for that sum on the stamped paper, and the prisoner then took it up and went out and never paid the money; and the court held that the prisoner could not be convicted of larceny, because the prosecutor never had such a possession of the paper as would have enabled him to maintain trespass. It seems impossible in principle to distinguish that from the present case; and the reasons given by Parke, B., apply equally here. His Lordship said: "The stamped paper never was in the prosecutor's possession, and the prisoner can not be convicted of stealing it, unless the prosecutor had such a possession of it as would enable him to maintain trespass. It was merely handed over for him to write upon it."

BRAMWELL, B. If the prosecutor, after he had written the acceptance, had discovered the fraud and refused to part with it, and the prisoner had snatched it way from him, could the prosecutor have maintained trespass?

*Prideaux.* No, I apprehend he could not.

Lord CAMPBELL, C. J. Suppose the prosecutor, having discovered the fraud, had refused to deliver the acceptance to the prisoner, and the prisoner had brought detinue to recover it, would not the prosecutor have had a good defence?

WILLIAMS, J. Under such circumstances would not the prosecutor at all events, have had a right to retain the acceptance till he had erased his name from it?

ERLE, J. Suppose the prosecutor, after having written the acceptance, had put the instrument away till the following day, and in the meantime received information of the fraud, which would have induced him to cancel it; but the drawer, during the interval, stole it? As at present advised, I think the drawer might be indicted for larceny.

*Prideaux.* There are two cases referred to in *Regina* v. *John Smith*, which also appear in point. One is *Rex* v. *Minter Hart*,[2] where the prosecutor was, by fraud, induced to write acceptances upon ten blank bill stamps provided by the prisoner, which were afterwards filled up by him as bills for £500 each, and put into circulation; and it was held that a charge of larceny against the prisoner for stealing the paper on which the stamps were, could not be sustained, because the prose-

[1] 2 Den. C. C. 449.

[2] 6 C. & P. 106.

cutor never had either the property or the possession of papers so as to make the taking of them by a prisoner a larceny. In that case, as here, there had been a *de facto* possession by the prosecutor, but no such possession as would have enabled him to maintain trespass against the prisoner for taking the bills.

Lord CAMPBELL, C. J. Could not the prosecutor in this case have maintained trespass against a stranger who had taken the bill?

*Prideaux.* Possibly he might against a stranger; but not against the prisoner. In *Mrs. Phipoe's Case*,[1] where the prosecutor was compelled by duress of his person to sign a promissory note previously prepared by the defendant, who produced it for the purpose, and took it away as soon as it was signed, it was held that the case was not within section 3 of 2 George II.,[2] because the instrument was of no value to the prosecutor, and because the note never was the property nor in the possession of the prosecutor.

Thirdly. The instrument was not a valuable security within the meaning of the statute.

Some of the cases previously referred to are also important on this point. In *Minter Hart's Case*, it was decided that the stamps filled up, as before mentioned. were neither bills of exchange, orders for the payment of money, nor securities for money, and in *Mrs. Phipoe's Case*, the promissory note, which the prosecutor was compelled by duress to sign, was held to be of no value while in the hands of the prosecutor. In order to make the instrument a valuable security within the meaning of the statute, it must be effectual as a security when obtained, in other words it must at that time be of value to some person other than the prisoner.

The bill was not a valuable security while in the hands of the prosecutor, because the acceptance was not complete until delivery. This is settled by *Cox* v. *Troy*,[3] where the defendant, having written his acceptance with the intention of accepting a bill, afterwards changed his mind, and before communicating to the holder or delivering the bill back to him, obliterated his acceptance, and it was held that he was not bound as acceptor.

Lord CAMPBELL, C. J. There must be either a delivery or a communication to bind the acceptor.

ERLE, J. The *animus accipiendi* notified.

Lord CAMPBELL, C. J. Was not that done when the prosecutor, in the presence of the prisoner, wrote his name with the intention of accepting the bill?

[1] 2 Leach, C. C. 643; 2 East P. C. 599. And see Rex *v.* Edwards, 6 C. & P. 521.

[2] ch. 25.

[3] 5 B. & A. 474.

BRAMWELL, B. In the ordinary course of banking business, a bill is left at the bank for acceptance for twenty-four hours; but there many considerations may intervene which do not take place here, where the prisoner and the prosecutor are together in the presence of the paper.

*Prideaux.* The prisoner had all the time an absolute property in the bill; neither the indictment nor the evidence shows an unqualified acceptance until the delivery of the bill.

The bill being of no value to the prosecutor was of no value to any person other than the prisoner at the time when it was obtained; because until indorsed it could not be of any value to any one except the prisoner himself.

In *Minter Hart's Case*, as here, there was no doubt a gross fraud had been committed; but the court held that they must look at the document as it was when obtained by the prisoner, and must see whether at the time when obtained it was a valuable security. In *Downe* v. *Richardson*,[1] it was held that an accommodation bill is not issued until it is in the hands of some person who is entitled to treat it as a security available in law.

CROWDER, J., referred to *Stoessiger* v. *The Southeastern Railway Company.*[2]

*Prideaux.* There C., being indebted to G., framed a document directed to himself ordering himself, three months after date, to "pay to my order" the amount. The document had the stamp proper for a bill of exchange of that amount and length of time, and was in all respects like a bill of exchange, except that there was no drawer's name. C. wrote on it his acceptance, and caused it to be forwarded, in a parcel directed to G., by a common carrier, in order that G. might add his name as drawer; and, in an action against the carrier, it was held that the instrument was not at the time of its delivery to the carrier a bill, order, note, security for payment of money, nor writing of any value.

The prisoner in this case, obtained no security of value to the prosecutor. He drew his bill of exchange and delivered it to the prosecutor, and the prosecutor by acceptance and delivery promised to pay it; and thus, according to the custom of merchants, it became the property of the prisoner if not so before. Everything previously to the delivery was the prisoner's, except the promise to pay; and a promise to pay is not the subject of larceny. Before the statute 1 and 2 George, IV ,[3] it was not necessary that the acceptance of an inland bill should be in writing; an acceptance by parol was sufficient at common law.

1 5 B. & A. 674.

2 3 El. & Bl. 549.

3 ch. 78, sec. 2.

Lord CAMPBELL, C. J. A promise to pay is something not material; it is something aerial; but here you have the written acceptance.

ERLE, J. In every valuable instrument the value lies in the words apart from the ink with which they are written.

*Prideaux.* Abstracting from the bill the promise to pay, all that was material was the ink and the paper, and they unquestionably belonged to the prisoner.

BRAMWELL, B. You say the chattel belonged to the prisoner, and that all he got was the evidence of the promise.

*Prideaux.* And independent of that, the moment it was an acceptance it became the property of the prisoner, according to the custom of merchants; and that the only person to whom the bill could be of the slightest value being the prisoner himself, it was in fact of no value to him, because, by reason of his fraud, he could not have maintained an action upon it.

I therefore contend, first, that the indictment is bad in arrest of judgment.

Lord CAMPBELL, C. J. The indictment gives a full, faithful and complete history of the whole transaction.

*Prideaux.* It does. Secondly, I contend that the prosecutor had no sufficient property in or possession of the instrument; and thirdly, that it was not a valuable security within the meaning of the statute. It was of no value while in the hands of the prosecutor; when it got into the hands of the prisoner it was of no value, not being indorsed to any person, except to the prisoner himself; and in fact it was of no value to him, because of the fraud. I submit, therefore, that both upon the indictment and upon the facts, I am entitled to your judgment.

*H. T. Cole*, for the Crown. First, the prosecutor had a sufficient qualified property in the bill at the time when it was obtained by the prisoner. He had such a possession of it, as would have enabled him to maintain trespass. The prisoner presented a piece of stamped paper to the prosecutor; it was not a bill till accepted.

Lord CAMPBELL, C. J. It was an unaccepted bill.

*Cole.* After signing it the prosecutor might, if he had chosen, have erased his acceptance.

Lord CAMPBELL, C. J. You say he had a right of possession for that purpose. If the prisoner had taken the bill from the prosecutor *malo animo*, with the intention of preventing him from erasing his acceptance, would that have been a larceny?

WILLIAMS, J. It would be difficult to say so, if *Regina* v. *Smith* was well decided.

BRAMWELL, B. You argue that the prosecutor had a right of posses-

sion because he had a right of cancellation; but they are not identical. You can not say that because he had right of cancellation, he had a right of possession.

*Cole.* *Evans* v. *Kymer* shows that if the prosecutor, after accepting the bill, had delivered it to the prisoner to hold for him, he might have maintained trover for it.

Secondly, the objection that the instrument was not a valuable security will not be maintained, if the court can see that in any way it can be so regarded, and, I contend, that it is quite sufficient, if the acceptance was valuable to the prisoner; and no doubt it was, for by indorsing it away, he obtained money upon it. In *Regina* v. *Bolton*,[1] it was held that a railway ticket, entitling a passenger to travel on the line of railway, was a chattel of value; although the ticket was not of value to the person from whom it was obtained, but only to the person obtaining it.

WILLIAMS, J. It was decided that it was a "chattel."

*Cole.* Section 5 of the statute gives the rule of interpretation which is, that "each of the several documents hereinbefore enumerated shall throughout this act be deemed for every purpose to be included under and denoted by the words 'valuable security.'" The documents before enumerated include any "bill, note, warrant, order, or other security whatsoever, for money or for the payment of money;" and I submit that the instrument in this case clearly comes within this definition of a valuable security. *Regina* v. *Smith*,[2] was not the case of a valuable security, but of a receipt. In *Regina* v. *Greenhalgh*,[3] an order upon the treasurer of a burial society, for payment of money to bearer, was obtained by the prisoner from the president by a false pretense that a death had occurred, and that order was held to be a valuable security within section 53, as explained by section 5 of the statute; although there the order was of no value to the person from whom it was obtained. That decision, I submit, entirely cuts away this branch of the argument for the prisoner. With regard to the indictment, the whole facts appear upon it.

Lord CAMPBELL, C. J. If the offense be indictable, of which I give no opinion, I think the first count is sufficient.

*Cole.* The rule of law as to what constitutes a complete acceptance, is thus laid down in Biles on Bills:[4] —

"The liability of the acceptor, though irrevocable when complete, does not attach by merely writing his name, but upon the subsequent

[1] 1 Den. C. C. 508.
[2] 2 Den. C. C. 449.
[3] Dears. C. C. 267.
[4] 7th ed., p. 167.

delivery of the bill or upon communication to some person interested in the bill, that it has been so accepted." Here the latter alternative is satisfied, and the acceptance was clearly complete before delivery, the prosecutor having written the acceptance in the presence of the prisoner, and thereby communicating it to the person interested, namely, to the prisoner; and the bill was therefore a valuable security when in the hands of the prosecutor.

I therefore contend, first, that the prosecutor had a sufficient qualified property in and possession of the bill to support the indictment. Secondly, that in order to make the instrument a valuable security within the meaning of the statute, it is sufficient if it be of value to the person obtaining it; in other words, if you obtain an acceptance from me, which is of value to you, you obtain a valuable security.

*Prideaux*, in reply. The result of the doctrine laid down in the passage cited from Byles on Bills[1] is thus stated by the learned author: —

"Hence it follows that if the drawer has written his name on the bill with the intention to accept, he is at liberty to cancel his acceptance at any time before the bill is delivered, or at least before the fact of acceptance is communicated to the holder." But, assuming that the acceptance was complete, as contended, the bill thereupon became the property of the prisoner, even if not so before. *Regina* v. *Boulton*[2] does not apply; since, in that case, the decision was simply that a printed ticket of the railway company was a chattel within the meaning of the statute.

In *Regina* v. *Greenhalgh*, the order was payable to bearer, and was therefore a valuable security to any person into whose hands it came; but here the instrument was of no value to any one except to the prisoner, although it might, after indorsement, become valuable to other persons. The question is, was it a valuable security to any person, other than the prisoner when obtained?[3]

When a man delivers a bill of exchange to the drawee for the purpose of being accepted, the drawee holds it for that purpose alone, and this does not in any way change the property in the bill; nor does it prevent the drawer, where there are no other parties to the bill, from demanding it back if he chooses; and if left at a bank for acceptance there is nothing to prevent him from demanding it, even within the twenty-four hours allowed for acceptance.

*Cur. adv. vult.*

1 7th ed., p. 167.

2 1 Den. C. C. 508.

3 Rex *v.* Pooley, Russ. & Ry. 12; Rex *v.* Clark, *Ibid.* 181; Rex *v.* Bingley, 5 C. & P 602; Rex *v.* Vyse, 1 Moo. C. C. 218; Reg. *v* Perry, 1 Den. C. C. 69.

The judgment of the court was delivered on 18th June, 1857, by Lord CAMPBELL, C. J. We are of opinion that the offense charged and proved in this case does not come within 7 and 8 George IV.[1] The "chattel, money, or valuable security," the obtaining of which by a false pretense may be made the subject of an indictment within this statute, must, we conceive, have been the property of some one other than the prisoner. Here there is great difficulty in saying that, as against the prisoner, the prosecutor had any property in the document as a security, or even in the paper on which the acceptance was written. In no one else could the property be laid. We should not have given weight to the argument that, even in the prisoner's hands, it was not a valuable security by reason of the fraud, which would prevent him from enforcing it, but we apprehend that, to support the indictment, the document must have been a valuable security while in the hands of the prosecutor. While it was in the hands of the prosecutor it was of no value to him, nor to any one else unless to the prisoner. In obtaining it the prisoner was guilty of a gross fraud; but we think not of a fraud contemplated by this act of Parliament.

*Judgment reversed.*

---

## FALSE PRETENSES — FALSE STATEMENT AS TO INTENTION — FUTURE FACT.

## PEOPLE v. BLANCHARD.

[90 N. Y. 314.]

*In the Court of Appeals of New York, 1882.*

1. **Upon the Trial of an Indictment** for obtaining goods by means of false representations, it is not necessary that the prosecution should prove all the false representations alleged in the indictment.
2. **Where the Representations** set forth in the indictment are proved, the sense in which they were used and what was designed to be and was understood from them are questions for the jury.
3. **An Indictment for False Pretenses** may not be founded upon an assertion of an existing intention although it did not in fact exist; there must be a false representation as to an existing fact.
4. **On the Trial of an Indictment** for obtaining a number of cattle by false pretenses, it appeared that the vendor sold the cattle to the prisoner at Buffalo and received his check post-dated for the purchase price, upon his representation that he was buying and wanted the cattle for G. who lived at Utica; that they were for G., who would remit the

[1] ch. 29. sec. 53.

price in time to meet the check; the prisoner had been in the habit of purchasing cattle to supply G. as a customer and of selling them to him and had general authority so to buy whenever cattle were low; two days before the purchase G. had written to the prisoner, stating that he wanted a choice lot of cattle and requesting him to send on a car load. The prisoner, however, instead of sending the cattle to G. shipped them to Albany, sold them at a reduced price and did not pay the check. *Held*, that a conviction was error; that while there might have been a fraud, there were no false pretenses, as the vendor was cheated not by any false statement of facts on the part of the vendee, but by reliance upon a promise not meant to be fulfilled, and a false statement as to intention.

APPEAL from judgment of the General Term of the Superior Court of Buffalo, entered upon an order made May 15, 1882, which affirmed a judgment entered upon a verdict convicting the defendant of the crime of obtaining property by false pretenses.

The indictment charged that defendant on the 10th day of February, 1880, at the city of Buffalo, with the intent to cheat and defraud John Thompson, did unlawfully, knowingly and designedly, falsely pretend and represent unto the said John Thompson that he, the said John H. Blanchard, was agent for Otto Gulick, of Utica, and that Otto Gulick, of Utica, wanted him to buy for him and send him eighteen cattle, and that he had a contract with Otto Gulick, of Utica, for buying cattle for said Gulick, and that said Gulick had agreed to pay him one dollar a head for buying cattle for him; and the said John Thompson then and there believing the false pretenses and representations so made as aforesaid by the said John H. Blanchard, and being deceived thereby was induced, by reason of the false pretenses and representations so made as aforesaid, to deliver, and did then and there deliver to the said John H. Blanchard eighteen cattle of the value of $1,157.07.

The material facts appear in the opinion.

*Samuel Hand*, for appellant.

*Tracey C. Becker*, for respondent.

FINCH, J. The defendant was indicted for obtaining property under false pretenses. The representations alleged to be false were stated in the indictment to have been that the accused "was agent for Otto Gulick, of Utica, and that he wanted to buy eighteen cattle for Otto Gulick, of Utica; and that Otto Gulick, of Utica, wanted him to buy for him and send him eighteen cattle; and that he had a contract with Otto Gulick, of Utica, for buying cattle for said Gulick, and that said Gulick had agreed to pay him one dollar a head for buying cattle for him." Taking this accusation as a whole, and construing it in the ordinary sense and acceptation of the language used, it charges a false representation or agency in the purchase of the cattle for Gulick. It begins with that direct assertion, and everything added is on its face, not only consistent with it but tends to strengthen and corroborate such averment. Representing himself to be Gulick's agent he says

that he wants to buy eighteen cattle for him; that is, he as Gulick's agent, which he claims to be, desires to buy the property for his principal. He adds that Gulick wants him "to buy for him" the eighteen cattle; that is, the principal desires the agent to make that particular purchase in his behalf. The accused adds finally that he has a contract with Gulick for making such purchases by the terms of which he, the agent, receives one dollar a head for the cattle bought. It is impossible to misunderstand the tenor of these representations taken together. They import an agency existing, action desired and intended under such agency, and a compensation of one dollar a head as the reward for the service rendered. If precisely the representations stated in the indictment had actually been made to the vendor of the cattle, he would have understood and been justified in understanding that he was selling his cattle to Gulick through Blanchard as his agent, and that the sole interest of the latter in the transaction was to perform his duty and earn his commission as agent. If they are to be thus understood and taken as a whole, there was a total failure of proof, for it was conceded that Blanchard did not at all profess or pretend to be Gulick's agent, or to be buying for him as principal for a commission payable to the agent. The vendor sold to Blanchard with no rights or recourse against Gulick, and took the former's individual check for his pay, so that the representations alleged in the indictment taken as a whole were unproved in their entire scope and meaning.

But they were not so taken and construed. While the indictment must show what the false pretenses were, and state them with reasonable certainty and precision,[1] it is not necessary that the prosecution should prove them all.[2] A conviction was had in the present case founded upon a part only of the representations stated in the indictment, which was permissible, but those claimed to be established were taken out of and separated from their context, and clothed with a new and different meaning, and this presents what there is of the first point argued on behalf of the appellant. Disregarding entirely the alleged claim of agency two statements were culled from the representations recited in the indictment and made the sole basis of the conviction. These are that Blanchard said "he wanted to buy eighteen cattle for Otto Gulick," and "that Otto Gulick wanted him to buy for him and send eighteen cattle;" and the meaning attached by the court and jury to these words, was that Blanchard represented that he wanted to buy in his own name and on his own responsibility for

[1] Rex *v.* Mason, 1 Leach C. C. 487; Reg. *v.* Henshaw, L & C. 444.

[2] State *v.* Mills, 17 Me. 211; Rex *v.* Hill, R. R. C. C. 190.

Otto Gulick as a customer of his, and that Gulick stood ready as such customer to make the purchase and take the property.

It is now said that the accused was indicted for one thing and convicted of another; that he was charged with a representation of agency and convicted on a representation which imported the exact contrary; that the final construction put upon the words selected out makes them inconsistent with and repugnant to the other representations alleged, and introduces contradiction into the indictment; and that therefore the words relied on can not bear the new sense given to them, and must still be read in the light of their context.

The argument in this direction is not without force. The evil it points out is that the accused may have been mislead; that coming prepared to meet an accusation that he falsely represented himself to be Gulick's agent and to be purchasing as such, he is suddenly confronted with a charge that he claimed to be buying for Gulick as a customer ready to take the property by purchase from the defendant as owner and vendor. It was held in *King* v. *Stevens*,[1] that "every indictment must contain a complete description of such facts and circumstances as constitute the crime without inconsistency or repugnancy;" and Lord Ellenborough said that if the language be clearly capable of different meanings it does not appear to clash with any rule of construction applied even to criminal proceedings, to construe it in that sense in which the party framing the criminal charge must be understood to have used it if he intended that his charge should be consistent with itself."

We should be impressed with the force of this argument but for two considerations. The representations relied on were proved almost literally as they stand in the indictment, and in such case it appears to be the rule that the sense in which they were used, the meaning they were intended to bear, and what was assigned to be and was understood from them, is a question for the jury.[2] And besides, we are unable to see how the question of variance was fairly raised. The representations proved were received without objection that they were not pleaded. The motion to direct a verdict for the defendant went upon no such distinct and definite ground, and none of the exceptions to the charge present the question. It is best, therefore, to consider the main question argued at the bar. Objections were taken which go to the foundation of the criminal accusation, and which raise the inquiry whether any false pretenses were established. Those recited in the indictment and proved upon the trial resolve themselves into two elements: first, the assertion as an existing fact of a present business relation between

[1] 5 East, 244.

[2] Rex *v.* Archer, 6 Cox, 518.

Blanchard and Gulick, and second, the expression of an intention to act upon and in accordance with such relation. The accused declared that he was buying the cattle for Gulick; that he couldn't make a draft on him, for he wouldn't allow him to draw; that he wanted the cattle for Otto, because they would suit him; that they were for Gulick, who would remit the price in time to meet the defendant's post-dated check. There is here clearly asserted an existing business arrangement between Blanchard and Gulick, calculated, if truly stated, to influence the purchaser. It imported that Gulick at that time desired to purchase of of Blanchard eighteen cattle, selected by the latter, and stood ready to take them and pay for them. That was a representation of an existing fact. It imported also that Blanchard was buying with reference to this fact, and with intent to resell to Gulick, and with the means thus obtained meet his post-dated check. That was a representation of an existing intention and promissory in its nature. By a false assertion of the existing business relation Thompson could be deceived; by a false assertion of Blanchard's purpose and intention, he could not be. As to that he was forced to rely upon the defendant's honesty and integrity and necessarily took that risk.

It is now claimed that the representations of fact, the assertion of an existing business relation between Blanchard and Gulick, were not shown to be false, and were proved to be true. If the jury were not authorized to conclude that Gulick's letter to Blanchard, dated February 9th, reached him on the morning of the 10th, before he arrived at the cattle yards in East Buffalo, that contention was correct. In his letter of February 8th Gulick told Blanchard that he wanted a choice lot of cattle, and requested him to send on a car load. He testified, also, that Blanchard had a general authority to buy for him, as a customer, whenever cattle were low; and had made purchases for him under both general and special authorities for a long time and to a large amount; and that while he had never forbidden drafts on himself, he had requested Blanchard not to draw, but to allow him to remit. Disregarding for the present the letter of the 9th, and the fact appears to be that when Blanchard bought these cattle Gulick did want them; he did desire defendant to buy them for him as a customer; he did stand ready to take them and pay for them, and desired to remit the price, and not be drawn upon for it. When, therefore, Blanchard made the representation stated in the indictment that Gulick wanted him to buy for him eighteen head of cattle, he told the truth. The business relation alleged to exist did exist, and the facts concerning it were not misstated, unless, as we have before intimated, the jury were warranted in finding that the letter of the 9th reached Blanchard before his purchase on the 10th.

The letter itself is open to the criticism that it does not countermand the order of the day before. It shows that Gulick still wants the load of cattle, still desires Blanchard to buy them for him as a customer, but says: "I can not conveniently use any cattle this week." "I prefer to have you wait until next week, when I hope to be ready." But giving to this rather mild expression of a wish the full force claimed for it by the prosecution, the question remains whether there was evidence from which the jury were entitled to infer its receipt before the purchase of the cattle. Gulick says he mailed it on the 9th, but can not tell at what hour of the day; that his custom was to mail such letters at the close of business for the day at about six or seven o'clock. We may therefore presume that this letter was so mailed. It was proven that the mail in which the letter would naturally go west left Utica at 1:20 the next morning and reached Buffalo at eight o'clock. A previous mail arriving at about midnight was regularly distributed in the morning, and the carriers for its free delivery left the office at eight o'clock. They left, therefore, and started on their routes just as the later mail arrived, and before it could be distributed. The carrier on Blanchard's route who left the post-office at eight o'clock in the morning can not be presumed to have had the letter in question. When the carrier again went over that route we do not know. So far we can presume from the ordinary course of business that the letter was in the Buffalo office at eight o'clock, and must also presume that it remained there until the carrier who started out at eight o'clock had completed his route, returned to the office and started out again for a second delivery. How many such deliveries there are in a day at Buffalo, and at what hours we do not know. We have no facts on which to found a further presumption, and as it is conceded that Blanchard was at the cattle yards making his purchases between nine and ten o'clock in the morning, and came two miles and a half in a cutter from his home, it is scarcely possible that he could have had this letter before leaving. The facts, therefore, do not warrant such an inference. On the contrary, the natural and just presumption to be drawn from them is that the letter did not reach defendant until after his purchase. To this must be added in a criminal case, the presumption of innocence not to be overcome by a mere chance or possibility, and the further fact of defendant's oath that he did not find the letter when he returned home after the purchase. We are of opinion, therefore, that the representations of fact as to the business relations existing between Gulick and the accused, and the statement that Gulick wanted him to buy eighteen cattle for him, were proved to be true.

But his further statement that he "wanted to buy eighteen cattle for

Gulick;" that he was "buying them for Otto Gulick;" and that with the proceeds of such sale, he would meet and pay his post-dated check, was shown to be false; for he sent the cattle at once to Albany, sold them there at a reduced price, and never paid his check given for the purpose. This brings us to the final question of the nature of this representation. It declares an intention and involves a promise. It states a present purpose, and design to sell the cattle when bought to Gulick, and a promise to apply the proceeds resulting from such sale, to the payment of the post-dated check. "I am buying for Gulick," "I want these cattle for Otto;" could mean only that the defendant bought them with a then present intention of sending them to Gulick. It was a statement of the design, and notice of the accused, in making the purchase. It represented what was at the time in his mind, and constituted his intention and so far as it tended to affect or influence the seller, it was essentially a promise and related to the future. It was as if he had said, after relating the truth, that Gulick wanted the cattle, and stood ready to take and pay for them, that he would ship them to Gulick, and on receiving the price appropriate it to the payment of the check. So far as this intention and promise were concerned, the seller necessarily took the risk of its fulfillment. He had to rely alone upon the supposed honesty and integrity of the defendant, and he was cheated not by any false statement of facts, but by reliance upon a promise and intention not meant to be fulfilled. If one sells property on credit, induced to do so by the purchaser's representation that he has a debt due him from a responsible debtor which will be paid before the expiration of the credit, and which the purchaser will use to pay the seller, the latter consciously takes upon himself the risk of the promise, although the facts stated are true. The debt referred to may exist and be paid in time, so that the purchaser has the very expected means of payment, but does not pay and never meant to. Here may have been a fraud, but certainly no false pretense. In the present case the vendor put his confidence in two things; in the facts which made it possible for the buyer to get the means, and then appropriate them to discharge his debt. Such protection as the facts could give, the vendor got. The asserted means of procuring the money to meet the check in fact existed, but the promise to use and then to pay, was broken, and the vendor suffered precisely at the point when he had to take the risk if he gave credit at all. We have found no case which holds that an indictment for false pretenses can be founded upon an assertion of an existing intention, although it did not in fact exist. Pollock, C. B., in *Archer's Case*,[1] describes the present

[1] Dears. C. C. 453.

case very nearly in his statement that "if a man says: 'I want goods for a certain house, and I mean to send them to that house; sell them to me,' that would not be a representation of an existing fact." Other authorities lead to the same conclusion.[1]

The prosecutor relies somewhat in the case of *Lesser* v. *People*,[2] but there a fact was falsely represented that the maker of the post-dated check offered in payment, has a business, and the check was good. Here as we have seen the facts stated were true, and only the intention and promise were false. It is sought to give these the appearance and force of a fact misrepresented by saying that Blanchard falsely asserted an existing *status*, a present relation; or that he was then and there acting upon such business relation, whereas, in truth and in fact, he was not so acting. But the intent with which he acted, is again the necessary test. If that was as he stated, there was no falsehood anywhere; if it was not, that became the sole and only untruth, since whether he was acting upon the relation or outside of it, depended upon nothing at the moment of the purchase, except his then present intention. With either design in his mind, his action and conduct up to the closing of the contract would have been the same, with no external or tangible difference. By an existing *status* or relation, the prosecutor must necessarily mean one which is compounded of the true facts and the false intention, and mingle the two in order to construct a representation of fact. But the falsity and the fraud are still in the intention alone, and a conviction can rest upon nothing else, because every thing else was proved to be true. And this, we think, must become very evident when we consider upon what the vendor necessarily relied in giving credit. There were two risks apparent. Blanchard might be unable to pay or unwilling to pay. He might fail to find a purchaser of the cattle, or sell to one who was irresponsible, and so fail to pay for want of means. Against this risk the seller guarded himself by saying, "I want to know to whom the cattle are going?" When told that it is Gulick who stands ready to take them, the seller was satisfied that the purchaser need not fail in payment for lack of ability to pay. But he took also another risk. He knew that the moment the sale was complete, Blanchard could sell to whom he pleased, and might with the money in his pocket refuse to pay. That was the risk of future action. It respected not an existing fact, but one yet to arise, and as to that he was compelled to trust, and did trust wholly to Blanchard's promise and his character as the sole guaranty

[1] 2 Whart. sec. 2118; West's Case, 1 D. & B. C. C. 575; Ranney *v.* People, 22 N. Y. 417; Reg. *v.* Bates, 3 Cox, C. C. 201, 203; Reg. *v.* Jennison, 9 *Id.* 158; Rex *v.* Goodhall, Russ. & Ry. 461; People *v.* Tompkins, 1 Park. Cr. 238.

[2] 73 N. Y. 78.

of its fulfillment. The vendor as we have said, was cheated precisely at that point; not by a false pretense, but by a broken and fraudulent promise. We are of the opinion, therefore, that the conviction of the defendant upon the facts developed on the trial, can not be sustained.

The judgment of the General Term and of the Criminal Term of the Superior Court of Buffalo, should be reversed and a new trial granted.

All concur except ANDREWS, C. J., and TRACY, J., not voting.

*Judgment reversed*

---

## FALSE PRETENSES — PRISONER MUST BE BENEFITED BY ACT.

## R. *v.* GARRETT.

[Dears. C. C. 232.]

*In the English Court for Crown Cases Reserved, 1853.*

**The Defendant was Indicted** in England for a misdemeanor in attempting to obtain moneys from L. & Co., by false pretences. The defendant, had a circular letter of credit marked No. 41, from D. S. & Co., of New York, for £210, with authority to draw on L. & Co. in London, in favor of any of the lists of correspondents of the bank in different parts of the world, for all or such sums as he might require of the £120. The circular letters of credit of D. S. & Co. were each numbered with distinctive numbers, and it was the practice of the correspondent on whom the draft was drawn, after giving cash on such draft, to indorse the amount on the circular letter; and when the whole sum was advanced, the last person making such advance retained the circular letter of credit. The defendant having procured from D. S. & Co., of New York, a circular letter of credit for £210, No. 41, came to England, and drew drafts in favor of the named correspondents there in different sums, in the whole less than £210, retaining the circular letter, the sums so advanced being indorsed on the letter. He then went to St. Petersburg, and there exhibited the letter of credit to W. & Co. of that place, a firm mentioned in the list of correspondents, the letter hoving first been altered by him, by tho addition of the figure 5 to 210, so converting it into a letter of credit for £5,210. He obtained from that house several sums, and finally a sum of £1,200, and another of £2,500, on drafts for those amounts on L. & Co. W. & Co. forwarded these drafts to their house in London, who presented the draft for £1,200 on L. & Co., and required payment of it. L. & Co. having been advised of the draft, No. 41, by D. S & Co., as a draft for £210 only, discovered the fraud and refused to pay it. The defendant being afterwards found in England was taken into custody and indicted, as before stated. The jury found the prisoner guilty, and in reply to a question put by the learned baron as to whether, although the defendant's immediate object was to cheat W. & Co. at St. Petersburg, by means of the forged letter of credit, he did not also mean that they or their correspondents, or the indorsees from them should present the draft and obtain payment of it from L. & Co., and the jury further found that he did. *Held*, that if L. & Co. had paid one of the drafts the defendant could not in law have been found guilty of the statutory misdemeanor; and, consequently, that he could not be found guilty of attempting to commit the common-law misdemeanor.

The prisoner was tried before me at the July Sessions at the Old Bailey for a misdemeanor. The indictment contained several counts. The seventh count stated, "that heretofore and before and at the time of the committing of the offense hereinafter mentioned, Sir Peter

Laurie, Knight, and others carried on the business of bankers at the parish of St. Mildred, the Virgin, in London, and within the jurisdiction, etc., and under the name or style of the Union Bank of London.

"That the said Sir Peter Laurie and others as such bankers as aforesaid had been and were the correspondents in London of Alexander Duncan and others who carried on business at New York in the United States of North America, under the style or firm of Duncan, Sherman & Co.

"That the said Messrs. Duncan, Sherman & Co. had been and were accustomed to give to such persons as should apply to them for the same authority to demand from the said Sir Peter Laurie and others, as such bankers and correspondents as aforesaid, payment of divers sums of money for account and on the behalf of the said Messrs. Duncan, Sherman & Co.

"That the said Sir Peter Laurie and others, as such bankers and correspondents as aforesaid, had been and were accustomed to pay to the persons so authorized as aforesaid, the sums of money demanded by them in pursuance of such authority, for the account and on the behalf of the said Messrs. Duncan, Sherman & Co.

"That the prisoner Gabriel Sans Garrett, well knowing the premises and being an evil-disposed person, and devising and designing, etc., on the 3d March, 1853, at the parish, etc., within the jurisdiction, etc., did demand payment for the account and on the behalf of the said Messrs. Duncan, Sherman & Co., from the said Sir Peter Laurie and others, as such bankers and correspondents of the said Messrs. Duncan, Sherman & Co., as aforesaid of the sum of £1,200 and did then and there unlawfully and falsely pretend to the said Sir Peter Laurie and others that he the said Gabriel Sans Garrett had been and was then duly authorized by the said Messrs. Duncan, Sherman & Co. for their account and on their behalf, the payment of the said sum of £1,200 from the said Sir Peter Laurie and others, as such bankers and correspondents of the said Messrs. Duncan, Sherman & Co. as aforesaid, with intent, etc., unlawfully, etc., to obtain from the said Sir Peter Laurie and other divers moneys to a large amount, to wit, £1,200 of the moneys and property of the said Sir Peter Laurie and others, to cheat, and defraud them of the same.

"Whereas the said Gabriel Sans Garrett, had not at any time been, and was not then, or at any time duly or at all authorized by the said Messrs. Duncan, Sherman & Co. to demand for their account, or on their behalf or otherwise, from the said Sir Peter Laurie and others, as such bankers and correspondents of the said Messrs. Duncan, Sherman & Co., as aforesaid or otherwise, the payment of the said sum of £1,200 or any part thereof, which said false pretense the pris-

oner at the time, etc., knew to be false. And so the jury say, that the Gabriel Sans Garrett by means of the said false pretenses on the day, etc., at the parish, etc., did attempt and endeavor unlawfully, etc., to obtain from the said Sir Peter Laurie and others, such money as aforesaid, then being their property, and to cheat and defraud them thereof."

The eighth count stated the pretense to have been made to Thomas Druitt, then being clerk to Sir Peter Laurie and others, and was in other respects the same as the seventh.

The fifteenth count charged, that on the same day and year, he did unlawfully, etc., pretend to Sir Peter Laurie and others, that he had been, and then was duly authorized by Alexander Duncan and others, then carrying on business in New York, in the United States of America, under the style or firm of Messrs. Duncan, Sherman & Co., to demand payment for their account, and on their behalf of the sum £1,200 from the said Sir Peter Laurie and others, with intent, etc., unlawfully, to obtain from the said Sir Peter Laurie and others, £1,200 of the money and property of the said Sir Peter Laurie and others, and to cheat and defraud them of the same; whereas the said prisoner had not at any time been, and was not then or at any time duly or at all authorized by the said Alexander Duncan and others, to demand for their account or on their behalf or otherwise, from the said Sir Peter Laurie and others, the payment of the said sum of £1,200 or any part thereof, which said false pretense at the time, etc., the prisoner knew to be false. And so the jury say that the prisoner by means of the said last mentioned false pretense, on the day and year, etc., at the parish, etc., and within the jurisdiction, etc., did attempt and endeavor unlawfully, etc., to obtain from the said Sir Peter Laurie and others, such moneys as aforesaid, then being their property, and to cheat and defraud them thereof.

The sixteenth count is similar in form and substance to the ninth count, but alleges that the pretense was made to one Thomas Druitt, then being clerk to Sir Peter Laurie and others.

The prisoner was convicted on these counts only, and it is unnecessary to state the others.

On the trial it appeared that Messrs. Duncan, Sherman & Co., of New York, the correspondents of the Union Bank in London, in which Sir Peter Laurie and others were partners, were in the habit of issuing circular letters of credit for certain sums, with a list of correspondents in different parts of the world, authorizing the person to whom letters of credit were given to draw in favor of one of those correspondents, for such part as he might require of the stipulated sum for which the

letters of credit were given. The Union Bank correspondent, on giving cash on such draft, was to indorse the amount on the circular, and when the whole was advanced, the last person making an advance, retained the circular. The circular letters of credit were each numbered with distinctive numbers. The prisoner having procured such a circular from Messrs. Duncan, Sherman & Co., at New York, for £210, No. 41, came to England, and there drew drafts in favor of the named correspondents there to the amount in different sums of less than £210, and consequently retained the circular letter of credit, those sums being indorsed on it. He then went to St. Petersburg, and there exhibited the letter of credit to Wilson & Co., of that place, one of the firms mentioned in the list of correspondents, it having been then altered by him, by the addition of the figure 5 to £210, and converted into a letter of credit for £5,210, No. 41. He obtained from that house several sums, and finally a sum of £1,200, and another of £2,500 on drafts for those amounts on the Union Bank, drawn by the prisoner in favor of their firm in London, all of which were indorsed on the back of the letter of credit.

Wilson & Co., on receiving those drafts, forwarded them to their house in London, and they duly presented the draft for £1,200 on the Union Bank, and required payment of it.

It becomes unnecessary to state the circumstances as to any other draft, the proof of one case being sufficient to raise the point made for the defendant. The Union Bank having been advised of the draft, No. 41, by Sherman & Co., a draft for £210 only and so discovering the fraud, refused to pay the £1,200, and the defendant being afterwards found in England was taken in custody, and then the indictment in question was preferred against him.

*Robinson*, the prisoner's counsel, contended—

1. That the prisoner had committed no offense in London.
2. That he had not committed the offense charged in the indictment.

I thought a person, though personally abroad, might commit a crime in England, and be afterwards punished here; as, for instance, if he by a third person sent poisoned food to one in England, meaning to kill him, he would be guilty of murder if death ensued, although he could not be amenable to justice till he was personally within the jurisdiction and I thought it was a question for the jury whether, although the prisoner's immediate object was to cheat Wilson & Co., at St. Petersburg, by means of the forged letter of credit, he did not also mean so that they or their correspondents or the indorsees from them should present the draft which was unauthorized by the true letter of credit, and

obtain payment of it from the Union Bank in London by presenting it as a true one, and I left the question to the jury whether he did so intend, and the jury found that he did.

The prisoner's counsel also contended that that if he did so mean and could be considered as making Wilson & Co., of London, his innocent agents to present the unauthorized cheque, that he did not mean to obtain the amount of the cheque from the Union Bank in the sense of that word in the indictment, which it was contended meant an obtaining for himself, but that he only meant to enable Wilson & Co., of London, to obtain it for themselves. *Rex* v. *Wavell*,[1] was cited.

I thought it right not to pass sentence on the prisoner, but to respite judgment until the opinion of the judges could be taken upon both these points.

I accordingly request their opinion.

J. PARKE,

The case was argued on 19th November, 1853, *coram* JERVIS, C. J., POLLOCK, C. B., PARKE, B., COLERIDGE, J., WILLIAMS, J., and CROMPTON, J., and reargued November 25th, 1853, *coram* Lord CAMPBELL, C. J., PARKE, B., COLERIDGE, J., MAULE, J., PLATT, B., WILLIAMS, J., TALFOURD, J., and CROMPTON, J.

*Byles*, Serjeant (with him *Robinson*).

1. The defendant did not intend or attempt to defraud the Union Bank at all in contemplation of law.

2. When the draft was presented by Wilson & Co., he had committed no offense in England, and would not if it had been paid.

3. He did not intend to obtain any "chattel, money or valuable security" within the meaning of 7 and 8 George IV.[2]

Upon the last point we contend that even if money had been parted from by the Union Bank, yet the defendant would not have obtained any "chattel, money or valuable security." Wilson & Co., would indeed have obtained the money, but for their own benefit, and they would not have been bound to account to the defendant. He would only have obtained credit in account with the Union Bank by overdrawing his account. This is, however, scarcely an open question, as it seems to have been decided in *Rex* v. *Wavell*.[3] There the defendant obtained credit in account from his own bankers by lodging with them a fictitious bill of exchange, and it is held that although the bankers paid money for him in consequence, by honoring his cheques drawn in favor of other persons, yet it was not a case within the statute. Lord Tenterden saying "he only obtains credit in account, somebody else receives the money." That case can not be distinguished from the pres-

[1] 1 Moo. C. C.

[2] ch. 29, sec. 53.

[3] 1 Moo. C. C. 224.

ent. Suppose a man utters a £5 note, knowing it to be forged. As between himself and the person to whom he utters, he might, supposing the misdemeanor did not merge in the felony, be guilty of obtaining money by false pretenses, but if the note subsequently passed through the hands of fifty other persons it can not be said that every time it changed hands there would be an obtaining money by false pretenses.

Lord CAMPBELL, C. J. After he once had the money he would have no further interest in the matter.

*Byles*, Serjeant. So here it was a matter of indifference to the defendant whether the draft were paid or not. If a man draws a cheque upon a banker with whom he has no account, or to an amount beyound his account, that is a fraudulent pretense to whom it is presented but not to the banker.[1]

*Huddleston* (with him *Dearsly*), in support of the conviction, was then heard upon this point. It is not necessary to constitute an offense within the act of Parliament, that there should be a getting of money from the party himself, or its use, but the inducing another to part with his money under such circumstances as amount to cheating is sufficient. The words of the statute are, "obtain from any other person." Suppose a man intending to ruin another induces him, by a false pretense, to part with a large sum of money to a third party, would it not be obtaining money under false pretenses?

MAULE, J. You say it is sufficient if a man, by false pretense, induces another to spend his money?

*Huddleston.* There must be the intent to cheat or defraud.

MUALE, J. The word "obtain" means the same as the word "get" in its sense of "acquire."

COLERIDGE, J. You must consider the word with reference to its use in the statute, which draws a distinction between larceny and false pretenses.

*Huddleston.* The statute does not contemplate the benefit of the the party defrauding, but the injury to the party defrauded.[2] Here there was an acquiring to the use of the defendant. It is not necessary that the party from whom the money is obtained should actually hand it over to the person making the false pretense. This case is distinguishable from that put on the other side of the £5 forged note. The jury have found, that defendant meant that Wilson & Co., in St. Petersburg, or their correspondents or indorsers, should present a draft, and obtain payment of it from the Union Bank. Thus Wilson & Co. are the agents pointed out and mentioned by the defendant himself,

1 Rex *v.* Lara, 5 T. R. 565.

2 Reg. *v.* Jones, 1 Den. C. C. 188.

as the persons to whom the Union bank, with whom he falsely asserts he has credit, should pay the money. They are the persons to receive it.

Lord CAMPBELL, C. J. What were they to do with the money when received?

*Huddleston.* They were to apply it to his own use. An actual reduction of the money into the possession of the defendant can not be necessary. *Wavell's Case* is distinguishable, the decision being, that no specific sum was obtained, but credit in account.

COLERIDGE, J. How is the false pretense made out? He had the circular letter of credit in his possession. The cheque imported only that he had funds.

PARKE, B. The check itself represented that it was authorized by the letter of credit. It referred to it by the figures 41. But that point is not reserved.

*Huddleston.* If the bankers had paid the money, they might have sued defendant for money paid to his use. Their payment to Wilson & Co. would have been a good payment to him.

*Byles*, Serjeant, replied.

The court then gave judgment, with argument upon the first two points as follows: —

Lord CAMPBELL, C. J. I am of opinion that the conviction can not be supported. The question is, whether, supposing the Union Bank honored the defendant's draft upon them, he could then have been indicted under this act of Parliament, for obtaining any chattel, money, or valuable security. I am clearly of opinion he could not. I do not proceed upon the ground that the offense was committed beyond the jurisdiction of the court, for if a man employ a conscious or unconscious agent in this country, he may be amenable to the laws of England, although at the time he was living beyond the jurisdiction; but I think this would not have been an obtaining of money within the meaning of the act of Parliament, which contemplates the money being obtained according to the wish and for the advantage, or at all events, to gain some object of the party who makes the false pretense. Here it was not to gain any object, and it was not according to his wish. He would derive no benefit from the cheque being honored. He had obtained his full object in St. Petersburg, and had the money in his pocket, and it would have been for the advantage of the defendant if the draft had been burnt or sent to the bottom of the sea. The statute was intended to meet a failure of justice arising from the distinction between larceny and fraud. But with regard to larceny, we must see whether there is not some advantage to be gained, not necessarily a pecuniary advantage, but some wish gratified by the taking and conversion, otherwise it

would not be larceny. Then we are pressed by the finding of the jury, but they merely meant to say that the defendant foresaw that the cheque would be presented to the Union Bank, and not that he wished it. In one sense it may be said, that he meant it according to the maxim, that everybody must be presumed to mean or intend the natural consequences of his act, but it is impossible to say that it was the real wish of the party when he drew the cheque, that it should be presented and honored. A gross fraud has been committed, but not an obtaining money under false pretenses within the statute.

Parke, B. The word "obtain" as used in the statute, seems to mean not so much a defrauding or depriving another of his property, as the obtaining some benefit to the party making the false pretense. In *Wavell's Case*, there was a false pretense, with the view of obtaining a specified sum of money, and it appears to have been decided upon the ground that no chattel or valuable security was obtained by means of that false pretense. The difficulty I have had supposing it to be the law, that this is not a case in which the party may be considered as having obtained some benefit, but I do not feel so strongly upon this point as to compel me to differ in opinion from my lord. It is not shown that he would have obtained the money if the draft had been honored and the money paid. I think, therefore, this conviction fails.

Coleridge, J. Upon the question of construction, the point to be considered is, whether if the money bad been obtained, this would be a case within the fifty-third section of the act. It is quite clear it can not be said the defendant actually obtained the money himself, nor do I think he obtained it by means of any agent. The obtaining must be either by the party's desire or intention, or for his benefit, but there is no foundation for saying that the money would have been obtained in this case either in one of these ways or the other. The defendant did not desire it, he could not have intended it, for he knew perfectly well that the payment was out of the question. The finding of the jury only means, that the defendant contemplated it as aprobable thing, that Wilson & Co. would present the draft.

Maule, J. I think all the defendant did with respect to the matter in hand was done at St. Petersburg, and no part of it in London. That which was done in London by Wilson & Co., is sought to be brought home to the defendant as an act of his, when it is clear he would desire that that very act should not be done. It is quite clear the jury never intended to say (if they did it is quite contrary to the facts of the case), that he requested, desired or ordered or made Wilson & Co. his agents to present the draft, but they must have meant that he considered that would take place which would naturally take place.

If a man uttered a forged note with intent to defraud the Bank of England, if the bank pay the note, they would be defrauded, and he must be responsible for his act. The question there depends upon the manner or mode in which the bank parts with the money and not upon who gets it. By the circumstances under which the bank is cheated out of their money, they are defrauded. But whether money is obtained or not by false pretenses does not depend upon the mode in which it is obtained, but upon the person and manner by whom and in which it is received. Here the money would have been obtained by some persons whom he foresaw would present the draft. They did not mean to apply the money to his purposes, but their own. I am, therefore, of opinion that the prisoner is not criminally responsible for what took place in London. He did not order it to be done. It was no act of his. And for the prisoner's own act in St. Petersburg, he is not responsible in London.

PLATT, B. The matter was complete as far as the defendant was concerned when the parties at St. Petersburg were deluded into giving him money upon the cheque. It can not be said that a party who presents a cheque for his own benefit is the agent of another who receives no benefits whatever.

The other members of the court concurred.

*Conviction quashed.*

---

## NOTES.

§ 441. **Fraud to be Indictable at Common Law Must Injure Public.** — A mere private fraud was not indictable at common law.[1] In *R.* v. *Bryan*,[2] the defendant came to a mercer, and affirmed that she was a servant to the Countess of Pomfret, and was sent by her to fetch some silks for the queen, endeavoring thereby to defraud the mercer; whereas, in fact, she was no servant of the countess, and was not sent upon the queen's account. After verdict for the King, it was moved in arrest of judgment, that there being no false tokens or any actual fraud committed, there was no offense indictable. *Reeve*, *contra*, cited a case from Ventris of an indictment for a conspiracy to charge a man with a bastard child, where there really was no child, so that the party could not suffer. The court said, there the conspiracy was the crime, and an indictment will lie for that, though it be to do a lawful act. This is no more than telling a lie, and no custom being shown to maintain it, the judgment must be arrested. In *R.* v. *Pinkney*, the defendant was indicted for selling a

[1] R. *v.* Wheatly, 2 Burr. 1125; 1 W. Bl. 273 (1761). And see Bennett and Heard's note to this case, 1 B. & H. Ld. Cr. Cas. 6; Com. *v.* Woodrun, 4 Clarke, 362 (1832); Com *v.* Hickey, 2 Pars. 317 (1843); Niven's Case, 5 City H. Rec. 79 (1820).

[2] 2 Str. 866.

sack of corn at Rippon market, which he falsely affirmed to contain a Winchester bushel, *ubi revera et in facto plurimum deficiebat*, and the indictment was quashed upon motion. And in the same case it was said, that if a shopkeeper who deals in cloth pretends to sell ten yards of cloth, but instead of ten yards bought of him, delivers only six, yet the buyer can not indict him for delivering only six, because he might have measured it, and seen whether it held out as it ought to do or not. In *R.* v. *Nicholson*, before Lord Raymond, the defendant being indicted for selling six chaldrons of coal, which ought to contain thirty-six bushels each, and delivering six bushels short, Lord Raymond ordered him to be acquitted. The same decision was made in *R.* v. *Dunnage*,[1] and in *R.* v. *Osborn*, four year afterwards, in the same court. Mr. Justice Ashton thought that this selling short measure instead of full measure, was worthy the attention of the Legislature, although it might not be indictable at common law unless charged to be by false measure; and Wilmot, J., added: "The reason why this is not indictable, is, because it is in everybody's power to prevent this sort of imposition, whereas a false measure is a general imposition upon the public, which can not well be discovered." In *R.* v. *Combrune*,[2] the defendant was charged with having delivered to Susan Farmer two hundred and seventy-four gallons of strong beer, when he ought to have delivered two hundred and eighty-eight gallons, as was agreed and paid for. It was moved to quash this indictment, as this was a fraud of a private nature, for which an action upon the case for a deceit was the proper remedy, and here was no charge that the defendant sold by false measure. This was held a mere action of deceit, and the indictment was quashed.[3] So, it is not an indictable cheat, to obtain goods on a promise to send the money for them by the servant who should bring them.[4] And in *Hartmann* v. *Commonwealth*,[5] it was held that obtaining a false credit otherwise than by false tokens, or the removal and secreting of goods with intent to defraud creditors, are not indictable at common law. And this was held in *Rex* v. *Lara*,[6] where the defendant, in payment for goods purchased, fraudulently gave a check on a bank where he knew he had no funds. Lord Kenyon said: "What the defendant did was immoral and highly reprehensible, but as he used no false token to accomplish his deceit, the judgment must be arrested."

In *Rex* v. *Bower*,[7] the defendant was found guilty of "knowingly exposing for sale and selling a gold chain, under the sterling alloy, as and for gold of the true standard weight." On motion in arrest of judgment, Lord Mansfield said: "The question is, whether the exposing wrought gold to sale under the standard is indictable at common law? It is clearly an imposition, but I incline to think it is one of those frauds only which a man's own common prudence ought to be sufficient to guard him against, and which therefore is not indictable, but the party injured is left to his civil remedy." In *R.* v. *Duffield*,[8] the defendant was indicted for a cheat in delivering less coal than was purchased, but the indictment was quashed. In *Regina* v. *Jones*,[9] the defendant came to A., pretending that he was sent by B. to receive £20, and he received it, whereas B. did not send him. Being indicted therefor, the indictment was

1 2 Burr. 1130.
2 1 Wils. 301.
3 See, also, Rex *v.* Reed, 7 C. & P. 848.
4 Rex *v.* Goodhall, R. & R. C. C. 461.
5 5 Barr, 60.
6 6 T. R. 565.
7 1 Cowp. 323.
8 Say. 146.
9 1 Salk. 379; 6 Mod. 105.

quashed, the court saying: "It is not indictable unless he came with false tokens. We are not to indict one man for making a fool of another. Let him bring his action." [1]

In *Rex* v. *Channel*,[2] an indictment was against the defendant for "that he keeping a common grist-mill and boy employed by W. B. to grind three bushels of wheat, did *vi et armis*, *illicite* take and detain forty-two pounds weight of the wheat." Upon a demurrer, judgment was given for the defendant, there being no actual force laid, and this a matter of a private nature, for which an action would lie.

In *Rex* v. *Haynes*,[3] it was held not indictable for a miller, who received good barley at his mill to grind, to deliver a mixture of oatmeal and barley meal in return. The meal given in exchange in this case was in fact musty and unwholesome, but as the indictment was insufficient in its allegations to convict upon that point alone, the judgment was reversed. Lord Ellenborough said: "As to the point, that this is not an indictable offense, because it respects a matter transacted in the course of trade, and where no tokens were exhibited by which the party acquired any greater degree of credit, if the case had been that this miller was owner of a soke mill, to which the inhabitants of the vicinage were bound to resort in order to got their corn ground, and that the miller's abusing the confidence of this, his situation, had made it a color for practicing a fraud, this might have presented a different aspect; but as it now is, it does seem to be no more than the case of a common tradesman who is guilty of a fraud in a matter of trade or dealing, such as is adverted to in *Rex* v. *Wheatly*, and the other cases, as not being indictable. These objections, therefore, and one is sufficient, seem to be fatal."

In *Commonwealth* v. *Warren*,[4] Warren was indicted for contriving and intending to deceive, cheat, and defraud one Adams, by falsely pretending and affirming to him that his name was Waterman, that he lived in Salem, and there kept a grocery store, and that he wished to purchase goods on credit, giving his own note as security therefor; and Adams, confiding in such false pretenses and affirmations, sold him the goods, and took his note, which he subscribed with the name of Waterman. This was held no crime. Parsons, C. J., said: "We see here no conspiracy, for the defendant was alone in the fraud, and no false tokens to induce a credit; and as for false weights and measures, there is no pretense. We can not, therefore, consider the facts stated in the indictment (however injurious they were to Adams), as constituting a public indictable offense." It was held no crime, but only a private wrong, for the grantee of a deed, lodged with a third person as an escrow fraudulently to obtain possession of the deed from such a depositary.[5] In *People* v. *Babcock*,[6] A., having a judgment against B., the latter said he would settle it by paying money in part, and giving his note for the residue; on which A. drew a receipt in full discharge of the judgment, and B. obtained the receipt without paying the money or giving the note; upon which he was indicted for having obtained the receipt "falsely, fraudulently, and deceitfully, and under false colors, acts and pretexts," etc. It was held there was no common-law offense, no cheating by any false token, and nothing but a false assertion, which common prudence would have guarded against, and, therefore, that no indictment would lie. In *People*

[1] 2 Ld. Raym. 1013.
[2] 2 Str. 793.
[3] 4 M. & S. 214.
[4] 6 Mass. 72.
[5] Com. *v.* Hearsey, 1 Mass. 137.
[6] 7 Johns. 201.

v. *Miller*,[1] where the defendant obtained possession of a promissory note by pretending that he wished to look at it, and then carried it away, and refused to deliver it to the owner; it was held that this was merely a private fraud, and not punishable criminally. In *State* v. *Wilson*,[2] it was held not an indictable cheat to sell a girl as a slave who was not known to be free, and the principle of the English decisions was approved. Neither is it an indictable cheat to put a large stone into one roll of butter, with intent to defraud the buyer.[3]

So a bare lie is not indictable,[4] as obtaining a quart of whisky by falsely pretending to be sent by another for it.[5]

In *Commonwealth* v. *Baker*,[6] the prisoner falsely represented to a lady that her husband had just been arrested and was about to be sent to prison, but for $40 he could get him out, when she at once gave him the money. In charging the jury ALLISON, J., said that in order to convict of false pretenses the representation must be such as to cause the party deceived to believe the defendant responsible for the credit given. A mere naked lie, void of such representation of property responsibility was not sufficient.

But by many statutes both in England and the United States the fraudulent disposition of goods and obtaining goods by fraud or "false pretenses" is indictable.

§ 442. **Fraud — Selling Mortgaged Property** — Under the Texas statute, the mortgage must be in writing and the party injured must be the holder of the lien.[7] To convict of fraudulently disposing of mortgaged property, the mortgage must be subsisting, valid, and unpaid at the time.[8] A growing crop is not "personal or movable property" within the Texas Code.[9]

§ 443. —— **Removing Goods with Intent to Defraud — Refusal to Surrender Not.** — To constitute the offense of fraudulently removing goods with intent to defraud creditors there must be an actual secreting or conveying of them away. A mere refusal to surrender them is not enough.[10]

§ 443*a*. —— **Fraudulent Intent.** — So there must be an intent to prevent the property from being made liable for the payment of debts.[11]

§ 443*b*. —— **Persons with Debts not Due not "Creditors."**—Creditors whose debts are not due are not protected by the statute. So a debtor may lawfully prefer a creditor whose claim is not due.[12] Under the statute punishing the selling of mortgaged chattels, the prisoner must do so intending to defraud the mortgagee thereof — it is not sufficient that he intended to defraud some third person.[13]

§ 443*c*. —— **Removing Property with Intent to Prevent a Levy.** — It is a good defence to this charge that the defendant's removal consisted only of a

1 14 Johns. 371.
2 2 Constit. 135.
3 Weirerback *v.* Trone, 2 W. & S. 408.
4 State *v.* Simpson, 3 Hawks. 620 (1825).
5 Chapman *v.* State, 2 Head, 56 (1858).
6 8 Phila. 613 (1871).
7 Moye *v.* State, 9 Tex. (App.) 88 (1880).
8 Satchell *v.* State, 1 Tex. (App.) 438 (1876).
9 Hardeman *v.* State, 16 Tex. (App.) 1 (1884).
10 Com. *v.* Smith, 1 Brewst. 347 (1867).
11 Com. *v.* Smith, 1 Brewst. 348 (1867).
12 Com. *v.* Smith, 1 Brewst. 348 (1867).
13 State *v.* Ruhnke, 27 Minn. 310 (1880).

change of residence of himself and family which he had communicated to others, even though the creditors did not hear of it.[1]

§ 444. —— **Removing Nuisance.** — A mortgager who removes a building situated upon mortgaged premises which is so ruinous as to be a public nuisance, for the purpose of abating the nuisance does not thereby incur the penalty of a statute prohibiting the removal of a building "with the intent to impair or lessen the value of the mortgage."[2]

§ 445. **False Pretenses — Breach of Contract not Indictable.** — This is laid down in a number of early cases. In *R.* v. *Bainham*,[3] there was an indictment for that A. borrowed £5 of the prisoner, and pawned gold rings to secure the payment; and at the day, A. tendered the money, but the prisoner refused to deliver up the rings; but this was considered only a breach of civil contract, and not indictable. In *R.* v. *Bradford*,[4] a physician was indicted for not curing his patient in three weeks, as he had promised to do, but the indictment was quashed as being only a breach of contract. And where the justices had made an order that A. should pay his tailor £7 for work done, which, he refusing to do, was indicted; the indictment was subsequently quashed, for it was a matter not indictable.[5] In *R.* v. *Nehuff*,[6] the defendant had borrowed £600, and promised to send the lender fine cloth and gold dust as a pledge; but in fact he sent no gold dust, but only some coarse cloth, worth little or nothing. The court said that was not a matter criminal, for it was the prosecutor's fault to repose such confidence in the defendant.

§ 446. —— **Puffing Goods. — Opinion.** — The mere puffing or exaggeration of the quality of goods is not a false pretense.[7] The law does not extend to mere "tricks of trade," as they are familiarly called, by which a man puffs his wares and deceives no one, as this is an excellent piece of cloth, or this is the best horse in the world.[8] Or where a seller says that a lot is of a certain value, or is "nicely located,"[9] or that certain spoons are as good as a noted manufacturer's.[10]

In a prosecution for false pretenses in the sale of a mortgage, if the property is worth the mortgage it is immaterial that the prisoner represented it to be worth more.[11]

In *Wallace* v. *State*,[12] S. had W.'s note for $150, and agreed with him if he would purchase land of N. he would credit his note for that amount, and W. purchased the land at $130, but represented to S. that N. had raised the price to $150, and S. agreed to take it at that price if W. could not get it for less. N. conveyed the land as S. directed, and S. gave up the note to W. "S.," said the court, "knew the land as well as W. did. He got the title to the land for which he contracted and paid only the price he agreed to pay. He was deceived only as to the price W. had paid for the property, but not as to the ownership, the title or the value of it. It was not, therefore, a false pretense in its legal sense."

1 Thomas *v.* People, 19 Wend. 480 (1838).
2 Chute *v.* State, 19 Minn. 271 (1872).
3 1 Salk. 379.
4 2 L. Raym. 366.
5 R. *v.* Brown, 3 Salk. 189.
6 1 Salk. 151.
7 R. *v.* Reed, 7 C. & P. 848 (1837).
8 State *v.* Phifer, 65 N. C. 325 (1871); State *v.* Young, 76 N. C. 258 (1877).
9 People *v.* Jacobs, 35 Mich. 36.
10 R. *v.* Bryan, Dears. & B. 265 (1857).
11 Keller *v.* State, 51 Ind. 111.
12 11 Lea, 543 (1883).

In *R.* v. *Lee*,[1] the prisoners, Oscar and Joseph Lee, were indicted for endeavoring to obtain 35s of Edward Rye by false pretenses. There was a second count for a conspiracy to obtain money by divers false pretenses.

The evidence showed that Joseph Lee had gone into the shop of the prosecutor, a pawnbroker, and offered an Albert chain in pledge. He asked 35s for it, representing that it was gold; that he had bought it in Oxford Street, and had given £3 10s. for it. It was tested and found to be little better than brass. There was a very small portion of gold, together with a little silver, the chain being of the value of 13s. A policeman was sent for, but before he arrived an inspector brought into the shop Oscar Lee, who had been waiting outside. He said it is my brother; we are dealers; you can do nothing with us: they are nine carat gold chains; we bought them at Debenham & Storr's.

*F. H. Lewis* (for the defendants), submitted that there was no case to go to the jury. The statements which were made by Oscar Lee in the presence of his brother, after he was brought in by the inspector, can not be taken into account, as they were made, not for the purpose of obtaining money, but in order to induce the prosecutor not to give him into custody. With respect to the representation made that the chain was gold, that would not be a false pretense within the statute. In *Regina* v. *Bryan*,[2] it was held that a similar representation would not support an indictment. There the defendant had falsely stated that certain forks which he offered in pledge were equal to Elkington's (Elkington's plate being an article of well known and recognized value in the trade), but the court held that such a misrepresentation was not within the act, it being with respect to quality only, and not as to the description of the thing itself. Then the article is clearly of some value, and the best gold chains are not made of fine gold, they all have alloy mixed with the more valuable metal; and in this case the chain contains some gold, although in a very small quantity.

*Sleigh* (for the prosecution). The case is within the statute. The question for the jury will be whether this is a gold chain within the recognized meaning of that term. If the contention on the other side is correct, then the most minute fraction of gold introduced into a chain of brass would constitute the brass chain a gold one. In *Regina* v. *Bryan* the false statement was simply with regard to quality; here it is made with reference to the thing itself.[3] At all events there is evidence on the count for conspiracy.

*Lewis* (in reply) The two cases cited were fully considered in *Regina* v. *Bryan*, and the same arguments were used. As to the count for conspiracy, that must fail, as the conspiracy is alleged to be by false pretenses to obtain, etc.

THE COMMON SERJEANT. I think there is no evidence to go to the jury. It is the constant practice for the seller to exaggerate the value of his goods and for the buyer to depreciate it without coming within the charge of "false pretenses," as meant by the statute. If because a man represents an article to be equal in quality to something which it is not equal to, he is liable to be indicted, charges of this kind would be multiplied to an alarming extent. I think the prisoner must be acquitted.

*Not guilty.*

[1] 8 Cox, 233 (1859).

[2] 7 Cox's Cr. Cas. 312.

[3] Reg. *v.* Roebuck, 7 Cox, 126; Reg. *v.* Sherwood, 7 Cox, 270.

In *R.* v. *Levine*,[1] the prisoner and one Wood were indicted for unlawfully obtaining money by false pretenses, and in a second count they were charged with a conspiracy to defraud.

*Metcalfe* and *M. Williams* prosecuted.

*Oppenheim* defended Levine. *Besley* defended Wood.

It appeared that, on the 13th of December, Charles Baron, a gentleman living in Hertfordshire, was in Ludgate Hill, and had his attention called to some auction rooms at No. 43. He went in, and saw there Levine, Wood, two females, and another man. Levine was in the rostrum, and Wood was on his right hand. A man came round and showed some goods on a waiter, which were then put up for sale by Levine, Wood generally making the first bid. About half a dozen lots were knocked down to Wood, but no money was seen to pass. Some salt cellars were then put up and bought by Miss Levine. The goods were apparently electroplated. A tea and coffee service was then put up, and Wood bid for it. It was started at £6 and knocked down for £7. Baron did not bid for it. Before it was knocked down Levine said he would warrant them the best silver genuine electroplate, and lined with gold, and the cost price would be £20. When it was knocked down Wood said it was worth more than £7. Levine went up and asked for Baron's name and address, which was given to him. He said to Baron, "The lot was knocked down to you." Baron said it was not. Previous to that, Wood had wanted to know whether it was knocked down to him, and Levine said, "No, it was knocked down to that gentleman," pointing to Baron. He said, "You need only pay a deposit." Baron said, "No, I will pay the full amount." Baron told Levine several times that he did not bid for them, and that they were of no use to him, but the latter said they were worth more money, and he would warrant them. Baron said if they were knocked down to him he would pay for them, and eventually did so, on the representation of Levine, that they were the best silver electroplate lined with gold. Baron afterwards bought a *liqueur* stand for 22s, on a similar representation, although he had never bid for it. While Baron was in the shop, no other money was paid to Levine except what he paid.

Charles Thomas Clements, an auctioneer's assistant, said he had known Levine all his life, and had been in his employment about three weeks previous to the sale of these goods. Levine carried on the business of an auctioneer at 43 Ludgate Hill. His sister used to be there and bid for small goods and pretend to buy them. Wood's duty was to bid for goods, and persuade people to buy them. Wood never used to pay for the lots he bought. Clement's duty was to run up the goods to a certain price, and then if a stranger in the room bid a shilling or two more, to discontinue bidding.

Henry Wright Atkins, an electroplate manufacturer, said that the tea and coffee service were of Britannia metal, covered with a transparent film of silver, it was, in fact, the very worst electroplate. The *liqueur* stand was of the same description. The wholesale price of the tea service would be 21s or 22s at the outside. The witness' firm had made such goods, not for the shops, but to see if they could get a trade of that kind. The retail price of the service would be about 30s. The *liqueur* stand would be very dear at 20s. The best electroplate is plated on nickel silver.

*Oppenheim*, for Levine, submitted that this case was governed by the decision of the Court for Crown Cases Reserved, in *Regina* v. *Bryan*,[2] where it was held

[1] 10 Cox, 374 (1867).

[2] 7 Cox, C. C. 313.

by ten of the judges (Willes and Bramwell *dissentientibus*), that representations "that certain spoons were of the best quality, and equal to Elkington's A, that the foundation was of the best material, and that they had as much silver as Elkington's A," though false, amounted to a mere misrepresentation of the quality of a commodity, which was not the proper subject of an indictment. In this case there was not even such a definite standard of quality as Elkington's A mentioned, and therefore there was less ground for holding the offense indictable.

*Besley*, for Wood, in support of the same objection, quoted a decision of Bramwell B., at the Warwick Assizes, in *Regina* v. *Ridgeway and another*,[1] defining the offense within these narrow limits, that if in selling coals by weight the seller falsely represented the quantity, the offense would be committed, whereas, if he were selling for a lump sum, and made the same misrepresentation the offense would not be committed. He also quoted *Regina* v. *Lee*[2] where in this court it was held that the represtation of a chain as gold which was a compound of brass, silver, and gold, was not a false pretense within the statute. He further submitted that there was no evidence of Wood's making any pretense at all until after the bargain was concluded for £7, when he said the tea service was worth more money. As to conspiracy the count was bad upon the face of it, for not alleging by what means the prosecutor was to be cheated. Such a count in *Sydserff* v. *Queen*,[3] had been held good upon a writ of error, but it had never been held so before verdict. Another objection was that there was no evidence of conspiracy, and lastly, that if there was any question of conspiracy, it could only be to obtain the prosecutor's money by representations which, on the authority of *Regina* v. *Bryan*, were perfectly lawful.

*Metcalfe*, for the prosecution, contended that if *Regina* v. *Bryan* governed the counts for false pretenses, it had no application to the charge of conspiracy, as what was lawful for one person to do might be unlawful for two to agree to do.

The COMMON SERGEANT. As for instance, hissing an actor.

*Metcalfe*. Or buying goods at an auction, and afterwards dividing them at a "knock out." Any person might buy at as low a price as he could, but he must not agree with other persons not to bid against them.

The COMMON SERJEANT, after consulting the Recorder, said: The counts for false pretenses alleged that the defendants falsely pretended that the goods were electroplated, and lined with gold, and the evidence proves that those pretenses were literally true. Those counts, therefore, fail, and it is only necessary to determine whether this case is governed by *Regina* v. *Bryan*, for the purpose of seeing whether the counts for conspiracy can be maintained. It is most important not to bring within the criminal law the ordinary enhancing of value and quality by the seller of goods. There is always a conflict of knowledge and skill between a buyer and seller, the one wishing to buy as advantageously, and the other to sell as advantageously as he possibly can, and it would be very dangerous to extend the criminal law to such cases.

At present the line is fixed, and there must be a false representation of an existing fact, operating upon the mind of a buyer, and deceiving him in such a manner that he can not protect himself against it. The only means suggested

1 3 F. & F. 858. 2 8 Cox, C. C. 233. 3 11 Q. B. 245.

upon this evidence as the means by which the defendants agreed to obtain the prosecutor's money are means which upon the authority of *Regina* v. *Bryan* are not unlawful. There is, therefore, no conspiracy and no case for the jury to consider.

*Not guilty.*

§ 447. —— **Value of Business.** — In *R.* v. *Williamson*,[1] the prisoner was indicted for obtaining money from one S. by means of false pretenses, the false pretenses laid being, (1) that the prisoner was then doing a good business; (2) that he said that he had sold a good business for £300; (3) that it was necessary for his safety, if he engaged S. as his assistant, that he should have from him a deposit of £50.

There was a second indictment charging that the prisoner obtained money from one W., by falsely pretending, (1) that he was then doing a business with returns of £100 a week; (2) that he had sold a business for £300.

*Lilley*, for the prosecution. *Oppenheim*, for the prisoner.

On the first indictment the prosecutor, S., who had been engaged by the prisoner as assistant, was called to prove the representations, and to show that upon the faith of the representation he entered into an engagement with the prisoner for a small salary and half profits, and also deposited £50 as a security, whereas in truth the business was worthless, and the prisoner a bankrupt. He stated that he had deposited the money in the belief that the prisoner "had a good business."

Byles, J. (to the counsel for the prosecution). On which of the pretenses do you rely? It is like the case of a sale of a business, with exaggerated representations of its value, upon which, though fraudulent, an indictment will not lie.

*Lilley* said he relied on the prisoner's representations that he was doing a good business, and that he had sold a business for £300.

Byles, J. The latter is too remote. You might as well go back to any former transaction of which he had given a representation — that is too remote. As to the other, have you any case in which it has been held that on the sale of a business — the vendor saying it was a good business — he has been thus indicted? (No such case was cited.)[2]

This appears to be rather matter for an action for false representation than for a criminal prosecution.

*Lilley* urged that here the pretense was more entirely false than in any previous case, for the man was a bankrupt.

Byles, J. There is no pretense laid that he was not a bankrupt. The pretense laid is that he had a good business. It is like the case of a sale of a business upon such a representation. No doubt if the business was worthless, there was a gross exaggeration, probably fraudulent; but is it a case for an indictment for obtaining money by means of false pretenses? If so, an indictment would lie in every case of a false and fraudulent representation of the value of a business. Unless some authority to the contrary can be cited, I must rule against the prosecutor.

No case being cited,

Byles, J., directed the jury to acquit the prisoner, on the ground that such a

[1] 11 Cox, 328 (1869).

[2] And, see, Reg. *v.* Watson, 20 L. J. 18, M. C., *contra*.

representation, although grossly fraudulent, was not the subject of a criminal proceeding.

*Not guilty.*

No evidence was offered on the other indictment.

§ 448. —— **False Warranty Not.** — A false warranty of the soundness of a horse is not indictable.[1] So selling a blind horse as a sound one.[2]

In *State* v. *Holmes*,[3] the prisoner falsely represented that a horse in his possession was sound and healthy, knowing this to be not so, whereby he obtained a sum of money. This was held not false pretenses. "If such a falsehood were indictable," said the court "then instead of all the actions which have been brought for deceits and false warranties the defendants should have been indicted for obtaining goods or property by false pretenses."

In *R.* v. *Pratt*,[4] the prisoner was indicted for falsely pretending that a certain mattress was stuffed with wool, whereas in truth and in fact it was stuffed with flock, by means of which said false pretense she did unlawfully obtain, etc., with intent, etc.

*Leigh*, for the prosecution.

It was proved on the part of the prosecution that the prisoner contracted with the prosecutrix to make for her a mattress to be stuffed with best wool at an agreed price. The mattress was made and delivered by the prisoner, and paid for at the agreed price. Being found to be hard and knotty in parts, it was opened about two months afterwards, and then it was discovered that, instead of being stuffed with wool as agreed, seventy pounds weight of a very inferior and different material called flock had been substituted.

MARTIN, B., said he felt much doubt whether this was anything more than a breach of contract or of warranty, for which there was a civil remedy.

*Leigh* referred to the cases of *Regina* v. *Goss* and *Regina* v. *Ragg*[5] and the cases there cited, in which it had been held by the Court of Criminal Appeal that where a seller represented coal to be of a certain weight, when it was not so, and cheese to be of a certain quality by the maneuver of passing off tasters as if extracted from the cheese offered for sale, whereas it was not, were indictable false pretenses.

MARTIN, B., said that on the authority of these cases he would send the case to the jury, but he had some doubt whether the present case was anything more than a breach of warranty, and if the prisoner was convicted he should reserve the point for the consideration of the Court of Criminal Appeal.

*Verdict, not guilty.*

In *State* v. *Chunn*,[6] it was held that selling a slave with a covenant of title, the vendor knowing that he had no such title was not a criminal false pretense.

In *R.* v. *Codrington*,[7] the defendant was indicted for obtaining money by false pretenses. This indictment (which was extremely long) charged that the defendant obtained the sum of £29, 3s, by falsely pretending to a person named Varlow, that he was entitled to a reversionary interest in one-seventh share of a sum of money left by his grandfather, whose name was Wickes; whereas in

[1] R. *v.* Pywell, 1 Stark. 402 (1816).
[2] State *v.* Delyon, 1 Bay, 353 (1794).
[3] 82 N. C. 607 (1880).
[4] 8 Cox, 334 (1860).
[5] 8 Cox, 262.
[6] 19 Mo. 233 (1853).
[7] 1 C. & P. 66.

fact he was not entitled to any interest in any share, etc., negativing the pretenses. Plea, not guilty.

It was opened that the defendant pretended that he was entitled to the reversionary interest mentioned in the indictment, and thereby induced Varlow, the prosecutor, to purchase it on the 22d of December, 1824, at the price of £29, 3s, the defendant having in fact sold all his interest in it to a person named Pick, on the 18th of September, 1824.

To prove the pretense, a deed dated December 22, 1824, assigning the defendant's interest in his one-seventh share of the money to Varlow, was put in, and in this deed there was the usual covenant for title.

*Ludlow*, objected, that this deed was no evidence of any false pretense, for if it was, every breach of every covenant would be indictable.

LITTLEDALE, J. Certainly a covenant in a deed can not be taken to be a false pretense.

The prosecutor was then called, and he proved that the defendant asked him to purchase a seventh share of some money that he would be entitled to under his grandfather's will on the death of one of his relatives, and that he agreed to purchase it, and got a deed of assignment executed to him, and he thereupon paid the defendant the purchase-money. To prove the falsehood of the pretense, the previous assignment by the defendant to Pick was put in.

*Ludlow*, objected, that the prosecutor did not advance the money in consequence of the verbal pretense used by the defendant, but took the covenant as security. What passed between the parties by parol was afterwards embodied in the deed; it was a mere breach of covenant.

*Palmer, contra*. This indictment charges that the defendant obtained the money by pretending that he was entitled to this reversionary interest. This pretense we prove to be false; and yet it is contended that because he reiterated that pretense in a deed it becomes no offense.

*Ludlow*, in reply. It is not everything which is untruly stated at the time of a bargain which is an indictable false pretense. If A. B. sold a horse, and warranted him five years old, and it were proved to his knowledge he was but four he might be indicted for swindling; or, to come nearer this case, if a man sold a piece of land as one hundred acres, without saying "be the same more or less," and in fact the land was only ninety-nine acres and a half, he might be transported; this is really only a breach of covenant.

LITTLEDALE, J. The doctrine contended for on the part of the prosecution would make every breach of warranty or false assertion at the time of a bargain a transportable offense. Here the party bought the property, and took as his security a covenant that the vendor had a good title. If he now finds that the vendor has not a good title, he must resort to the covenant. This is only a ground for a civil action.

*Verdict, not guilty.*

§ 449. —— **Pretense Must be False.** — It is indispensably necessary that the pretense be false.[1]

§ 450. —— **False Pretense Turning out True.** — In this case it has been held no crime is committed.[2]

[1] Tyler *v.* State, 2 Humph. 298 (1840).

[2] Re Snyder, 17 Kas. 542; Keller *v.* State, 51 Ind. 111; Scott *v.* People, 62 Barb. 63 (1872).

§ 451. —— **Prisoner Must Know that Pretense is False.** — The prisoner must know the pretense to be false.[1]

§ 452. —— **Representation must be Relied on.** — The prosecutor must have relied on the false representation.[2]

In *Commonwealth* v. *Drew*,[3] the prisoner having opened an account with a bank and drawn a check under a fictitious name, subsequently drew a check when he had no money on deposit, presented it himself and was paid. He was held not guilty of false pretenses. MORTON, J., delivering the following opinion: "These indictments are founded upon the statute of 1815.[4] The first section provides 'that all persons who knowingly and designedly, by false pretense or pretenses, shall obtain from any person or persons, money, goods, wares, merchandise or other things, with intent to cheat or defraud any person or persons of the same, shall, on conviction,' be punished, etc., as therein specified. This section, which is a copy of statute 30 George II.,[5] is revised and combined with some provisions in relation to other similar offenses in the Revised Statutes.[6]

"To constitute the offense described in the statute and set forth in these indictments four things must concur, and four distinct averments must be proved: —

"1. There must be an intent to defraud.

"2. There must be an actual fraud committed.

"3. False pretenses must be used for the purpose of perpetrating the fraud; and

"4. The fraud must be accomplished by means of the false pretences made use of for the purpose, viz., they must be the cause which induced the owner to part with his property.

"It is very obvious that three of the four ingredients of the crime exist in the present case. The fraudulent intent, the actual perpetration of the fraud, and the fact that some of the pretenses used were the means by which it was accomplished, are established by the jury. And although the prisoner's counsel has objected to the sufficiency of the evidence, yet we see no reason to question the correctness of their decision. It only remains for us to inquire, whether the artifices and deceptions practiced by the defendant and by means of which he obtained the money, are the false pretenses contemplated by the statute.

The pretenses described in the indictments and alleged and shown to be false, are: —

"1. That the defendant assumed the name of Charles Adams.

"2. That he pretended that he wished to open an honest and fair account with the Hancock Bank and to deposit and draw for money in the usual manner and ordinary course of business.

"3. That he pretended that the checks were good, and that he had in deposit the amount for which they were drawn.

"The first is clearly a false pretense within the meaning of the statute. And had the money been obtained by means of the assumption of this fictitious name, there could be no doubt of the legal guilt of the defendant. The eminent

1 Maranda *v.* State, 44 Tex. 442 (1876); Hirsch *v.* State, 1 Tex. (App.) 373 (1876); R. *v.* Burrows, 11 Cox, 258 (1869).

2 People *v.* Tompkins, 1 Park. C. C. 224 (1851); Jones *v.* State, 50 Ind. 473; Thorasson *v.* People, 82 N. Y. 238 (1880); Fay *v.* Com., 28 Gratt. 912.

3 19 Pick. 179 (1837).

4 ch. 136.

5 ch. 24, sec. 1.

6 ch. 126, sec. 32.

lawyer who filled the office of Mayor of New York when the adjudication referred to by the defendant's counsel was made, says, the false pretenses must be the sole inducement which caused the owner to part with his property.[1] This point is doubtless stated too strongly; and it would be more correct to say, that the pretenses, either with or without the co-operation of other causes, had a decisive influence upon the mind of the owner, so that without their weight, he would not have parted with his property.[2] But in this case the assumed name, so far from being the sole or decisive inducement, is clearly shown to have had no influence whatever. The bank officers did not confound the defendant with Charles Adams, and it does not appear that the defendant knew that there was any other person by that name. He never claimed any credit on account of his name, and the coincidence might have been accidental. At any rate it had no influence upon the credit of either, nor any effect upon their accounts or the payment of their checks.

"2. The opening and keeping an account with the Hancock Bank might have been, and doubtless was, a part of a cunning stratagem, by which the defendant intended to practice a fraud upon that bank. But the business was done and the account kept in the usual manner. The defendant made his deposits and drew his checks like other customers of the bank. He made no representation of the course he intended to pursue and gave no assurance of integrity and fair dealing. And we can see nothing in the course of this business, constituting it a false pretense, which would not involve the account of any depositor, who overdrew in the same category.

"3. The pretense, if any such there were, that the check was good, or that the defendant had funds in the bank for which he had a right to draw was false. He had no such funds. Did the defendant make any such pretense? He made no statement or declaration to the officers of the bank. He merely drew and presented his checks and they were paid. This was done in the usual manner. If then he made any pretense, it must result from the acts themselves. What is a false pretense within the meaning of the statute? It may be defined to be a representation of some fact or circumstance calculated to mislead, which is not true. To give it a criminal character there must be a *scienter* and a fraudulent intent. Although the language of the statute is very broad, and in a loose and general sense, would extend, to every misrepresentation, however absurd or irrational or however easily detected; yet we think of the true principles of construction render some restriction indispensable to its proper application to the principles of criminal law and to the advantageous execution of the statute. We do not mean to say that it is limited to cases against which ordinary skill and diligence can not guard; for one of its principal objects is to protect the weak and credulous from the wiles and stratagems of the artful and cunning; but there must be some limit, and it would seem to be unreasonable to extend it to those who, having the means in their own hands, neglect to protect themselves. It may be difficult to draw a precise line of discrimination applicable to every possible contingency, and we think it safer to leave it to be fixed in each case as it may occur.[3]

"It is not the policy of the law to punish criminally mere private wrongs. And the statute may not regard naked lies as false pretences. It requires some

[1] People *v.* Conger, 1 Wheel. Cr. Cas. 448; People *v.* Dalton, 2 *Ib.* 161.

[2] People *v.* Haynes, 11 Wend. 557.

[3] 2 East's C. P. 828; Young *v.* King, 3 T. R. 98.

artifice, some deceptive contrivance, which will be likely to mislead a person or throw him off his guard. He may be weak and confiding and his very imbecility and credulity should receive all practical protection. But it would be inexpedient and unwise to regard every private fraud as a legal crime. It would be better for society to leave them to civil remedies.[1]

"The pretense must relate to past events. Any representation or assurance in relation to a future transaction, may be a promise or covenant or warranty, but can not amount to a statutory false pretense. They afford an opportunity for inquiring into their truth, and there is a remedy for their breach, but it is not by a criminal prosecution.[2] The only case,[3] which has been supposed to conflict with the doctrine, clearly supports it. The false pretense alleged was, that a bet had been made upon a race which was to be run. The contingency which was to decide the bet was future. But the making of the bet was past. The representation which turned out to be false was, not that a race would be run, but that a bet had been made. The false pretense, therefore, in this case related to an event already completed and certain, and not to one which was thereafter to happen and consequently uncertain, and the decision was perfectly consistent with the doctrine and law here laid down.

"A false pretense, being a misrepresentation, may be made in any of the ways in which ideas may be communicated from one person to another. It is true that the eminent jurist before referred to in the cases cited held that it could be made only by verbal communications, either written or oral. If this be correct, no acts or gestures, however significant or impressive, could come within the statute. And brutes, though capable of conveying their ideas and intentions in the most clear and forcible manner, could hardly be brought within its prohibition. Can it make any difference in law or conscience, whether a false representation be made by words or by the expressive motions of the dumb? Each is a language. Words are but the signs of ideas. And if the ideas are conveyed, the channel of communication or the garb in which they are clothed is but of secondary importance, and we feel bound to dissent from this part of these decisions. In this we are supported by the English cases.[4]

"The representation is inferred from the act, and the pretense may be made by implication as well as by verbal declaration. In the case at bar the defendant presented his own checks on a bank with which he had an account. What did this imply? Not necessarily that he had funds there. Overdrafts are too frequent to be classed with false pretenses. A check, like an order on an individual, is a mere request to pay. And the most that can be inferred from passing it is, that it will be paid when presented, or in other words that the drawer has in the hands of the drawee either funds or credit. If a drawer passes a check to a third person, the language of the act is, that it is good and will be duly honored. And in such case, if he knew that he had neither funds nor credit, it would probably be holden a false pretense.

"In the case of Stuyvesant,[5] it was decided that the drawing and passing a check was not a false pretense. But in *Rex* v. *Jackson*,[6] it was ruled that the drawing and passing a check on a banker with whom the drawer had no ac-

[1] Rosc. Cr. Ev. (2d. ed.) 419; Goodhall's Case, R. & R. 461.

[2] Stuyvesant's Case, 4 City Hall Rec. 156; Rosc. on Cr. Ev. (2d ed.) 422; Rex. *v.* Codrington, 1 C. & P. 661.

[3] Young *v.* King, 3 T. R. 98.

[4] Rex *v.* Story, R. & R. 81; Rex *v.* Freeth, *Ib.* 127.

[5] 4 City Hall Rec. 156.

[6] 3 Camp. 370.

count and which he knew would not be paid, was a false pretense within the statute. This doctrine appears to be approved by all the text-writers, and we are disposed to adopt it.[1]

"But to bring these cases within the statute, it must be shown that the drawer and utterer knew that the check would not be paid, and in the cases cited it appeared that that he had no account with the banker. In these respects the case at bar is very distinguishable from the cases cited. If the checks in question had been passed to a third person, it could not be said that the defendant knew that they would not be paid. On the contrary, he had an open account with the bank, and although he knew there was nothing due to him, yet he might suppose that they would be paid. And the fact that he presented them himself, shows that he did not know that they would be refused.

"The defendant presented the checks himself at the counter of the bank. They were requests to pay the amount named in them, couched in the appropriate and only language known there; and addressed to the person whose peculiar province and duty it was to know whether they ought to be paid or not. He complied with the requests, and charged the sums paid, to the defendant, and thus created a contract between the parties. Upon this contract the bank must rely for redress.

"This case lacks the elements of the English decisions. And we think it would be an unwise and dangerous construction of the statute to extend it to transactions like this. This case comes pretty near the line which divides private frauds from indictable offenses; and at first we were in doubt on which side it would fall. But, upon a careful examination, we are well satisfied that it can not properly be brought within the statute.

"*Verdict set aside and new trial granted.*"

In *People* v. *McAllister*,[2] the pretense charged was that the prisoner owned a house and lot in a certain locality, and was building an addition to it, and wished to buy the articles for use in the building. "The information," said CAMPBELL, J., "does not show, and the testimony throws no more light, how this pretense operated as a fraud, or what good the truth of the statement said to have been made would have done the complaining witness. It was entirely compatible with the averment that respondent may have owned other property, or that the house might be a homestead, and in no way subject to legal process, or incumbered to its value. It does not appear that respondent was given to understand that the question asked him about his building was put for the purpose of ascertaining whether it was safe to trust him. He made no representations at all when he asked for credit for this small bill until an inquiry was made, and the only question asked him was the single one whether he was building. This contained no intimation that he was expected to give information concerning the ownership or value of property, or that his credit would depend upon his answer. There can be no offense under the statute, unless the party knows, or has reason to believe, that his representations are relied on as the grounds of credit. And there is nothing in the testimony indicating this; neither does the information point out how any fraud could result from such statements standing alone and unexplained.

"On the trial the claim was that the seller of the goods expected to have a mechanic's lien. But he asked and he obtained no information whatever that

[1] Rosc. Cr. Ev. (2d ed.) 419.

[2] 49 Mich. 12 (1882).

had any tendency to show that such a lien would arise, or would be of any value. While we need not refer to it to make out error, it appears very distinctly that respondent had just such property as he claimed to have, and there is nothing to indicate that the trifling difference in location made, or could have made, any difference in the honesty of the transaction. The court erred in admitting any testimony under the information and in allowing any conviction. There was nothing which had any legal force to prove the crime alleged."

In *Woodbury* v. *State*,[1] the false statement made a ground of the prosecution was as to the prisoner's place of residence. He was convicted and appealed. "A false pretense," said BRICKELL, C. J., "to be indictable, must be calculated to deceive and defraud. As of an actionable misrepresentation it must be of a material fact on which the party to whom it is made has the right to rely; not the mere expression of an opinion, and not of facts open to his present observation, and in reference to which, if he observed, he could obtain correct knowledge. Whether the prosecutor could have avoided imposition from the false pretense if he had exercised ordinary prudence and discretion to detect its falsity, is not a material inquiry. As a general rule, if the pretense is not of itself absurd or irrational, or if he had not at the very time it was made and acted on the means at hand of detecting its falsehood, if he was really imposed on, his want of prudence is not a defence.[2] If the residence of the accused at a particular locality was a material fact in the transaction between him and the prosecutor; if, with the intent to defraud the prosecutor, the prisoner misrepresented the locality of his residence, and by means of the misrepresentation obtained the sewing machine, the misrepresentation being a controlling inducement with the prosecutor to part with his property, it is not a defence that if the prosecutor had taken the precaution to inquire at the particular locality, he could have found it was not the residence of the prisoner, and would not have been deceived and defrauded. The prosecutor had a right to rely on the representation, and there was no obligation or duty to the prisoner to inquire into its truth or whether he was dealing fairly and honestly. The false pretense must not only be, however, of a material fact but it must have been, not the sole, but exclusive or decisive cause, a controlling inducement with the prosecutor for the transfer of the money or property. Other considerations may mingle with the false pretense, having an influence upon the mind and conduct of the prosecutor; yet if in the absence of the false pretense he would not have parted with his property, the offense is complete.[3] But if without the false pretense he would have parted with his property — if that is not an operative moving cause of the transfer — if he did rely and act upon it, there may be falsehood, but there is not crime.[4]

"In view of the evidence of the prosecutor, tending strongly to the conclusion, if it is not a positive affirmation, that the misrepresentation of the locality of his residence imputed to the accused had no influence with him in causing or inducing him to part with the sewing machine, the instructions given the jury seem to us erroneous. If to this phase of the case they can be regarded as directing the attention and consideration of the jury it is only by the construction which counsel, accustomed to a close examination of legal propositions, would place upon them. As a general rule, if affirmative charges assert correct

1 69 Ala. 515 (1881).
2 2 Whart. Cr. L., sec. 2128.
3 People *v.* Haynes, 11 Wend. 557; 28 Am. Dec. 530.
4 2 Whart. Ev., secs. 2120-22.

legal propositions, their generality, obscurity or ambiguity must be obviated by a request for more specific instructions. But if the immediate, direct tendency of such instructions is to mislead the jury, diverting their attention from material evidence and from the consideration of controlling inquiries, or creating the impression that they are authorized to exclude evidence they ought to consider, such instructions are erroneous and must operate a reversal of a judgment they have induced.

"These instructions, omitting all proper reference to the evidence of the prosecutor, tending to show that he was not influenced in parting with the machine by the representation of the accused, that his residence was at a particular locality, in effect excluding that evidence from the consideration of the jury, had an immediate tendency to mislead them. It was the duty of the court to instruct the jury that if the misrepresentation was not an inducing controlling motive with the prosecutor to part with the machine, there should not be a conviction of the accused upon either of the counts for false pretenses.[1] It is not necessary to pass upon the other exceptions as this view will probably be decisive of the case on another trial."

§ 453. **False Pretenses — Intent Must be to Deprive Owner of Property.** — It is essential not only that the pretense was false and the property obtained thereby, but also that the prisoner at the time intended to defraud.[2]

In *R.* v. *Kilham*,[3] the prisoner, by falsely pretending to be a livery man, and that he was sent by another person to hire a horse for him, for a drive, obtained the horse. He returned it the same evening, but did not pay for the hire. This was held not the obtaining of a chattel by false pretenses with intent to defraud.

In *People* v. *Getchell*,[4] the defendant was indicted for false pretenses in procuring the indorsement by the prosecutor of a promissory note by the falsehood that a similar former note was destroyed. On the trial, after proof of the facts charged, the defendant offered to show in defence that he was a partner of the prosecutor; that the latter was bound by agreement to indorse for him to amount larger than the two notes, but had refused to do so, and that the money obtained in the notes was used in the business for their joint benefit. The exclusion of this evidence was held error on appeal. "The indictment," said MARTIN, C. J., "charges that on the 11th of December, 1858, he by means of false pretenses, obtained the indorsement of Strong to a note of one hundred and fifty dollars made by himself. The statute under which the indictment was found, provides that 'every person who, with intent to defraud or cheat another, shall designedly, by color of any false token or writing, or by any other false pretense, obtain the signature of any person to any written instrument, the making whereof would be punishable as forgery, or obtain from any person, any money, personal property or valuable thing, shall be punished,' etc.[5]

"The object of the defence in this case in offering the rejected evidence, was to show that there was no intent to cheat or defraud; the untruth of the pretense being admitted. A falsehood does not necessarily imply an intent to de-

1 Com. *v.* Davidson, 1 Cush. 33.

2 O'Connor *v.* State, 30 Ala. 1 (1857); Brown *v.* People, 16 Hun, 535 (1879); State *v.* Norton, 76 Mo. 180 (1884); People *v.* Baker, 96 N. Y. 340 (1884); Fay *v.* Com., 28 Gratt. 912.

3 11 Cox, 561 (1870).

4 6 Mich. 496 (1859).

5 2 Comp. L., sec. 5783.

fraud, for it may be uttered to secure a right, and however much and severely it may be reprobated in ethics, the law does not assume to punish mere delinquencies as such. To defraud, is to deprive another of a right of property, or money, and this may be accomplished by falsehood; by withholding the right, or property, or by force. In the present case the prosecutor insists that he was defrauded, because he was induced to indorse a note by the false representation of the defendant, that a prior note for the same amount, indorsed by him was defective, and had been destroyed; that he was thereby induced to lend his name for double the amount he otherwise would. The simple fact of procuring by falsehood the indorsement, was not an offense within the statute; it must have been procured with the intent to defraud, and when an intent is made the gist of an offense, that intent must be shown by such evidence as, uncontradicted, will fairly authorize it to be presumed beyond a reasonble doubt. It is true that a man is presumed to intend the natural consequences of his acts, but under the statute, it is not the consequence, but the intention, which fixes the crime. There are no natural consequences, strictly speaking to this act. It is in itself an indifferent act, as the consequences will depend upon what he does with the paper, and this will depend upon his will, in other words, his intent. It was, therefore, necessary for the prosecutor to show something more than the application, the falsehood, and the indorsement, before he could ask a conviction; he should have shown those facts which, in the absence of all other proof, would warrant the jury in finding an intent to defraud; unless such intent is fairly to be inferred from the circumstances attending the act itself. If the fact of negotiating both notes would justify such a finding, yet the presumption thus raised might be repelled by the defendant by exhibiting in evidence such a state of facts as would show that fraud was not designed, or could not have resulted. This he attempted to do by showing the relations of himself and Strong, the obligation of Strong to indorse his paper, his refusal to do so, notwithstanding his contract, the necessity for the money for their joint benefit, and the appropriation of the avails of the note in their business, and according to the terms of their agreement. All this was refused, and the evidence offered for that purpose ruled out.

"We think this evidence would legitimately tend to disprove the presumption of an intent to defraud, and should have been allowed to go to the jury to nable them to determine *quo animo* the indorsement was procured.

"These considerations render an examination of the other errors assigned unnecessary.

A new trial should be granted.

CHRISTIANCY and CAMPBELL, JJ., concurred.

MANNING, J. When by false pretenses, the signature of a person is obtained to a written instrument, where the signing of the name by a third person to such instrument would be punishable as forgery, the law implies an intent to cheat or defraud, and nothing more need be shown to warrant a conviction. But the fraudulent intent implied from the act itself, is not conclusive on the party. He may show there was in fact no intention to defraud.

The Recorder seems to have erred in supposing the implication of law was conclusive, and not *prima facie* evidence only of the criminal intent. In this I think he erred.

*New trial ordered.*

§ 454. —— **Money or Property Must be Obtained.** — In *Regina* v. *Crosby*,[1] the prisoner having entered into an agreement to act as captain of a certain vessel belonging to the prosecutor, upon receiving two-thirds of the net profits of the vessel delivered in a bill for repairs to a larger amount than he had actually paid, and was allowed the amount in the settlement of accounts. MAULE, J., directed an acquittal, saying: "How can it be said that the prisoner obtained any money by this false pretense. I have no doubt at all about the pretense or the falsity of it; but my difficulty is, that he obtained no money by it, but only credit on account; it is only a mere payment of the (amount overcharged). It is like *Wavel's Case.*"[2]

So obtaining by false representations, a note from a minor, is not false pretenses, as the minor is not bound by law to pay it to any one.[3]

In *Regina* v. *Martin*,[4] the indictment charged that the prisoner by falsely pretending to one Cloke, that he was authorized by F., obtained from the said Cloke, certain hop-poles, the property of, and with intent to defraud, the said Cloke.

The prisoner hearing that one F., who lived at M., wanted hop-poles, went to him and agreed to sell him a number at 16s 9d per hundred, to be delivered at M. Station. He then went to Cloke who had hop-poles, and said he was commissioned by F. to buy them, promising that F. would send a cheque for the price. A cheque was sent; it did not appear by whom. Cloke sent the poles to the station (with his own team) consigned to F. The bill was made out to F., who paid the carriage and got the poles. Then the prisoner got the money for him. *Roupell* for the prisoner. The prisoner, never got the poles. He pretended to sell, or sold goods he had not. Cloke ratified the contract between F. and the prisoner; and if the prisoner was indictable at all, it was for obtaining money from F., not goods from Cloke.

WIGHTMAN, J., so held and directed an acquittal.

An indictment for obtaining by false pretenses, the signature of a person to a deed of land, must show that the prosecutor owned or had an interest in the property or that the deed contained covenants on which he would be liable in an action.[5]

Obtaining credit on account from a party's own banker by drawing a bill without authority on another person is not within the statute, although the banker pays money for him in consequence thereof to an extent he would not otherwise have done.[6]

§ 455. —— **Obtaining Satisfaction of Debt—"Money or Property" must be Obtained.** — In *Jamison* v. *State*[7] the defendant owing one Thompson and Thompson being indebted to one Mattingly in the same amount and having the money to pay him, by false pretenses induced Mattingly to satisfy Thompson's claim against defendant by giving Thompson credit for the amount and taking from the defendant a worthless mortgage to secure it — no money passing between the parties. This was held not indictable as false pretenses. "The money," said the court, "must have been actually and not merely impliedly or constructively obtained, and must have come into the defendant's

[1] 1 Cox, 10 (1843).

[2] 1 Moo. 224.

[3] Com. *v.* Lancaster, Thatch. Cr. Cas. 429 (1835).

[4] F. & F. 501 (1859).

[5] Dord *v.* People, 9 Barb. 671 (1851).

[6] R. *v.* Wavell, 1 Moody 224 (1829).

[7] 37 Ark. 445 (1881).

possession." And so as to obtaining consent to enter a judgment by false representations.[1]

§ 456. —— **Representations made Subsequently.** — Therefore a false representation made after the property is obtained is not a "false pretense." [2]

§ 457. —— **Obtaining Charitable Donations.** — This, though obtained by false representations, has been held not within the statute.[3]

§ 458. —— **Property must be Obtained by Means of Pretense.** — In *R.* v. *Brooks*,[4] the indictment charged that the prisoner by falsely pretending to C. & Co., that he was sent by one W. for nine gallons of ale, obtained the property of C. & Co., with intent to defraud them.

The prisoner, who was a carrier, and dealt with the prosecutor, who was a brewer, went to him and said, "I want a cask of XX ale; I will call on my way back." Then he came again and said, "Is my beer ready?" C. said, "Yes," and the prisoner took it up, saying, "It is for W.," which it was not.

*Denman* objected that the prisoner did not obtain the ale by means of the alleged false pretense; the order originally given was for himself, and not until he had got possession of the ale did he say anything of W.; and it might be that even then, C. thought that the prisoner intended to sell to W.

WIGHTMAN, J., was of that opinion, and directed that the prisoner should be acquitted.

In *R.* v. *Bulmer*,[5] the prisoner was convicted of obtaining a mare by falsely pretending that he was the servant of A. It appeared that the prisoner so pretended at first, but when the prosecutor confounded A. with B., the prisoner availed himself of the mistake to obtain the mare which the prosecutor parted with in the belief that the prisoner was the servant of B. It was held that the conviction was wrong.

§ 459. —— **Pretense Must be Made with Design of Obtaining Property.** — In *Bowder* v. *State*,[6] the defendant was charged with having defrauded the clerk of the Colored Baptist Church out of money by pretending that he was a Baptist minister in good standing. In reversing the case the Supreme Court says: "The false pretense must be made with the design to obtain the money. * * * The evidence for the State satisfies us that the pretenses relied on, whether they were true or false, were not made with any design to obtain the money or even to procure an employment as pastor of the church. The accused did not seek the place. The congregation or their representatives, the deacons as the proof shows, sought him, and invited him to become their pastor. He stated his terms, and left them to reflect upon the subject and to write to him their conclusions. No doubt he had represented himself to be a minister, and if they had not believed him to be one, they would not have called him. Whether he was so or not, we do not undertake to decide. But so far as the proof shows he did not take any steps or use any means to induce the prosecutor to employ him."

1 Com. *v.* Harkins, 128 Mass. 79.

2 Stuyvesant's Case, 4 City Hall Rec. 156 (1818); People *v.* Haines, 14 Wend. 546 (1835).

3 People *v.* Clough, 17 Wend. 351 (1837).

4 1 F. & F. 502 (1859).

5 L. & C. 477 (1864).

6 41 Miss. 570 (1867).

§ 460. —— **Owner Must Intend to Part With his Property.** — The owner must intend to part with his property in the goods.[1]

§ 461. —— **Prisoner must have Received Property.** — Proof that it was received by a third person will not do.[2]

§ 462. —— **Object of Pretense Must be as Charged.** — In *R.* v. *Stone*,[3] the indictment charged that the prisoner being a member of a building society, obtained from the society the sum of £30 by means of a false pretense that he had completed two houses which he had to erect before he was entitled to receive the money. The counsel for the prosecution, in opening the case, said that the prisoner by the rules would have forfeited the houses in case they were not completed by the time he made the pretense; and that the certificate of a surveyor was necessary to be obtained before the money could be received; and this being so the object of the false pretense might be to avoid the forfeiture. He, therefore, thought the charge not sustainable to which MELLOR, J., assented.

§ 463. —— **Pretense Must be of Existing fact, not Future Event.** — It is well settled that to be criminal, the pretense must be as to an existing event, and not of a future fact.[4]

Therefore a promise that one will on demand repay a loan is not a false pretense,[5] nor is it where A. advances $20 to a laborer on the latter's promise to work it out, which he afterwards refuses to do.[6] So obtaining money by the false representations that the prisoner will give the party employment at a cerin compensation is not false pretenses.[7] Where a person got possession of a promissory note, by pretending that he wished to look at it, and carried it away and refused to give it back, the crime was held not committed.[8] So for B. to obtain the property of A. by pretending to him that B.'s goods and chattels are about to be attached is not within the law.[9] So in another case, the false pretense charged was that M. would assign to B. a certain note which he had already for value sold to B., and thereby he obtained the note and failed to assign or return it, for the purpose of cheating B. This was held insufficient.[10] So, also, where one obtained money on the false statement that he had to pay his rent.[11] So giving a check on a bank in which the party has no funds is not false pretenses as he may intend or his implied promise may be to put funds in to meet it — it is otherwise, of course, if he make an express representation that he has funds in the bank.[12] To obtain a pair of pants from a tailor on the representation that the party would pay for them after he had tried them on is not false pretenses.[13] Where A. promised to pay B. fifty cents for four fish if B.

[1] Canter *v.* State, 7 Lea, 350 (1881); State *v.* Vickery, 19 Tex. 362 (1857); White *v.* State, 11 Tex. 769 (1854).

[2] Willis *v.* People, 19 Hun, 84 (1879).

[3] 1 F. & F. 311 (1858).

[4] Dillingham *v.* State, 5 Ohio St. 280 (1855); Johnson *v.* State, 41 Tex. 65 (1874); Keller *v.* State, 51 Ind. 111; State *v.* Evers, 49 Mo. 542 (1872); Colly *v.* State, 55 Ala. 84 (1876); R. *v.* Bertles, 13 U. C. C. P. 607; R. *v.* Gemmell, 26 U. C. Q. B. 312; R. *v.* Henshaw, L. & C. 444 (1864); Com. *v.* Moore, 99 Pa. St. 570 (1882); Allen *v.* State, 16 Tex. (App.) 150 (1884).

[5] State *v.* Magee, 11 Ind. 154 (1858).

[6] Ryan *v.* State, 45 Ga. 128 (1872).

[7] Ranney *v.* People, 22 N. Y. 413 (1860).

[8] People *v.* Miller, 14 Johns. 371 (1817).

[9] Burrow *v.* State, 2 Ark. 65 (1851).

[10] McKenzie *v.* State, 11 Ark. 594 (1851).

[11] R. *v.* Lee, L. & C. 309 (1863).

[12] Stuyvesant's Case, 4 City Hall Rec. 156 (1808).

[13] Canter *v.* State, 7 Lea, 350 (1881).

would deliver them at A.'s house, and B. delivered them, but A. would not pay him, this was held not swindling.[1]

In *R.* v. *Goodhall*,[2] the prosecutor, Thomas Perks, was a butcher at Wolverhampton, and on the 17th of August, 1821, the prisoner came to his shop to purchase three sheep and two legs of veal; on being told by the prosecutor that he would not trust him, he promised the prosecutor if he would send the sheep and veal in good time on the following morning, he would remit the money back by the bearer. The meat was accordingly sent on the 18th of August, by the prosecutor, and delivered to the prisoner by the prosecutor's servant, who asked him for the money; and said, if he did not give it him, he must take the meat back again. The prisoner replied, "Aye, sure!" and wrote a note; and told the prosecutor's servant to take it to his master, and it would satisfy him. This note (of which the following is a copy) was delivered to the prosecutor by his servant: —

"*Mr. Perks* —

"Sir: I have a bill of Walsall Bank, which is a very good one, if you will send me the change, or I'll see you on Wednesday certain.

"Yours, M. G."

The jury found the prisoner guilty; and said, they were of opinion, that at the time the prisoner applied to Perks, he knew Perks would not part with the meat without the money; and that he promised to send back the money, to obtain the goods. The jury also found, that at the time he applied for the meat, and promised to send back the money, he did not intend to return the money; but by that means to obtain the meat and cheat the prosecutor.

The learned judge respited the judgment, making an order that the prisoner might be delivered on finding bail, to appear at the then next assizes.

In Michaelmas Term, 1821, the judges met and considered this case. They held the conviction wrong; being of opinion, that this was not a pretense within the meaning of the statute. It was merely a promise for future conduct, and common prudence and caution would have prevented any injury arising from the breach of it.

In *R.* v. *Walne*,[3] the prosecutor agreed to sell a mare, warranted sound, to prisoner for £20 10s. Prisoner came and took the mare away on a Thursday, giving a banker's check for the price, which at the request of the prisoner the prosecutor agreed not to cash till Saturday. Prosecutor, however, paid this check to his bankers on the same Thursday; they returned it to him on the Saturday indorsed "no account." It was proved that the prisoner had no effects at the bank on which the check was drawn on the Saturday, or on any day for a long time previously. For the prisoner, B., a witness, proved that he had requested prisoner to buy a horse for him (B.), and that prisoner had told B. that he thought he knew of a mare that would suit, and asked B. for a check which, B. did not give, as he had not his check book with him; that the prisoner on the Monday after the said Saturday told B. he had bought a horse for him, for £20 10s, and that B. sent a check to him on the following day for the amount. On the Wednesday the mare was sent back to the prosecutor, with a veterinary certificate that she was not sound, a summons against the prisoner having been taken out by the prosecutor and left at the prisoner's

1 Allen *v.* State, 16 Tex. (App.) 150 (1884).

2 R. & R. 461 (1821).

3 11 Cox, 647 (1870).

house on the previous Monday. At the close of the evidence prisoner's counsel contended that the prisoner ought to be acquitted, first, because, the prosecutor having broken the contract, the charge of false pretense could not be maintained; secondly, because there was no false pretense of an existing fact, as the prisoner did not allege he had funds at the bank at the time he drew the check; thirdly, because upon B.'s evidence the prisoner had reasonable cause to believe that the check would be paid on Saturday.

The court overruled the objections, and directed the jury that if they believed that the prisoner knew he had no funds at the bank, at the time he gave the check, and that the prosecutor had parted with the mare upon the belief that the check was a good and valid one, they must find the prisoner guilty. The jury thereupon found the prisoner guilty. *Held*, that the direction to the jury was wrong, and that the case ought not to have been left to them, and that the conviction ought to be quashed.

In *People* v. *Richards*,[1] an indictment for conspiracy charged that defendant had falsely pretended that one F. was about to prosecute A. for an attempt to commit a rape on his infant daughter, and that by the testimony of the girl he would be sent to prison whereby he was induced to convey to them property, etc. It was held, that the charges were not of existing facts but of things which a third person had threatened to do — upon which no indictment for false pretenses could be predicated.

In *Commonwealth* v. *Stevenson*,[2] the defendant falsely represented to A. that he had then in his possession a check for the payment of money drawn by him in favor of A. from the proceeds of which he intended to pay certain bills due from A. to certain persons. "This," said the court, "was a promise to do something in the future with no representation of any existing, material fact."

§ 464. —— **False Representation of Existing Fact Essential — Assertion of Existing Intention Insufficient.** — In *People* v. *Blanchard*,[3] the prisoner was convicted of obtaining a number of cattle by false pretenses. The facts were as follows: The vendor sold the cattle to the prisoner at Buffalo, New York, and received his check postdated for the purchase price, upon his representation that he was buying and wanted the cattle for G. who lived at Utica, and who would remit the funds in time to meet the check. The prisoner had been in the habit of purchasing cattle to supply G. as a customer and of selling them to him and had general authority so to buy whenever cattle were low; ten days before the purchase, G. had written to the prisoner stating that he wanted a choice lot of cattle and requesting him to send a car load. The prisoner, however, instead of sending the cattle to G. shipped them to Albany, sold them at a reduced price and did not pay the check. On appeal the conviction was held error; because while there might have been a fraud there was no false pretenses as the vendor was cheated not by any false statement of facts on which he relied, but by reliance on a promise not meant to be fullfilled and a false statement of intention.

In *R.* v. *Johnston*,[4] it was held that obtaining money from a woman under the false pretense that the prisoner intended to marry her and wanted the money to pay for a wedding suit he had purchased was not within the statute.

[1] 1 Mich. 216 (1849).
[2] 127 Mass. 446 (1879).
[3] 90 N. Y. 314 (1882).
[4] 2 Moody, 325 (1842).

On the trial it was proved that the prisoner paid his addresses to one Hannah G. Hutchinson and that the banns were regularly published in church with his sanction on the 23d and 30th January, and 6th February. It was further proved that after the first publication of the banns, the prisoner met the said H. G. Hutchinson at a draper's shop by appointment, in order that he might there buy a suit of clothes for the wedding; that he accordingly bought a suit of clothes for £4, and asked her for £4 to enable him to pay for them. That she accordingly gave him £4 for that purpose.

It was further proved, that on the 3d of February, the prisoner told the said H. G. Hutchinson, that he had asked his master to lend him a cart to go to New-castle, to get the furniture for them to put into a house for which they were in treaty, and in which they proposed to live after the marriage, and that his master had agreed to lend him the cart; accordingly on the next day, the prisoner applied to the said H. G. Hutchinson for the money to enable him to purchase the furniture. The said H. G. Hutchinson, after some discussion as to the amount required at last gave him seventeen sovereigns and a £5 note to enable him to get the furniture, which the prisoner said he would procure on the next day (the 4th). On the next day, he told the said H. G. Hutchinson that his master could not let him have the cart till the following Monday (the 7th), and on that same day, the 4th, the prisoner and the said H. G. Hutchinson went together to the landlady of the house for which they had been in treaty, and finally agreed to hire it, and paid 1d by way of earnest; no application, had ever been, in fact, made for the cart. On the next day, the 5th, the prisoner went off and soon afterwards was apprehended in Scotland, having spent the whole of the money.

The jury found the prisoner guilty on both counts, but the learned judge entertained great doubt whether the evidence warranted a conviction on the first count, as the house was not hired until after the prisoner had got the money; and, as to the second count, he doubted whether the pretense stated was one on which a conviction could take place, and the learned judge, therefore, respited the judgment till the following assizes, in order to have the advice of the judges of both points.

The prisoner entered into a recognizance with two sureties, to appear at the next assizes to receive judgment.

This case was considered at a meeting of the judges in Easter Term, 1842, and they held the conviction wrong.

§ 465. —— **Remoteness of Pretense.** — The pretense must not be too remote.[1] A pretense to a parish officer, as an excuse for not working, that the party has no clothes when he really has, though it induces the officer to give him clothes, is not obtaining money by false pretenses.[2]

In *R.* v. *Bryan*,[3] the prisoner was indicted for having, on the 7th of January, at Sunderland, by falsely pretending that he was a member of the naval reserve, and entitled to receive 30s for a quarter's payment next day, obtained from Arthur Calvert, of Sunderland, board and lodgings, at 14s per week, and 6d in money. The prisoner pleaded not guilty. It appeared from the opening statement of the counsel for the prosecution that the prisoner went to a lodg-

1 R. *v.* Carpenter, 11 Cox, 600 (1870); R. *v.* Gardner, Dears. & B. 40 (1856); Morgan *v.* State, 42 Ark. 131 (1883).

2 R. *v.* Wakeling, R. & R. 504 (1823)

3 2 F. & F. 567 (1861).

ing-house in Sunderland, kept by the prosecutor, Arthur Calvert, and there represented that he was a member of the naval reserve, and was entitled next day to receive 30s for a quarter's payment. Believing this representation, the prosecutor agreed to let him have board and lodgings for a week for 14s. The prisoner then said he was short of cash, and asked the prosecutor to lend him 6d which he did. The prisoner remained some days at the prosecutor's, and it was then discovered that he was not a member of the naval reserve, nor entitled to receive any pay as such, and that he had no means of paying for his board and lodgings.

HILL, J. How do you distinguish this case from *Regina* v. *Gardner*.

*Meynell*, for the prosecution. In this case money was obtained by reason of the false pretense, in addition to board and lodgings.

HILL, J. I can not distinguish this case from *Regina* v. *Gardner*. (To the jury.) You will return a verdict of not guilty, because although the prisoner obtained money or goods from the prosecutor, he did it by means of a contract, and he obtained the contract only by means of the false pretenses. It is too remote to say that he obtained the goods or money by the false pretenses. The point is decided and I am bound by that decision.

The prisoner was then found not guilty, and ordered to be discharged.

In *R.* v. *Larner*,[1] it appeared that on the 23d day of August, a swimming handicap took place at the Surrey County Baths. Entries were to be made previously to Alfred Endin, Esq., and competitors to be handicapped by qualified persons. A competitor's ticket was issued by Mr. Endin to each accepted entry. The length of the course was one hundred yards, and there being a good many entries the race was swum in heats.

A programme was printed and circulated, containing, amongst other matters, the names of the competitors, and arrangement of the various heats, and on that programme appeared the name of W. Larner, to whom a start of twenty seconds had been assigned.

Some few days before the issuing the programme, Mr Endin received the following letter: —

NELSON CLUB, 90 DEAN STREET,
OXFORD STREET, August 19, 1880.

SIR: I enclose entrance fee for another entry for your 100 yards handicap. W. Larner (Middleton Swimming and Athletic Club) in club races receives twenty-five seconds from scratch — I remain, sir, yours, respectfully.

H. GREEN, *Hon. Sec.*

Another letter of the same kind had been received by Mr. Endin entering one Binns for the same race. The letters were received in the usual course through the post-office. The two entries of Larner and Binns were accepted, and the entrance fee of 2s 6d each paid. Mr. Endin stated that he knew nothing about Larner or his accomplishments as a swimmer; that he received his entry in consequence of the representations contained in the letter, and that the start of twenty seconds was apportioned to him for the like reason. He further stated that he handed Larner a competitor's ticket; that Larner swam in the competition, and after being second in his own heat won the final easily. It was believed that Larner could have won the race from a scratch.

For the prisoner it was objected that the false pretenses were too remote, that if he obtained anything thereby it was the competitor's ticket and not the cup;

[1] 14 Cox, 498 (1880).

that the cup was obtained by his own bodily activity; and that the case fell within *Reg.* v. *Gardner*,[1] in which case the prisoner had at first obtained lodgings only by a false representation, and after he had occupied the lodgings for a week he obtained board; and it was held that the false pretenses were exhausted by the contract of lodging, the obtaining board not having apparently been in contemplation when the false pretense was made.

For the prosecution it was urged that the false pretense was a continuing one, that the winning of the cup was clearly in the contemplation of the prisoner when he entered for the race, and that the judgment of Willes, J., in *Reg.* v. *Gardner*, citing *Reg.* v. *Abbott* and *Reg.* v. *Burgess*, was an authority the other way. They also cited *Reg.* v. *Martin*.[2]

Held by the Common Serjeant, after conferring with STEPHEN, J., in the Old Court, that the objection must prevail as the false pretenses were too remote.

The prisoner was afterwards tried, for uttering the letter knowing it to be forged, and convicted.

In *R.* v. *Woodman*,[3] the indictment charged one Gregory with having obtained £30 from prosecutor Woodman on the false pretense that he the said Gregory then wanted the loan of £30 to enable him to take a public house at Melksham; by means of which said false pretense the said Gregory did then unlawfully and fraudulently obtain the said sum from the said Samuel Woodman with intent to defraud. Whereas the said Gregory was not then going to take a public house at Melksham * * * as he the said Gregory well knew. And whereas the said Gregory did not then want a loan of £30 or any money to enable him to take the said house.

At the close of the prosecutor's evidence —

MELLOR, J. It seems to me that the real motive and inducement was this: the prisoner says, "I am going to take a public house; if you will let me have £30 I will do so." The inducement for all was, "I shall be able to return you the £30 while I carry on business at Melksham." It was, therefore, the expectation of being paid out of the profits of the business at Melksham. The old rule is, there must be a false representation of that being alleged to be a fact which is not a fact.

*Ravenhill*, for the prosecution, suggested that here the existing fact was the intention of prisoner.

MELLOR, J. How can you define a man's mind? It is a mere promissory false pretense.

*Ravenhill* proposed to show that prisoner was not able, at the time of making the pretense, to take a public house.

MELLOR, J. That is too far a field. In criminal matters we must take the immediate result. This is one of those cases in which the prosecutor was too credulous. [After having conferred with DENMAN, J., the learned judge continued]: My brother DENMAN is clear that there is not enough evidence to leave to the jury of any existing false pretense. We both think that, had the whole circumstances been known earlier, something might have been made of a statement by the prisoner that he had £30 at home and that he could then take the house.

§ 466. —— Direct Promise Must be Proved. — In *R.* v. *Masterson*,[4] the prisoner wrote to two different traders, enclosing to each a half of the same $5

[1] 1 Dears. & B. C. C. 40; 7 Cox, C. C. 136.

[2] L. R. 1 C. C. R. 56; 10 Cox, C. C. 383.

[3] 14 Cox, 179 (1879).

[4] 2 Cox, 100 (1846).

note, and requested goods to be forwarded to him, which was accordingly done. The court held that an indictment would not lie as the prisoner had not received the goods under a false pretense, though such might be implied from each half of the note being sent to a different person on the same day; but there was no direct promise in either of the letters which had been sent to the traders that the other half would be forwarded to him.

§ 467. —— **Pretense Must be Proved — Inference of Pretense from Conduct.** — In *R.* v. *Partridge*,[1] the London and Brighton Railway Company were in the habit of advancing small sums of money to persons sending goods to be carried by their railway on the faith of receiving such sums from the consignee on the delivery of the goods to him. The defendant went to the principal railway station, and gave to a clerk there a card, on which was written, "Case to Brighton, 11s 9d to pay," at the same time requesting that the case might be sent for to a certain tavern, and forwarded to its destination. The card was, in the ordinary course of business, sent to the goods station of the company with the message left by the defendant, and the manager there directed a carman to fetch the case from the tavern and to pay the 11s 9d. This was done. The case was sent to Brighton, but the address written upon it was found to be a fictitious one, and, on opening the case, it was found to contain nothing but brickbats and other rubbish.

It was held that these facts did not support an allegation of a false pretense that the box contained certain valuable articles.

*Lilley* (for the defendant) contended that on this state of facts the defendant could not be convicted. There was no false pretense within the statute. The pretense in the indictment was, that the box contained valuable property, but no such statement was made by the defendant, nor could it be inferred, from anything that he had said or done. Again, the pretense, if any, was not made to the person advancing the money. Neither of the clerks at the different stations saw the case at all. The second clerk who directed the carman to pay the money did not even see the defendant; he saw nothing but the card, and what was written upon it certainly did not amount to the pretense alleged.

*Robinson* (for the prosecutor) submitted that the pretense stated in the indictment was not made by the defendant in so many words; but that was immaterial. It was sufficient if the defendant, from his conduct, fraudulently led the prosecutor or his agent to believe in a particular state of facts, although he did not assert their existence. That was established by the well known case of *R.* v. *Barnard*,[2] where the defendant, who was not a member of the university, went into a tradesman's shop at Oxford in a cap and gown, and obtained goods from him; this was held to be a false pretense that he was a member of the university although he did not say so.

*Lilley.* In that case the defendant did represent in terms that he was a member of the university.

*Robinson* (on referring to the case) admitted that was so, but in the judgment that was unnoticed, and it was expressly stated by the learned judge that, even without such a declaration the pretense would have been made out, and in all the text-books the decision was so treated. *Story's Case*[3] was also in

[1] 6 Cox, 183 (1853).
[2] 7 C. & P. 784.
[3] R. & R. 81.

point. The circumstance of the person advancing the money not having seen the box, was immaterial. It was proved that the company only advanced money under such circumstances upon property that was of value, and it would be a question for the jury, whether the defendant was not aware of that practice, and whether by his conduct he did not seek to represent to them that the box contained valuable articles. The clerk at the principal station received his directions from the prisoner himself, who must have intended him to believe what alone would procure the advance of 11s 9d, and although this clerk did not himself pay the money, he did it through his agent, for he gave instructions to the clerk at the goods station, who gave orders to the carman advancing the money. So that in contemplation of law it was the first clerk who paid the amount, and it was paid on the false representation of the prisoner. The case was similar to those of the presentation of a false cheque, where nothing was said about its validity, but where on its production change was given for it on the faith of its being good. There were several cases showing that the merely uttering such an instrument was equivalent to a statement that the cheque was a valid one.[1]

THE COMMON SERJEANT (after consulting JERVIS, C. J., and COLERIDGE, J. who were in the adjoining court). I am of opinion, and the learned judges whom I have consulted agree with me, that the evidence does not support the indictment. This is not like the case suggested of presenting a false cheque, because there the check was shown by the defendant to the person paying the money, and he immediately acted upon it. Nor is it like that of the pretended collegian, for there the cap and gown were seen upon the person. In the present case, the person from whom the money was obtained, never saw the box at all. Moreover, I do not think that the pretense alleged in the indictment can be inferred from what the defendant is proved to have done. The merely representing that there would be 11s 9d to pay does not necessarily involve the assertion that the box was of value, because the money might be payable on the box reaching its destination, although the box itself was of no value whatever. Then if it is said that the prisoner meant the clerk to infer that the 11s 9d would be paid at Brighton, which he knew to be untrue, this is a pretense with regard to something future, and, therefore, not within the statute.

*Not guilty.*

§ 467*a*. **Protection Afforded only to Honesty — Property given to Induce Compromise of Alleged Crime.** — In *McCord* v. *People*,[2] the prisoner represented that he had a warrant against M. and thereby induced him to give him a watch and diamond ring. It was held on appeal that as the property was parted with to induce an officer to violate his duties, the indictment could not be sustained. "If the prosecutor," said the court, "parted with his property upon the representations set forth in the indictment, it must have been for some unlawful purpose, a purpose not warranted by law. There was no legitimate purpose to be attained by delivering the goods to the accused, upon the statements made and alleged as an inducement to the act. What action by the plaintiff in error was promised or expected in return for the property given is not disclosed. But whatever it was it was necessarily inconsistent with his duties

[1] Jackson's Case, 3 Camp. 370; Freetly's Case, Russ. & Ry. 127.

[2] 46 N. Y. 470 (1871).

as an officer, having a criminal warrant for the arrest of the prosecutor, which was the character he assumed. The false representation of the accused was that he was a officer and had a criminal warrant for the prosecutor. There was no pretense of any agency for, or connection with any person, or of any authority to do any act, save such as his duty as such pretended officer demanded. The prosecutor parted with his property as an inducement to a supposed officer to violate the law and his duties; and if in attempting to do this he had been defrauded, the law will not punish his confederate, although such confederate may have been instrumental in inducing the commission of the offense. Neither the law or public policy designs the protection of rogues in their dealings with each other, or to insure fair dealing and truthfulness as between each other in their dishonest practices. The design of the law is to protect those who for some honest purpose are induced, upon false and fraudulent representations, to give credit or part with their property to another, and not to protect those who, for unworthy or illegal purposes, part with their goods.[1] The judgment of the Supreme Court and of the Sessions must be reversed, and judgment for the defendant."

§ 468. —— **Merely Obtaining One's Own, Not.** — False representations to induce a man to pay a debt are not criminal.[2] As where a constable by means of false representations collected the amount of a judgment from a person against whom it had been rendered.[3]

In *R.* v. *Williams*,[4] A. owed B. a debt of which B. could not get payment. C., a servant of B., went to A.'s wife and obtained two sacks of malt, saying that B. had bought them of A. C. knew this to be false, but took the sacks to B. to enable him to pay his debt. It was held that C. was not guilty of false pretenses. "It is not sufficient," said COLERIDGE, J., "that the person knowingly stated that which was false, and thereby obtained the malt; you must be satisfied that the prisoner at the time intended to defraud A."

In *State* v. *Hurst*,[5] it was held that a person who by means of false pretenses induces another to pay a debt already due, is not guilty of obtaining money under false pretenses, with intent to defraud; and so when the prisoner, by means of false pretenses, obtained $158, of which $144 was due from the prosecutor to the prisoner, the prisoner is not guilty of obtaining the whole $158 by means of false pretenses within the statute, but only the $14 excess over what he was bound to pay. "This," said the court, "involves the question whether a person can be indicted for procuring money by false pretenses, who, by false pretenses has induced another to pay him a debt already due. Bishop, in his Criminal Law,[6] states the law to be, that an indictment in such a case will not lie. The oldest decision on this question, which I find is a case decided in 1836, by COLERIDGE, J., in the case of *R.* v. *Williams*.[7] The prosecutor owed the prisoner's master a sum of money which he would not pay; the prisoner, to secure his master the means of paying, himself went to the prosecutor's wife and falsely pretended that his master had bought of her husband two

[1] People *v.* Williams, 4 Hill, 9; People *v.* Stetson, 4 Barb. 151.

[2] People *v.* Thomas, 3 Hill, 169 (1842); Com. *v.* McDuffy, 126 Mass. 467 (1879).

[3] Com. *v.* Thompson, 2 Clark (Pa.) 33 (1843).

[4] 7 C. & P. (1836).

[5] 11 W. Va. 54.

[6] vol. 2, sec. 442 (3d ed.)

[7] 7 C. & P. 354.

sacks of malt and had sent him to fetch them away, and she thereupon gave them to him, and he carried them to his master. Judge COLERIDGE charged the jury, 'that if they were satisfied that the prisoner did not intend to defraud the prosecutor, but only to put it in his master's power to compel him to pay a just debt, it will be your duty to find him not guilty. It is not sufficient that the prisoner knowingly stated what was false, and thereby obtained the malt. You must be satisfied that the prisoner intended at the time to defraud the prosecutor.' The case of *Commonwealth* v. *Thompson*,[1] it is said in the case of *Commonwealth* v. *Henry*,[2] to have been a case in which the prisoner, by falsely pretending he had a warrant of arrest against the prosecutor, procured the payment of an honest debt. It was held that he was not liable to be indicted for procuring money by false pretenses. This case is cited approvingly in the case of *Commonwealth* v. *Henry*, and the court adds: 'A false representation by which a man is cheated into the performance of a duty, is not within the statute.' In the case of *People* v. *Thomas*,[3] the court in rendering its decision uses precisely the same language as was used by the Supreme Court of Pennsylvania, in the case of *Commonwealth* v. *Henry*, though an examination of the case shows that the decision of this principle was not involved in the case before the court. These are the only decisions or *dicta* to which I have been referred, or which I have found bearing on the subject directly. Other cases have been relied on in which the question discussed was the criminal intent or absence of such intent in common-law offenses; but they seem to me to throw but little light upon the subject. The true question involved is, what is the proper construction of the twenty-third section of chapter 145 of the code of West Virginia? Its language is: 'If a person obtain by any false pretenses from any person, with intent to defraud money, etc., he shall be deemed guilty of larceny.' The words, false pretenses, used in this statute are very comprehensive, yet the courts, looking to the purposes of the legislature, have often held that every false representation or statement ought not to be held a false pretense, and have put a limited meaning on these broad words which they have attempted to define with such accuracy as the nature of the case would permit. In the same spirit, I think, the words, 'with intent to defraud,' should be interpreted. It is doubtless immoral for a person by false pretenses to obtain the payment of a just debt. The end sought may be just, but such end will not, by a correct code of morals, justify the use of improper means; but the law does not, in many instances, attempt the enforcement of good morals, and the question is, whether the use of false pretenses, to obtain a claim justly due, is within the true meaning of this criminal statute a fraud. To so construe this statute, would, in my judgment, consign to the penitentiary as thieves many persons who can not be classed with common thieves, without breaking down all our ideas of distinction in degrees of immorality. I think, therefore, that within the true meaning of this statute, a man can not be held guilty of procuring money by false pretenses, with intent to defraud, who has merely collected a debt justly due him, though in making the collection he has used false pretenses. The authorities I have cited, though not entitled to much weight in themselves, sustain this view; and I have seen no authority which sustains the contrary view."

[1] Reported in 3 Pa. Law Jour., and commented on in Lewis' U. S. Cr. L. 197.

[2] 22 Pa. St. 256.

[3] 3 Hill, 169.

§ 469. —— **Person Deceived Must Have Used Ordinary Prudence.** — It is settled that ordinary prudence and common caution are required of the prosecutor.[1]

In *Leobald* v. *State*,[2] the court doubted whether a representation made by one that he is the owner of an extensive manufacturing establishment in a city in another State, is such a pretense as would induce a person of ordinary caution to loan the person ten dollars.

"It was not the intention of the statute to convert every fraud which might fall within the cognizance of a court of equity into a criminal offense, and to protect every individual from the consequences of his own credulity, imprudence or folly, but it was designed to extend no further than to embrace such representations as were accompanied with circumstances fitted to deceive a person of common sagacity and exercising ordinary caution." [3]

In *People* v. *Babcock*,[4] the prisoner by false pretenses got from one of the firm of B. & D. a release of a judgment against him on the promise that he would pay part of it and give his note for the balance. It was held that this was not indictable. "There was nothing," said the court, "beyond the defendant's false assertion that he was ready to pay the judgment. There was not even the production of either note or money and common prudence would have dictated the withholding of the receipt until the money was paid and the note drawn."

In *State* v. *DeHart*,[5] the defendant purchased goods falsely representing that he had in his office a certain quantity of property liable to his debt. "If," said the court "the only foundation for his credit was the existence of the property of the defendant in his office as alleged, common prudence and caution upon the part of the prosecutor should have required him to resort to other information as to this fact. The defendant's conduct, if as alleged, was highly reprehensible, but we think it is not a case of felony under the statute."

In *People* v. *Williams*,[6] the conviction of the defendant was reversed on appeal. He had been convicted for obtaining by false pretenses the signature of one Van Guilder to a deed of lands. At the trial the defendant's counsel requested the court to charge that the pretenses laid in the indictment were not such as could be made the subject of a criminal prosecution, but the court refused and held the contrary, the other facts appear from the opinion.

*By the Court.* It is impossible to sustain this indictment without extending the statute to every false pretense, however absurd or irrational on the face of it. The charge is of falsely representing to Van Guilder that he was about being proceeded against for a debt due from him, and that by means of the representation, his signature was obtained to a deed of lands. How such a result was made to follow from means apparently so inadequate, we are left to conjecture. Looking to the case made by the indictment Van Guilder's only ground of complaint would seem to be, that in attempting to defraud another, he had himself been defrauded. But whatever the fact is in this particular there can be no doubt that an exercise of common prudence and caution on his part would have enabled him to avoid being imposed upon by the pretenses alleged; and if so the case is not within the statute.[7]

*New trial ordered.*

1 Com. *v.* Haughey, 3 Metc. 223 (1860); Com. *v.* Grady, 13 Bush, 285.

2 33 Ind. 484 (1870).

3 Burrow *v.* State, 12 Ark. 65 (1851).

4 7 Johns. 201; 5 Am. Dec. 256 (1810).

5 6 Baxt. 222 (1873).

6 4 Hill, 9 (1843).

7 See Goodhall's Case, Russ. & Ry. 461; Rosc. Cr. Ev. 362.

In *People* v *Stetson*,[1] the defendant represented to the prosecutor that he was a constable and had a warrant against him issued by a justice of the peace for the crime of rape, but if he would give him his watch he would settle it. This was held not to be punishable. "It is," said MAYNARD, P. J., "a well settled and rational rule that the false pretenses in order to sustain an indictment must be such that, if true, they would naturally, and according to the usual operation of motives upon the minds of persons of ordinary prudence, produce the alleged results; or, in other words, that the act done by the person defrauded must be such as the apparent exigency of the case would directly induce an honest and ordinarily prudent person to do, if the pretenses were true. Applying this rule to the case in hand, it will, I think, appear that the false pretense, even if believed to be true, could not by any course of reasoning, have induced any person to do what the prosecutor did. No man could suppose that he could procure a discharge from a warrant for felony by delivering money or goods to the officer holding the warrant. The pretense is in exhibiting a forged warrant and pretending it to be true; there is no allegation that the accused asserted that he had authority to settle it by receiving money or goods; he offered to do so, and the prosecutor accepted his proposal, and delivered his property. It was the offer to settle the warrant which naturally produced the result, and not the supposed warrant. The conduct of the accused was in the highest degree immoral and reprehensible, but there seems to be no law to punish him under this indictment. He may be indictable for forging the pretended warrant, if in truth he had such an one as the indictment seems to suppose." SELDEN, J., concurred.

*Judgment for defendant.*

§ 470. —— **Passing Counterfeit Money.** — Passing counterfeit bank-notes in payment of goods is not obtaining money by false pretenses.[2]

In *State* v. *Allred*,[3] the prisoner sold to the prosecutor a pair of shoes for $1.40 and received $1.50, and paid him the ten cents change in counterfeit money. It was held that he was not guilty of obtaining the ten cents by false pretenses. "The money of the prosecutor," said the court, "was not obtained by any fraudulent representation or practice by which he was induced to part with it."

§ 471. —— **Passing Bank-note of Bankrupt Bank.** — In *R.* v. *Spencer*,[4] the prisoner was indicted for false pretenses in passing, in payment for meat purchased by him, as a good note the note of a bank that had stopped payment. The prisoner knew that the bank had stopped payment, but one of the partners of the bank was still solvent. "On this evidence," said GASELEE, J., "the prisoner must be acquitted, because as it appears that the note may ultimately be paid, I can not say that the prisoner was guilty of a fraud in passing it away."

§ 472. —— **What not False Pretenses — Illustrations.** — Selling a promissory note which has been paid as a due one is not false pretenses at common law,[5] nor is inducing one to sign a deed on pretense that it is a mere receipt.[6]

[1] 4 Barb. 151 (1848).

[2] Cheek *v.* State, 1 Coldw. 172 (1860); Roberts *v.* State, 2 Head, 501 (1859).

[3] 84 N. C. 749 (1881).

[4] 3 C. & P. 420 (1828).

[5] Middleton *v.* State, Dudl. 275 (1838).

[6] State *v.* Justice, 2 Dev. 200 (1829).

Obtaining goods on a forged order for their delivery is not false pretenses in England,[1] nor is a mere fraudulent overcharge for work done.[2]

A surveyor of highways, having authority to order gravel for roads, ordering gravel which he applies to his own use, is not guilty of obtaining it by false pretenses.[3]

§ 473. —— **Partnership Affairs — Statute Not Applicable to.**[4] — In *R.* v. *Evans*,[5] POLLOCK, C. B., said: "In this case the defendant was tried at the Chester Sessions on an indictment which charged him with obtaining money under false pretenses. The facts are that the defendant entered into partnership with two other persons, and afterwards, by a verbal agreement, it was arranged that he should become the agent of the partnership for a particular purpose, that his traveling and other expenses as such agent should be first paid out of the capital funds of the partnership. He was indicted for obtaining money by making charges against those funds for which there was no foundation. Now, inasmuch as before there could be any division of profits, those expenses would have to be paid out of the capital fund, those charges would be matter of account between the parties. If there was a real foundation for these charges, they would come into the account, and be deducted from the profits of the partnership, The act of the defendant was no more than a misrepsentation, which would be overhauled when the accounts were gone into. It was not an obtaining of money by false pretenses within the meaning of the statute.

"Speaking for myself only, I may add that in my opinion the statute against obtaining money by false pretenses was never intended to meddle with the real business of commerce. It was not to control commercial proceedings, unless where there was really and truly a piece of swindling, nor to apply to frauds committed in the course of a commercial transaction. In my opinion — and I am giving this as my opinion only, and not that of the courts — it would be very mischievous to make every knavish transaction the subject of an indictment. *Conviction quashed.*"

§ 474. —— **"False Token or Writing" — False Use of Genuine Writing.** — A false use of a genuine writing is not the use of a "false token or writing" within the Indiana statute. Thus where A. under a letter of authority sold B.'s corn and afterwards by the use of the same letter sold the same corn to another purchaser, this was held not within the statute.[6]

§ 475. —— **"False Writing."** — To constitute a "false writing" within the statute the document must be one false in fact but purporting to be signed by some person, and to be his act, and so framed as to have more weight and influence in effecting fraud than a mere naked assertion of the party. Therefore a document in the form of a bond, but having no signature attached to it, is not "a false writing."[7]

§ 476. —— **"Fraudulent, Swindling or Deceitful Practices."** — In Vermont, in 1838, under a statute punishing the obtaining of money, goods or chattels by

[1] R. *v.* Evans, 5 C. & P. 555 (1833).
[2] R. *v.* Oates, 6 Cox, 540 (1855).
[3] R. *v.* Richardson, 1 F. & F. 488 (1859).
[4] See R. *v.* Watson, Dears. & B. 348 (1857); R. *v.* Evans, 9 Cox, 238 (1862).
[5] L. & C. 256 (1862).
[6] Shaffer *v.* State, 82 Ind. 223 (1882).
[7] People *v.* Gates, 13 Wend. 311 (1835).

false tokens, messages, letters or by "other fraudulent, swindling or deceitful practices," it was held that to obtain goods by a false and fraudulent declaration as to one's state and circumstances was not indictable.[1]

§ 477. —— **"Money."** — Obtaining a certificate of deposit of a bank is not obtaining "a sum of money."[2]

§ 478. —— **"Money, Goods or other Property."** — Obtaining an indorsement upon a promissory note by false pretenses is not obtaining "money, goods or other property."[3]

§ 479. **False Pretenses — "Valuable Security."** — An unstamped order for the payment of money which ought to be stamped to be legal is not a "valuable security."[4] To support a conviction for obtaining a valuable security "by a false pretense," the security must be the property of, and of value to some one other than the prisoner.[5]

§ 480. —— **"Written Instrument" — Must work Prejudice to the Property of some one.** — If the instrument be one that could not prejudice any one as to his estate it is not a "written instrument" within the statute as to obtaining signatures to such documents by false pretenses.

So it was held in *People* v. *Galloway*,[6] thata deed of land by a wife conveying real estate belonging to her in her own right, executed by her with her husband at the solicitation of the husband, under the pretense that it was a deed of lands belonging to him, but not acknowledged by her as required by law, is not within the statute.

§ 481. —— **Swindling and Theft under Texas Code.** — In *Pitts* v. *State*,[7] the distinction between theft and swindling is thus pointed out by ECTOR, P. J.: "The appellant, J. B. Pitts, was indicted, tried, and convicted by the District Court of McLennan County for the theft of a bay gelding, the property of one J. Robinson. The evidence, as shown by the statement of facts is substantially as follows: J. B. Nixon, on December 9, 1876, took up on his place, in McLennan County, a certain black gelding, which he estrayed. After having complied with the requirements of the statute in regard to advertising said estray Nixon loaned the estray gelding to appellant, to be worked by appellant on his (Nixon's) farm, until the time came for Nixon to sell said animal. In April or May, 1877, Pitts disappeared from the neighborhood, carrying with him the black gelding. He went to the store of one J. Robinson, a witness for the State, in the city of Waco, McLennan County, and proposed to trade him the

[1] State *v.* Sumner, 10 Vt. 587; 33 Am. Dec. 219 (1838).

[2] Com. *v.* Howe, 132 Mass. 250 (1882); as to the construction of "money, goods and merchandise," and "effects," see Schlesinger *v.* State, 11 Ohio St. 669 (1860), and "order for money" see R. *v.* Cartwright, R. & R. 107 (1806). Dogs are not "chattels." R. *v.* Robinson, 8 Cox, 115 (1859). "Procure" and "obtain" are construed in Kennedy *v.* State, 34 Ohio St. 310 (1877); Baker *v.* State, 34 Ohio St. 314 (1877).

[3] State *v.* Moore, 15 Iowa, 413 (1863). Land is not within the phrase, "money, goods, property or other things of value." State *v.* Burrows, 11 Ired. 477 (1850).

[4] R. *v.* Yates, 1 Moody, 170, (1827). This phrase is construed in R. *v.* Brady, 26 U. C. Q. B. 13.

[5] R. *v.* Danger, Dears. & B. 307 (1857).

[6] 17 Wend. 541 (1837).

[7] 5 Tex. (App.) 122 (1878). And see Matthews *v.* State, 33 Tex. 102 (1870).

black gelding, which he (Pitts) then had with him, representing that the animal was his property, and that he had worked said black gelding in making his crop of the previous year. Robinson traded with appellant for the black gelding, giving Pitts a bay gelding (the one named in the indictment) and $20 in money for the black gelding. Appellant traded the black gelding to Robinson without the knowledge or consent of Nixon. Soon after appellant carried off the black gelding, Nixon, finding the animal in the possession of Robinson, proved this animal and got possession of him from Robinson. Appellant, on the same day he traded with Robinson, sold the bay gelding in the city of Waco. Robinson testified that the bay gelding was his property, which he traded to appellant, and that he would not have given his bay horse and $20, or anything else, to Pitts, but for the representation made by Pitts to him at the time of the trade in regard to the black gelding, and that he has never seen the bay gelding (traded by him to appellant) since the day of the trade. We believe that the facts proven in this case do not, in law, constitute the offense of theft, but of swindling. It is clear from the evidence that Robinson intended to part with his property, the bay gelding mentioned in the indictment, when he traded him to Pitts. The authorities, in drawing the distinction between the offenses of swindling and of theft, all seem to rest such distinction upon the fact as to whether the owner of the property, at the time of parting with it, intended to part with the title, or merely the possession of the property. When the title is parted with by the owner, on false representations to induce the owner to sell, the crime is swindling; and, on the other hand, when the owner does not agree to part with the title, but only the possession of the property, the subsequent appropriation is theft. In the one case the owner, by means of false pretenses, has been induced to part, not only with the possession, but with his right of possession in the property itself; and in the other case the owner intended to part only with the possession of the property for temporary uses, without ever intending to part with the property itself. This distinction is clearly drawn beween the offenses of swindling and theft, by the following authorities: *White* v. *State*,[1] *Cline* v. *State*,[2] *Wilson* v. *State*,[3] *Ross* v. *People*.[4]

§ 482 —— **Swindling Under Texas Code.** — In several cases in the Court of Appeals of Texas, the evidence was held insufficient to convict the prisoner of swindling.[5] In *Popinaux* v. *State*[6] a conviction was reversed, HURT, J., delivering the following opinion: Aus. Popinaux was convicted of swindling, the amount acquired being of the value of three dollars. The offense is a misdemeanor. The evidence upon which defendant was convicted is as follows: J. H. Howry, the prosecutor, testified: "I was then engaged in a small retail business, including the sale of cigars. I am acquainted with defendant, Aus. Popinaux. On the 18th day of February, 1881, he came into my room, and he and John Skaggs got into a game of dice. They threw dice for the cigars. John Skaggs won twenty-five cents' worth of cigars of defendant and defendant paid me for the cigars. They played again and John Skaggs won twenty-five cents' worth of cigars of defendant; defendant paid me for

1 11 Tex. 770.
2 43 Tex. 494.
3 1 Port. 126.
4 5 Hill, 294.

5 Lutton *v.* State, 14 Tex. (App.) 518 (1883); Childers *v.* State, 16 Tex. (App.) 525 (1884); Baker *v.* State, 14 Tex. (App.) 332 (1883).

6 12 Tex. (App.) 140 (1882).

them. They played again, until Skaggs won fifty cents' worth of cigars of defendant. I told defendant I would like for him to pay up for them, before getting more. He remarked that I need not be alarmed, that he had the money to pay for them, and that he was going to continue the game until he lost $3 which he had in his pocket, and that he would pay for them before he left the room. Defendant got from me sixty cigars, worth five cents apiece. When he played until he lost $3 he quit the game. I then demanded my money. Defendant said he did not have it, but would go home and get it. He went off; and did not come back that evening. I sent Ned. Hembry to him to get the money that evening, but did not get it. I filed an affidavit against him that evening." Cross-examined. "Defendant and Skaggs were playing at a game of dice for the cigars; the understanding was that the loser would pay for them. I understood that while defendant and Skaggs were throwing dice, that the game was limited to $3, and that the loser would pay for the cigars; that was the custom. I know the game was limited to $3. (Here witness said that he had got himself into a tangle, and had told it wrong.) That he was expecting Aus. Popinaux to pay for the $3 worth of cigars; that he relied upon defendant's statement that he had the money and would pay him before he left the house. If I had not believed his statement, I would not have let him have the $3 worth of cigars. * * * Defendant came to me next morning and said he had come to pay me for the cigars, and said something about being too late. I told him that he was too late; that he could not pay for them then; I had commenced a prosecution against him. He did not tender me the money. Parties had been throwing dice in my room before defendant came in. I do not know that defendant did not have $3 on his person; never examined. He is not in the habit of having money, — though this is the first time I saw him to know him. He has not been about me since. The place where the defendant obtained the cigars from me was in Denton County, Texas. He has never paid me for the cigars. The cigars were my property." James Oldham, a State's witness, on oath says: "I was present on the 18th day of February, in the room of Mr. Howry, where defendant and John Skaggs were throwing dice for the cigars. Skaggs won the cigars off of defendant. Skaggs won twenty-five cents' worth of cigars of defendant. Defendant paid for them. They continued the game until Skaggs won twenty-five cents' worth of cigars again of defendant. Defendant paid for them. They continued the game until Skaggs won fifty cents' worth of cigars off of defendant; when Mr. Howry told defendant he would have to pay up. Defendant remarked that Howry need not be uneasy, that he (defendant) had the money to pay for the cigars. He did not say that he had the money on his person, or where. I did not hear them say the game was limited to $3. It might have been said when defendant quit the game. He said he would go home and get the money. I heard defendant tell Howry that he had the money and would pay for the cigars before he left the room. I did not hear him say where he had the money; he might have said so and I not have heard it." John Skaggs, introduced in behalf of defendant, says: "I am the party who threw dice with defendant for cigars on the 18th day of February, 1881, in Mr. Howry's room. I had been in the room throwing dice with various parties, and when defendant came in, I bantered him for a game. We played a while until defendant won some cigars off me. I remarked then if he would stick to me he might win a box of cigars. We continued the game until I won $3 worth of cigars off of defendant. Defendant did not say he had $3 in his pocket or anywhere else.

He did not limit the game to $3. The game was not limited to any amount. I heard all that was said; was present all the time till defendant left the room. After I had won some cigars off of defendant, Mr. Howry wanted him to settle up for what he had got. Defendant told him not to be uneasy; that he would pay for the cigars. When defendant quit the game he said he would go home and get the money, and return and pay for them." Cross-examined. "I did not tell Mr. Howry I would be a good State's witness, last week; nor any other time that I would be a good State's witness." J. H. Howry, re-examined. "Last week or two John Skaggs told me he would be a good State's witness; I did not have him subpœnaed, because I thought he was busy in the game and might not remember what was said. I had James Oldham subpœnaed for me."

If the witnesses for the defendant told the truth, then there was no offense committed by the defendant. The conviction of defendant must have been upon the evidence of Howry alone, and the evidence of the two witnesses for defendant utterly disregarded. Was the evidence of the prosecutor Howry sufficient to sustain the verdict? The defendant had met and completely crushed the case made by the prosecution, and that, too, by two witnesses. Not only so, but the witness Howry deliberately swears to facts about which there could not have been a mistake, facts reaching the vital point in the case, and which, if true, repelled all inference of guilt of the offense charged. This witness, however, was very suddenly impressed with the fact that he (as he says himself) had "got himself in a tangle and had told it wrong." What produced this tangle? Why had he told it wrong? Was the subject one in regard to which tangles and mistakes would probably and possibly occur? This witness knew the moving cause which induced him to part with his property. Most evidently, if he looked to the defendant for his pay, he could not have been mistaken about it. This was not only a very badly "tangled" witness, but rash in the extreme. Hear him on the pecuniary condition of the defendant! He says: "He was not in the habit of having money, — though this was the first time I saw him to know him. He has not been around me since."

While it is true that the jury are the judges of the credibility of the witnesses and the weight to be given to their testimony, still the defendant's guilt should at least be made reasonably to appear; and in passing upon this question, to wit, the guilt of defendant, the spirit, manner, contradictions, etc., of the witness should be looked to. If not, the jury, having the right to disregard the testimony of defendant's witnesses utterly, the defendant would be placed beyond all power of defence. We are not satisfied with this conviction. The judge below should have granted the motion for a new trial.

There is another view in which we desire to present this case. The defendant returned next morning and proposed to pay for the cigars. At the time he acquired them did he intend to defraud and cheat the prosecutor? We can not present this question and reasoning upon the same in a better light (nay not as clear) than that in which it is expounded by Judge Anderson in *Fay* v. *Commonwealth*,[1] a case we think quite analogous to the one before us. The facts of that case are these: "The only proof of any false pretense in this case, or that the prisoner made any statement that was not strictly true, is that he said he was the owner of the lots. It appears from the certificate of facts that the prisoner had an interview with Bowden, the owner of two lots of land,

[1] 28 Gratt. (Va.) 912.

in which Bowden expressed his willingness to sell the two lots of land together for $300, but declared that he would not sell them separately, and that afterwards, the prisoner sold one of them to Nelson Randolph, a colored man, for $200, telling him he owned them; that Randolph paid him $50 in cash, and agreed to pay the balance in monthly installments of $15 each; that a few days after the sale to Randolph he went to Bowden and completed the contract of purchase with him, paying him in cash $50, the money or the amount he had received from Randolph, and executing his notes for the deferred payments, and entering into articles of agreement with him setting out the terms of the sale and purchase, informing him that he had sold each of the lots for two hundred dollars, an advance of one hundred dollars on the price he was to pay for them, and requesting him, when the purchase-money was paid, to convey the lots respectively to the vendees. The court is further of opinion that unless the selling was by false pretense, with intent to defraud the buyer, the case is not within the statute. It follows that the fraudulent intent must have existed at the time the false pretenses were made by which the money was obtained." The principles enunciated in this opinion can be readily applied to the case at bar.

We are of the opinion that the court below should have granted a new trial, and in failing to do so it committed an error for which the judgment will be reversed and the cause remanded. In addition to the above reasons for reversal, there is no plea for defendant apparent of record, and on this ground the judgment of conviction is a nullity.

*Reversed and remanded.*

# PART III.

# LARCENY.

---

## LARCENY—TAKING OF PROPERTY ESSENTIAL.

## R. *v.* POOLE.

[Dears. & B. 345.]

*In the English Court for Crown Cases Reserved, 1857.*

1. **To Constitute Larceny,** there must be an intention on the part of the prisoner to appropriate the property to his own use.
2. **Case in Judgment.**—Two glove finishers took a quantity of finished gloves out of a store room, and laid them on their tables, with intent fraudulently to obtain payment for them as for so many gloves finished by them. *Held,* that they were not guilty of the larceny of the gloves.

The following case was reserved and stated by BRAMWELL, B., at the Summer Assizes, 1857.

The defendants were convicted before me at the Assizes for the city of Worcester of stealing from their master.

The master was a glove maker; the defendants were in his employ as glove finishers. When they had done any work, the practice was to take the finished gloves to an upper room and lay them on a table, in order that the workmen might be paid according to the number finished. The defendants broke open a store-room on the premises of the master, took a quantity of finished gloves out, and laid them on the table in the upper room, also part of the same premises, with intent fraudulently to obtain payment for them as for so many gloves finished by them. The gloves were never off the master's premises. Doubting the sufficiency of this evidence, I reserved the point, and ordered the prisoners to be bailed on finding sureties.[1] G. BRAMWELL.

This case was argued on November 21, 1857, before COCKBURN, C. J., ERLE, J., WILLIAMS, J., CROMPTON, J., and CHANNELL, B.

*E. V. Richards* appeared for the Crown; no counsel appeared for the prisoners.

*E. V. Richards*, for the Crown. This case was tried before BRAMWELL, B., and the case of *Regina* v. *Holloway*,[2] being cited on behalf of the prisoner, his lordship considered that the decision in that case could not be supported, and in that view MARTIN, B., concurred, and the point

1 See Reg. *v.* Holloway, 1 Den. C. C. 370.

2 1 Den. C. C. 370.

was therefore reserved. In *Regina* v. *Holloway*, the prisoner was indicted for stealing skins of leather, and there was a special verdict that the prisoner took the skins, not with intent to sell or dispose of them, but to bring them in and charge them as his own work, and to get paid by his master for them; the skins not having, in fact, been dressed by the prisoner, but by another workman; and the court held this not to be a larceny. That case was followed by *Regina* v. *Hall*,[1] in which the prisoner wrongfully took the goods of the prosecutor, and offered them for sale to the prosecutor as the goods of another person, and that was held to be a larceny; and Alderson, B., distinguished that case from *Regina* v. *Holloway* by saying that in the latter case the prisoner never intended to treat the goods as the property of any one but the real owner. I can not distinguish the present case from that of *Regina* v. *Holloway*.

Erle, J. The law is correctly laid down in *Regina* v. *Holloway*, and the distinction between that case and *Regina* v. *Hall*, is very clear. The test is whether the person who takes the property, assumes to exercise dominion over it as owner. The offer to sell in *Regina* v. *Hall*, was the strongest evidence of the intention of the prisoner to exercise dominion over the goods.

Williams J., referred to in *Rex* v. *Webb*,[2] in which it was held that it was not larceny for miners employed to bring ore to the surface, and paid by the owners according to the quantity produced to remove from the heaps of other miners, ore produced by them, and add it to their own, in order to increase their wages, the ore still remaining in the possession of the owner.

Erle, J. In larceny there must be the intent to vest the property in the thief by wrong.

*Richards*. It is said in *Regina* v. *Holloway*, that the intention must be permanently to deprive the owner of the property, but it seems to be a dangerous doctrine that an intention to return will excuse the taking. Here the intenion was to return the gloves to the owner, but subject to a lien for the work intended to be done upon them.

Cockburn, C. J. Not so. There is no lien.

Crompton, J. If the prisoner had obtained a lien, the case might have been different; but the offense intended seems to be that of obtaining money by false pretenses.

Erle, J. It is important that offenses should be accurately defined, and *Regina* v. *Holloway* has defined the *animus furandi*, to mean an intention to vest the property in the thief by wrong, and consequently to divest the real owner.

[1] 1 Den. C. C. 381.

[2] 1 Moo. C. C. 431.

COCKBURN, C. J. I do not see how this case is distinguishable from *Regina* v. *Holloway*, which I think is decided on very sound principles.

CROMPTON, J. I confess I am not quite so clear as to the principle of that decision. If this had been the first time the point had been raised I should have been inclined to think that there was sufficient here to make out the *lucri causa;* but we are bound by authority, and the conviction must be quashed.

*Conviction quashed.*

---

LARCENY — TAKING — DEPRIVATION OF PROPERTY MUST BE PERMANENT NOT TEMPORARY.

## R. v. HOLLOWAY.

[1 Den. 370; 2 C. & K 943]

*In the English Court for Crown Cases Reserved, 1848.*

1. **Definition of Larceny — There must be Permanent Deprivation of Property.** — Larceny is the fraudulent taking the personal goods of another with the felonious intent to convert them to the taker's own use, without the consent of the owner — "felonious" meaning without color of right for the act and "intent" to deprive the owner not temporarily but permanently of the property.
2. **Case in Judgment.** — A. who was in the employ of B., a tanner, took skins from the warehouse of B. to C. the foreman of B. at another part of the premises pretending that he had done work on them for which be was to be paid. A. intended to return the skins to his master when he had been paid for his pretended work on them. *Held,* not larceny.

The following case was reserved to this court: —

The prisoner William Holloway was indicted at the General Quarter Sessions holden in and for the Borough of Liverpool, on December the fourth, one thousand, eight hundred and forty-eight, for stealing within the jurisdiction of the court, one hundred and twenty skins of leather, the property of Thomas Barton and another.

"Thomas Barton and another were tanners, and the prisoner was one of many workmen employed by them at their tannery, in Liverpool, to dress skins, of leather. The skins, when dressed, were delivered to the foreman, and every workman was paid in proportion to and on account of the work done by himself. The skins of leather were afterwards stored in a warehouse adjoining to the workshop. The prisoner, by opening a window, and removing an iron bar, got access clandestinely to the warehouse, and carried away the skins of leather mentioned in the indictment, and which had been dressed by other workmen. The prisoner did not remove these skins from the tannery, but they were seen and recognized the following day at the porch or place where he usually worked in the workshop. It was proved to be a common practice at

the tannery for one workman to lend work, that is to say, skins of leather dressed by him, to another workman, and for the borrower in such case to deliver the work to the foreman, and get paid for it on his own account, and as if it were his own work.

"A question of fact arose as to the intention of the prisoner in taking the skins from the warehouse. The jury found that the prisoner did not intend to remove the skins from the tannery, and dispose of them elsewhere, but that his intention in taking them was to deliver them to the foreman, and to get paid for them as if they were his own work, and in this way he intended the skins to be restored to the possession of his masters.

"The question is, whether on the finding of the jury, the prisoner ought to have been convicted of larceny.

"Judgment was postponed, and the prisoner was liberated on bail taken for his appearance at the next or some subsequent Court of Quarter Sessions, to receive judgment or some final order of the court."

On the 20th January, 1849, this case was argued before Lord DENMAN, C. J., PARKE, B., ALDERSON, B., COLTMAN, J., COLERIDGE, J.

*Lowndes*, for the Crown.

PARKE, B. Is this case distinguishable from *R.* v. *Webb.*[1]

*Lowndes.* I distinguish it thus. In that case there was no taking at all from the possession of the owner. There was no positive physical act which showed an intention to defraud the owner.

ALDERSON, B. Here he only removes the skins from one part of the workhouse to the other.

COLERIDGE, J. In *R.* v. *Webb*, there was the space between the heaps of ore and a removal over that space; and the intention to injure the owners was necessarily involved in the act of removal.

PARKE, B. The difficulty here is that it is essential to larceny, that there should be a taking with intent wholly to deprive the owner of his property; a mere temporary appropriation is not enough to constitute a felonious taking. Here the intent was to return them to the master.

*Lowndes.* The older authorities show that such intent is not necessary, but that an intent to return the chattel in an impaired or altered state will constitute the offense. In *R.* v. *Privett and Goodhall*,[2] the owner can not be said to have been wholly deprived of the oats; they were applied to his use, though improperly. Here the skins were taken wrongfully, and though with a view of returning them to the master, it was not until they had been first made the means of defrauding him; therefore they can not be said to have been returned to him in the same state as when taken. They had other incidents attached to them

[1] 1 Moody, C. C. 431.

[2] 1 Den. 193.

by the wrongful act of the prisoner, which incidents carried with them an intent to deprive the owner of his property. The taking was clearly a trespass; it, therefore, was such a taking as to support a charge of larceny, provided the object of the taker was to convert them to his own use wrongfully. It clearly was so. The old authorities show that where there has been a fraudulent taking, and an intention on the part of the taker to use the thing taken as his own and so wrongfully to assert an entire dominion over the thing *pro tanto*, there is no necessity that he should also intend to deprive the owner wholly of his property forever. It is true that where such intention exists, coupled with a taking, every such act is a larceny; but there may be a larceny without such intention. Surely it would be a larceny to take a horse out of A.'s stable with a view of using him for six months, and then returning it to A. If it be not, what length of user on the part of the taker will make the taking felonious?

In the *Mirror*, it is said, "Larcine est prise d'autre moeble corporelle trecherousment contre la volunt de celuy a q. il est p. male egaigne de la possession, ou del use." The mere wrongful taking for the purpose of user is here said to be larceny. It is true that Bracton expands the words "*prise trecherousment*" into "*contrectatio fraudulenta cum animo furandi;*" Fleta uses precisely the same words; and Coke[1] calls it "the felonious and fraudulent taking." But the question still remains, what is meant by felonious? Is not the definition in the *Mirror* correct, which says that a wrongful and fraudulent taking to use is a larceny?

ALDERSON, B. If a servant takes a horse out of his master's stable, and turns it out into the road with intent to get a reward the next day by bringing it back to his master, would that be larceny?

PARKE, B., cited *R.* v. *Phillips*,[2] as showing that a wrongful taking for a temporary user was not larceny, even though the takers there were found by the jury to be perfectly indifferent whether the owner ever recovered his property or no, and certainly to have had no intention of returning it to him themselves.

*Lowndes* then said that if the court thought fit to send back the case to the recorder to be restated, the evidence would show that there was another ground on which the conviction might be supported.

Lord DENMAN C. J., intimated that the court would not take that course; that the case should be so stated as to enable the court to give their decision in the first instance.[3] And in giving judgment against

[1] 3 Inst. cap. 47.

[2] 2 East. P. C., ch. 16, sec. 98.

[3] By stat. 11 and 12 Vict., ch. 78, sec. 4, it is enacted, "that the said justices and barons, when a case has been reserved for their opinion shall have power, if they think fit, to cause the case or certificate to be sent back for amendment, and thereupon the same shall be amended accordingly, and judgment shall be delivered after it shall have been amended."

the conviction, he said that if this case could be considered open upon the authorities, there seemed great reason to hold that it was a larceny, but that as the court had so lately determined that the intention of the taker must be to deprive the owner wholly of his property, the conviction could not be supported.

PARKE, B. We are bound to say that this is no larceny. The books do not give a full definition of that crime;[1] East's Pleas of the Crown defines it with perhaps more accuracy than other writers to be "the wrongful or fraudulent taking and carrying away by any person of the mere personal goods of another from any place with a felonious intent to convert them to his (the taker's) own use, and make them his property without the consent of the owner. But this definition needs some addition; the taking should be not only wrongful and fraudulent, but should also be "without any color of right." All the cases show that if the intention were not to take the entire dominion over the property that is no larceny. *R.* v. *Phillips, and Strong*,[2] is the earliest case on the subject, and there are others to the same effect. Then there is the case of *R.* v. *Webb*,[3] which is precisely the same as the present case. Therefore the essential element of larceny is here wanting, viz., the intention to deprive the owner wholly of his property.

ALDERSON, B., and COLERIDGE, J., concurred.

COLTMAN, J. It is safer to be guided by the cases than by the definitions given by text-writers. If on looking through all the cases on the subject, it seems to have been considered that a taking, though wrongful, for a mere temporary purpose, does not amount to larceny, we must be governed by such authority, even though some old definitions would seem to warrant a different judgment. It is difficult to frame definitions so as to be absolutely correct; they are constantly amended and explained by the cases.

---

## LARCENY — CAPTION AND ASPORTATION ESSENTIAL.

## EDMONDS *v.* STATE.

[70 Ala. 8.]

*In the Supreme Court of Alabama, 1881.*

1. **Caption and Asportation Essential to Larceny.** — To constitute larceny the possession of the thing must pass from the owner. Therefore, where E. with corn coaxed a hog twenty yards, and then struck it with an ax, when the hog squealed and E. ran away and left it: *Held*, that E. was not guilty of larceny.

1 ch. 16, sec. 2. 2 East's' P. C., ch. 16, sec. 98. 3 1 Moo. C. C. 431.

APPEAL from Russell County.

SOMERVILLE, J. The indictment in this case charges the defendant with the larceny of a hog, which, under the statute, is made a felony, without reference to the value of the animal stolen.[1]

The only evidence in the case showing any caption or asportation of the animal was the testimony of an accomplice, one Wadworth who, made the following statement: that shortly after dark, on the 18th of February last, witness met defendant near the horse lot, on the plantation of one Ilges; that the two went together to witness' house, where the latter procured an axe, and they then returned to the lot. Witness then got some corn, and, after giving defendant the axe, by dropping some corn on the ground, "toled" the hog to the distance of about twenty yards; the defendant then struck the hog with the axe, and the hog squealed, whereupon, immediately, both the witness and defendant ran away, leaving the hog where it was.

Upon this state of facts the court charged the jury that, if they believed the evidence, it was sufficient to show such a taking and carrying away of the property, if done feloniously, as was necessary to make out the offense of larceny.

We think the court erred in giving this charge, though the question presented is not free from some degree of difficulty and doubt. The usual definition of larceny is, "the felonious taking and carrying away of the personal goods of another."[2] It is defined in Roscoe's Criminal Evidence as, "the wrongful taking possession of the goods of another, with intent to deprive the owner of the property in them."[3] It is a well settled rule, liable to some few exceptions, perhaps, that every larceny necessarily involves a trespass, and that there can be no trespass unless there is an actual or constructive taking of possession, and this possession must be entire and absolute.[4] There must not only be such a caption as to constitute possession of, or domination over the property, for an appreciable moment of time, but also an asportation, or carrying away, which may be accomplished by any removal of the property, or goods, from the original *status*, such as would constitute a complete severance from the possession of the owner.[5] It has been frequently held, that to chase and shoot an animal, with felonious intent, without removing it after being shot, would not be such a caption and asportation as to consummate the offense of larceny.[6] So it has been decided that the mere upsetting of a barrel of turpentine, though done with felonious intent,

1 Code 1876, sec. 4358.

2 4 Bla. Com. 229.

3 *Id.* 622.

4 Roscoe's Cr. Ev. 623, 624; 3 Greenl. on Ev., sec. 154.

5 1 Greenl. on Ev., sec. 154; Roscoe's Cr. Ev. 645.

6 Wolf *v.* State, 41 Ala. 412; State *v.* Seagler, 1 Rich. (S. C.) 30; 2 Bish. Cr. L., sec. 797.

does not complete the offense, for the same reason.[1] The books are full of cases presenting similar illustrations.

On the contrary, it is equally well settled, that where a person takes an animal into an inclosure, with intent to steal it, and is apprehended before he can get it out, he is guilty of larceny.[2] In *Wisdom's Case*,[3] it was said, *arguendo*, by Mr. Justice Goldthwaite: "If one entice a horse, hog or other animal, by placing food in such a situation as to operate on the volition of the animal, and he assumes the dominion over it, and has it once under his control, the deed is complete; but if we suppose him detected before he has the animal under his control, yet after he has operated on its volition, the offense would not be consummated." This principle is, no donbt, a correct one, but the true difficulty lies in its proper application. It is clear, for example, if one should thus entice an animal from the possession, actual or constructive, of the owner, and "tole" it into his own inclosure, closing a gate behind him, the custody or dominion acquired over the animal might be regarded as so complete as to constitute larceny.[4] It is equally manifest that if one should, in like manner, entice an animal, even for a considerable distance, and it should, from indocility or other reason, follow him so far off as not to come virtually into his custody, the crime would be incomplete.

The controlling principle in such cases would seem to be, that the possession of the owner must be so far changed as that the dominion of the trespasser shall be complete. His proximity to the intended booty must be such as to enable him to assert this dominion by taking actual control or custody by manucaption, if he so wills. If he abandons the enterprise, however, before being placed in this attitude, he is not guilty of the offense of larceny, though he may be convicted of an attempt to commit it.[5] It would seem there can be no asportation within the legal acceptation of the word without a previously acquired dominion.

The facts of this case, taken alone, do not constitute larceny. It is not a reasonable inference from them, that there was such a complete caption and asportation as to consummate the offense.

The judgment of the circuit court is reversed, and the cause is remanded.

[1] State *v.* Jones, 65 N. C. 395.
[2] 3 Inst. 109.
[3] 8 Port. 507, 519.
[4] 2 Bish. Cr. L. sec. 806.
[5] Wolf *v.* State, 41 Ala. 412.

## LARCENY — INSUFFICIENT TAKING.

## R. v. Gardner.

[L. & C. 243.]

*In the English Court for Crown Cases Reserved, 1862.*

**A. Found a Check, and being Unable** to read showed it to G. who told him it was only an old check; that he wished to show it to a friend. G. kept the check on different excuses, in the hopes of getting the reward which might be offered for it. *Held*, that this constituted no "taking" from A. such as would amount to larceny.

The following case was stated by the Deputy Assistant Judge of the Middlesex Sessions.

At the Middlesex Adjourned Sessions, holden on the 25th of August, 1862, Edward Gardner was tried before me on an indictment charging him in the first count with stealing one banker's check and valuable security for the payment of £82 10s, and of the value of £82 19s, and one piece of stamped paper of the property of James Goldsmith.

In the second count the property was stated to be the property of Thomas Boucher.

It appeared from the evidence of Thomas Boucher, a lad of fourteen, that he found the check in question; that, having met the prisoner, Gardner, in whose service he had formerly been, he showed it to him; that the prisoner (Thomas Boucher being unable to read) told him that it was only an old check of the Royal British Bank, and that he wished to show it to a friend, and so kept the check.

It was also proved that Boucher, very shortly, on the same day, went to prisoner's shop, and asked for the check; that the prisoner from time to time made various excuses for not giving up the check; and that Boucher never again saw the check.

It also appeared that the prisoner had an interview with Goldsmith, in which he said that he knew the check was Goldsmith's, asked what reward was offered, and, upon being told five shillings, said he would rather light his pipe with it than take five shillings.

The check has never been received either by Goldsmith or Boucher; though there was some evidence (not satisfactory) by prisoner's brother of its having been enclosed in an envelope and put under the door of Goldsmith's shop.

The jury found, "that the prisoner took the check from Thomas Boucher in the hopes of getting the reward; and, if that is larceny, we find him guilty."

I thereupon directed the verdict of guilty to be entered, and reserved for the opinion of the court, whether upon the above finding, the prisoner was properly convicted.

This case was argued on the 15th November, 1862, before POLLOCK, C. B., WIGHTMAN, J., WILLIAMS, J., CHANNELL, B., and MELLOR, J.

*J. Best* (*Besley* with him), for the prisoner. The facts in this case do not amount to larceny. The jury have found that the prisoner kept the check in the hope of getting a reward. There was, therefore, no felonious intent on his part. In *Regina* v. *York*,[1] the prisoner had found a watch; and the jury brought in a verdict of "not guilty of stealing the watch, but guilty of keeping possession of it in the hope of reward from the time he first had the watch." Upon argument it was held that that finding amounted to an acquittal. (He was then stopped.)

*Kemp*, for the Crown. It may be admitted that it is not larceny for the finder of a lost chattel to keep it in the hope of getting any reward that may be offered for it. Here, however, the boy, Boucher, was the finder, and had by law a right to the possession of the chattel against all the world except the right owner.

POLLOCK, C. B. *Armory* v. *Delamirie*,[2] is the foundation of that doctrine. In this case any one who could read would know to whom the check belonged.

*Kemp*. The case states that the boy could not read. He showed the check to the prisoner, who refused to give it back to him.

POLLOCK, C. B. A check is not a chattel, and is not the subject of larceny at common law. In *Rex* v. *Aslett*,[3] the prisoner was indicted for embezzling exchequer's bills, and it was held that the indictment was not proved, because they had not been signed by a person legally authorized to do so. He was afterwards tried upon a second indictment,[4] one count of which, founded upon the 15 George II.,[5] described the property as "effects," and was held to have been rightly convicted on that count. There was also a count describing them as pieces of paper; but no reliance was placed on that. How is this prisoner indicted in this case?

*Kemp*. He is charged with stealing a piece of stamped paper.

POLLOCK, C. B. Then it was not a piece of paper, but a check.

*Cur. adv. vult.*

The judgment of the court was delivered, on the 22d of November, 1862, by

POLLOCK, C. B. We are of opinion that the facts stated do not show any felonious taking. The mere withholding of the check under the circumstances of this case did not amount to such a taking as is required to constitute the offense of larceny.

*Conviction quashed.*

[1] 1 Den. C. C. 335; 3 Cox Cr. Cas. 181.

[2] 1 Strange, 504; *s. c.* 1 Smith Ld. Cas. (4th ed.), 256.

[3] 2 Leach, C. C. 954.

[4] 2 Leach, C. C. 958; Russ. & R. 67.

[5] ch. 13, sec. 12.

LARCENY — TAKING ESSENTIAL.

## McAfee v. State.

[14 Tex. (App.) 668.]

*In the Court of Appeals of Texas, 1883.*

1. **A Necessary Element of Theft** is the fraudulent taking of property from the possession of the owner, or some one holding possession for him. A taking by the party accused is essential to his guilt of theft, and no other subsequent connection with the stolen property, whether in good or in bad faith, will of itself constitute theft; wherefore it was error to charge, in substance, that the jury was authorized to convict if they believe that when he purchased the alleged stolen property from another, the defendant knew that the person from whom he purchased had no title to the property, and no right to sell it.
2. **Possession of Property Recently Stolen** may be relied upon by the State to connect the defendant with the taking, but this possession may be accounted for by purchase whether in good or bad faith. And a purchase in bad faith, though it would subject the accused to prosecution for knowingly receiving stolen property, is matter defensive to a prosecution for theft of the property thus purchased with knowledge that the seller had stolen it.

Appeal from the District Court of Navarro. Tried below before the Hon. L. D. Bradley.

The indictment charged the appellant and John Bassett with the theft of a cow, the property of H. Hailey, in Navarro County, on the twenty-fifth day of October, 1882. Upon his separate trial the appellant was convicted, and was awarded a term of two years in the penitentiary.

Hiram Hailey testified, for the State, that on October 25, 1882, he was going from Corsicana home in his two-horse wagon, his father and brother following a short distance behind in another wagon. About three miles out from town, the witness met the defendant and John Bassett driving three head of cattle, including the animal in question. The witness saw them before they saw him. When defendant and Bassett saw the witness they stopped, and permitted the cattle to leave the road and go to a tank which lay toward the witness. The defendant started off to a branch as though to water his horse. The witness called Bassett and asked him what he and the defendant were doing with his cow, pointing to the animal. Bassett replied that the defendant McAfee had bought the cow as one of the JD brand, and that he witnessed the bill of sale. About that time the defendant came up and the witness asked him what he was doing with the cow, and he replied that he had bought her as an unbranded cow. Witness asked: "Well, how is this; one of you claim to have bought her as an unbranded cow, and the other says you bought her as a JD cow." Whereupon defendant and Bassett dopped their heads.

The wittness knew his cow, and claimed her as soon as he saw her.

Defendant and Bassett denied that she belonged to the witness, and, though requested, refused to tell who they bought her from, or to show the bill of sale, saying they would do so at the proper time. The witness told the parties that they had to drive the cow back to the place where they got her. Bassett offered to stand good for her delivery next day, but the witness replied to Bassett that he would not accept him as security. Presently Sam. Black rode up and offered to stand good for the animal, and the witness agreed. The defendant and Bassett said they would put the cow in Huskey's pasture near by, and take her next day to 'Squire Leetch's, where witness and they were to meet. The parties met at Leetch's next morning, but defendant and Bassett did not bring the cow. They said that no one but a small boy was at the pasture when they turned her in, the night before, and that Huskey turned her out that night.

The witness had purchased the animal from Pete Adams about eighteen months before, and milked her up to about four months before this time. Her color was red; her mark a swallowfork and underbit in the left and a crop off the right ear; her brand was the figures 7 and 6 connected, by giving the curl of a 6 to the down stroke or stem of a 7, making 76, and that brand on this cow was very plain. She was four years old when bought by witness. The defendant knew the few stock owned by the witness. He often passed the house of the witness while the witness was milking this cow. This animal came to Mr. Adams in the division of his father-in-law's estate, to which the 76 brand belonged. The mark belonging to that estate was a swallowfork and underbit in the left and a hole and two underbits in the right ear. The mark in which this cow was belonged to widow Newman, who gave the JD brand.

When the witness met the defendant as stated, he accused the defendant of running the cow on the Sunday previous, at which time she escaped into the witness' field. The defendant admitted the charge, and said that the cow did not belong to the witness. The witness had never seen the cow since he saw the defendant and Bassett driving her. Frank Hailey, the brother of the previous witness, stated that he was with his brother when they met the defendant and Bassett, on October 25, 1882, with the cow and two other cattle, and otherwise testified substantially as did his brother. Sometime after the occurrences at that meeting, the witness' said brother got twenty-five dollars from Fred. Black, to hold until the cow was delivered.

Wid. Hailey, the father of the last two witnesses, testifying for the State, related the occurrences at the meeting of the parties, together with the cow, as they were related by his sons. He said, in addition, that, after the meeting of the parties at 'Squire Leetch's, he heard the

defendant and Bassett admit that they believed the cow to be the property of Hiram Hailey. The names of the witness' sons were H. K. and E. F. Hailey. H. K. Hailey signed his name H. K. Hailey and E. F. signed his E. F. Hailey. H. in the name of the prosecutor stands for Hiram, K. for King.

M. Huskey testified, for the State, that he lived about three miles south of Corsicana, and owned a pasture there. No cattle were put into his pasture and none turned out in 1882, by the witness. He had no little boy. He had one near neighbor, and others not very far off. They all have pastures. The State closed.

Jack McAfee testified, for the defence, that he and the defendant were brothers. In October, 1882, a man named Williams drove a cow up to the house of the witness' mother, where the defendant and the witness lived. He inquired the way to Mr. W. A. Hancock's place. The cow was of a pale red color, about six years old; marked with a crop off the right and a swallowfork and underbit in the left ear, which was the mark of Mrs. Shones, then Mrs. Newman. The cow was not branded. The man Williams claimed the cow, saying that he had traded for her, and offered to sell her to the defendant, and did so, giving the defendant a bill of sale. The defendant wrote the bill of sale, Williams signed it, and the witness and John Bassett signed it as witnesses. The defendant signed Williams' name, and Williams made his mark. Witness and Bassett signed it at the request of Williams. The witness examined the cow at that time, but could see no brand on her.

After the trade spoken of, the cow was put into the lot and was there at sundown, but broke out that night, and the witness had never seen her since. When Williams brought the cow to the house the animal looked as though she had been run. Williams had lived in that neighborhood twice within the last several years. Witness had never seen Williams since. John Bassett, Clint Collins, John Bowman, witness and the defendant were present when Williams drove up with the cow. The witness knew one or two of Hailey's cows, and knew Williamson's (Adams' father-in-law) 76 brand. Williamson's mark was two underbits in the left, and an underbit and a notch out of the end of the right ear.

The defence then introduced in evidence the bill of sale, which reads as follows: —

"The State of Texas. } The County of Navarro, s. s. } 1882.

"Known all men by these presents, that I the undersigned have this day bargain, sold and delivered to N. McAfee one pale red cow, about

six years old, marked thus: (as stated by first witness) with no brand perceivable, which I will warrant and defend all titles.

"G. T. WILLIAMS, ×
"Witness J. T. BASSETT, ×
"J. K. MCAFEE."

John Bowman testified, for the defence, that he was at Mrs. McAfee's in October, 1882, when Williams came there with a pale red cow, in the mark described by previous witnesses, and inquired directions to Hancock's. Williams claimed that he had traded for the cow, and that she was his property, and he finally sold her to the defendant, who, in the presence of the witness, paid him eighteen dollars for her. Williams drove the cow up quietly. The witness was at the gate when the bill of sale was written. It was his impression that Williams wrote it, though he was not certain. He could see into the house where the bill of sale was being written, but paid little or no particular attention to the matter. The witness could not write, and he did not write the bill of sale. He saw Williams make his mark to the bill of sale. He saw the cow put into the pen at McAfee's and had not seen her since. The witness examined her and could find no brand on her. She was not branded. The witness had been a witness for the defendant in other cases. The matters testified to in regard to the cow occurred on the 12th or 13th of October, 1882, before Hailey's cow was said to have been lost. The cow was quiet and did not appear to have been run. The witness did not know Williams, nor has he seen him since.

Clint Collins testified for the defence, that he was at McAfee's when Williams brought the cow there in October, 1882. He saw the defendant write the bill of sale in the house after he brought the cow. The cow was a pale red animal in Mrs. Newnan's mark, but was unbranded. He saw the cow in the lot that evening. He saw Williams on the prairie in the neighborhood a week before, and saw him several times during the previous spring. He did not know where Williams lived then or now.

Percy Collins testified, for the defence, that on the twelfth day of October, 1882, he met a man on the road between Grice's and Black's, who asked if Hancock was at home. He was driving a pale red cow in Mrs. Newman's mark, but unbranded. The witness asked him his name and he said Williams. Witness passed the cow first. She turned around during the conversation, and thereby enabled witness to see that she was not branded on either side. McAfee's was distant a short piece, and was between Grice's and Hancock's. Witness had never seen the man Williams before.

Henry Swink testified, for the defence, that he had seen the cow two or three times, the last time about three miles from Corsicana, on the Pursely Road. She was grazing with other cattle. This was in the fall of 1882. She was a pale red cow, in Mrs. Newman's mark, and was not branded. The witness first saw this animal, when she was a year or two old, on Tehuacana Creek. She was then in the same mark. He next saw her on Alligator Creek, near Hailey's. The cow was near a pasture when witness last saw her.

Fred Black testified that in November, 1882, his brother Sam told him to get twenty-five dollars from Mr. Jones and take it to K. H. Hailey; which the witness did.

Tom Black testified, for the defence, that in the fall of 1882 he saw the cow in question between Pecan and Cedar Creeks. As he could see no brand, he roped and threw her down and examined for brands. She was not branded.

J. P. Hailey, in rebuttal, testified that he had a bill of sale on his books, dated February 14, 1883, signed by W. A. Hancock. The witness was not present when it was executed. He did not know whether or not it was correct, as he had never seen the cow. The witness' report, showing age, marks and brands of cattle bought and killed from January 1 to May 17, was made out by Mr. Killebrew, not present on this trial. Killebrew made it out from witness' books and bills of sales, but witness could not say that it was correct in all particulars. The report contains the following entry: —

"One cow, four years old (the Newman mark), branded seventy-six (connected), bill of sale by W. A. Hancock."

Hiram Hailey, recalled, disputed several matters testified to by the witnesses for the defence.

The motion for a new trial was overruled.

*William Croft*, for the appellant.

*J. H. Burts*, Assistant Attorney-General, for the State.

HURT, J. Nabe McAfee was charged with the theft of a cow, the property of H. Hailey. Hailey swore that his name was Hiram, but it appeared from the evidence that the initials of his given name are K. H., making K. H. Hailey. Counsel for defendant urged below, and here insists, that this was a fatal variance.

To allege H. and prove Hiram would suffice. To allege Hiram. and prove that he was commonly known as Hiram would be sufficient, though Hiram be the middle name. But to allege H. and prove K. H., the H. standing for Hiram, presents quite a different case. Under the well settled rule "that a middle name or initial is not known in law, and is treated as of no consequence whatever," it would follow that to allege a middle name or middle initial only, would not be a basis for

proof of any name; and that, when the evidence developed the fact that the middle name or initial had been charged in the indictment, the insufficiency of the indictment would appear, and the prosecution crumble under such an indictment. These observations have reference to the law as it stood prior to the revision.

By article four hundred and twenty-five of the Code of Criminal Procedure, it is sufficient to state one or more of the initials of the Christian name, and the surname. This article settles the question against the defendant.

Defendant relied upon a purchase and bill of sale from another party. There was evidence in support of this defence. Upon this theory of the case, the learned judge charged the jury as follows: "3. If you believe from the evidence that the defendant in good faith purchased from one Williams said cow, and that he took and had possession of the same by reason of such purchase and the bill of sale introduced, although you may believe from the evidence that it had been stolen by the said Williams, you are instructed that such taking would not constitute theft, and in that case you will find the defendant not guilty, unless you believe from the evidence that defendant knew, at the time, that the said Williams had no right or title to or ownership in said cow, or authority to sell the same."

Suppose that defendant took possession of the cow by reason of such purchase, what had good faith to do with this case? Let us illustrate. A. steals a cow. B., with knowledge of the theft, buys the cow from A. Shall we say, thereupon, B. stole the cow? Again A. steals a cow. B., with knowledge of the theft, buys from A. Are we not forced to say, therefore, B. did not steal the cow, this being the real fact of the case?

Theft is the fraudulent taking of property from the possession of the owner, or some one holding possession for him. There must be a taking, and no subsequent connection with the stolen property, be it in good or bad faith, honest or fraudulent, will constitute theft.

If the evidence fails to connect defendant with the taking, unless by recent possession, this recent possession may be accounted for by proof of purchase, whether in good or bad faith; and defendant may in law urge the purchase, notwithstanding he had full knowledge that the seller had stolen the property. It is true that this would be receiving property knowing that it had been stolen, for which the purchaser, under an indictment charging this offense, could be tried and convicted. But appellant in the case at bar was tried for and convicted of theft. It was this charge, this offense, he was called upon to meet, and no other; and he had the right to meet and defeat the charge of theft with any

matter which would secure that purpose, although his guilt of another offense should be developed.

In the charge complained of, the jury are told that if defendant in good faith purchased the cow from Williams, and by virtue of said purchase took possession of the cow, they should find the defendant not guilty, "unless defendant knew at the time that Williams had no right or title to or ownership in the cow, or authority to sell the same." Now, the jury are not informed what they should do in the event they should find from the evidence that defendant did know that Williams had no right or title to or ownership in the cow, etc. But the inference of guilt of the theft of the cow from this charge is inevitable. And the jury could have drawn no other conclusion, if they believed defendant knew these facts, than the guilt of defendant.

If the defendant should attempt to meet the proof of a fraudulent taking with a purchase and bill of sale, his guilty knowledge of the seller's title or right to sell becomes of very great importance. He will not be permitted by a sham purchase, or by any character of purchase, whether in good faith or otherwise, to excuse the fraudulent taking.

But suppose that the jury should believe from the evidence that the defendant did not take the cow, but purchased the same with full knowledge that Williams had stolen her, he certainly would not be guilty of theft. Hence, we conclude that if the defendant's connection with the cow was subsequent to the taking, he is not guilty of theft, whether this connection be fraudulent or in good faith. We are not discussing the question as to what is required to constitute a principal.[1]

We are of the opinion that the court erred in the charge discussed; and as this charge was excepted to, the judgment must be reversed and the cause remanded.

*Reversed and remanded.*

---

LARCENY — EVIDENCE OF TAKING ESSENTIAL — CORPUS DELICTI.

## R. *v.* WALKER AND MORROD.

[Dears. 280.]

*In the English Court for Crown Cases Reserved, 1854.*

**W. was Indicted for the Larceny** of six pounds of brass from a foundry. The only evidence was that W., who was employed on the premises, had been seen to come into the place where the brass was kept. *Held,* that there was no evidence on which to convict.

1 See this subject exhaustively treated in Cook *v.* State, 14 Tex. (App.) 96.

The prisoners were indicted at the East Riding of Yorkshire Sessions, held at Beverley on the 3d of January, 1854, for stealing six pounds weight of brass from Mr. Crosskill, with a count in the indictment for receiving.

It was proved at the trial that Walker had worked for Mr. Crosskill, and borne a good character, for five or six years. That on the 9th of November he left Mr. Crosskill's employment. That on the 9th of November, Morrod, who was brother to Walker's wife, offered for sale in Beverley, six pounds weight of brass (being that charged in the indictment as being stolen from Mr. Crosskill's) and a quantity of white metal similar to block tin. That the brass (which was of a peculiar kind, and was in ingots cast in moulds belonging to Mr. Crosskill) was usually left in a shop the door of which opened on to the road leading into Mr. Croskill's works, to which workmen on the premises might have access, the door not being kept locked. That block tin and white metal were only kept in the brass foundry within this outer shop with a door between them. That Thomas Morrod was employed for one week on Mr. Crosskill's premises, in September last, as a bricklayer's laborer, and that in such employment he would have to pass along the road into Mr. Crosskill's works, and might have access to the outer shop (where the metal called brass was kept), but had never been seen there; that he never had been seen in the brass foundry, and could not have gone in there without some of the workmen seeing him. That Walker was employed as an iron moulder at works on the other side of Mr. Crosskill's yard. That he frequently went into the brass foundry to borrow tools, and had at times borrowed white metal, saying that he wanted it for purposes of casting. Walker was apprehended in November at Wakefield. Morrod, when he sold the brass on the 9th of November, stated to the person to whom he sold it that Walker's wife had given it to him to sell, and that Walker had that day left her and gone into the West Riding; which he also stated to the jury in his defence, telling them that he did not know but that it was honestly obtained. It was proved that he had given his name and address to the person to whom he sold the brass, and immediately he heard that it had been stolen from Mr. Crosskill and had gone to see about it.

The chairman told the jury, that they were not to take what Morrod said as to the way he obtained the brass, as evidence against Walker, drawing their attention to the fact that it was easy for a man who had himself stolen it to invent such a story, and it was therefore not fair to take such into account as evidence against the other prisoner.

The jury believing that Walker had stolen the metal, and that Morrod had received it, not knowing it to have been stolen, found Walker guilty of stealing, and acquitted Morrod.

Mr. *Dearsly*, on behalf of Walker, objected that there was no evidence whatever to go to a jury of Walker having stolen the brass, and requested the chairman to reserve a case for the consideration of the Court of Criminal Appeal, and the case was therefore reserved upon this point.

The jury was probably partly influenced in their finding by the facts which it was omitted to prove distinctly by the prosecution, but which were nevertheless apparent in the case, that Walker and his wife and her brother Morrod, lived in one house together, and that Walker had left Beverley on the 9th of November, and also by the general demeanor of the prisoners. It is also impossible that they should not give some weight to what Morrod had said at different times as against Walker, believing as they did that he had sold the metal innocently, and was speaking the truth for himself.

C. W. Strickland,
*Chairman.*

This case was argued on the 28th of January, 1854, before Jervis, C. J., Maule, J., Wightman, J., Williams, J., and Platt, B.

*Dearsly*, for the prisoner. This conviction is wrong. There is not a particle of evidence to be left to the jury.

Maule, J. Not a *scintilla.*

Jervis, C. J. This conviction must be quashed.

*Conviction quashed.*

---

## LARCENY — OWNER INTENDING TO PART WITH PROPERTY BY FRAUD.

## Kellogg *v.* State.

[26 Ohio St. 15.]

*In the Supreme Court of Ohio, 1875.*

**Where the Owner Intends to Part** with his property there is no larceny. Thus where a contract for the loan of money is induced by fraud and false pretenses of the borrower, and the lender, in performance of the contract, delivers certain bank-bills, without any expectation that the same bills will be returned in payment, the borrower is not guilty of the crime of larceny.

Error to the Court of Common Pleas of Hamilton County.

At the June term, 1875, of the court below, the plaintiff in error was convicted of the crime of larceny, and sentenced to the penitentiary for a term of years.

The testimony offered on the trial showed that, in the month of

April preceding, the prisoner had obtained $280 in bank-bills, from the prosecuting witness, under the following circumstances: —

The witness and the prisoner had first met and formed a casual acquaintance as passengers on a train of cars passing from St. Louis to Cincinnati. After their arrival at Cincinnati they again met at the railroad depot, where the prosecuting witness was about to take another train for his home in Madison County, when the following occurrences took place, as detailed by the witness: The defendant asked me if I was going to take that train; I said yes. He said he thought he would go on that train too. Then a man came up to us and said to the defendant, "If you want to go on that train, you had better get your baggage and pay your freight bill." The defendant then said, "Confound these fellows, they won't pay me any premium on my gold, and I have no other money to pay this freight bill, and I don't want to give them two hundred and eighty dollars in gold and get no premium." He then said to me, "Will you let me have $280 in currency, and I will give you this gold to hold as security until I can go to the bank and draw some money which I have there, and I will then pay you $280 back." He further said, "I must get my freight out to-night, and they won't let me have it till I pay the bill, which is $280." I then told him I would let him have the two hundred and eighty dollars to pay his freight bill; which I did, and he gave me fourteen pieces of what he said were gold, and which I took for twenty-dollar gold pieces, and I gave him $280 in paper money. He started off, and I examined them and found that they were not twenty-dollar gold pieces, nor were they gold at all. * * * I followed him but did not overtake him or see him any more until he was arrested. On cross-examination the prosecuting witness testified as follows: "I delivered my money to him voluntarily. He used no force or violence to obtain it from me. I never expected to get the same money again. He said he would go to the bank and draw some money, and come back and pay me what he borrowed and get the gold." The commission of the crime charged in the indictment was not otherwise proved than as above stated.

The court was requested by the defendant to charge that, "if the jury found, from the evidence in the case, that the defendant fraudulently and wrongfully induced Denton, the prosecuting witness, to part with the money mentioned in the indictment; and if they also found that the prosecuting witness was fraudulently induced to, and in fact did part with the possession and property in the money described in the indictment," the defendant could not be convicted of the offense of larçeny as charged in the indictment. The record shows that "the instruction in that form the court refused to give," but did give the same with the following explanation: "That the word property, as used, does

not mean the mere money — it means the proprietary right of ownership in the money. So that, while the manual possession of the money may be in one person, the legal technical property may still be in another, and a bailment or possession of goods and chattels obtained by a trick or fraud does not transfer the property to the person practicing the trick or fraud. If you find, therefore, that the mere possession of the money with the owner's consent was fraudulently obtained by the defendant with intent to steal it from the owner, it is larceny."

*C. H. Blackburn*, for plaintiff in error. The testimony shows that Kellogg obtained the money from Denton without force or violence; that Denton delivered the money to him voluntarily, and did not expect to get the same money again. This being so, there was no trespass, and could be no larceny.[1]

McIlvaine, C. J. On the trial below, the jury was properly instructed that the defendant could not be convicted of larceny, if he obtained the possession of the money alleged to have been stolen from the prosecuting witness with his consent, if it was further found that, at the time of the transfer of the possession, the right of property in the money also passed from the prosecuting witness to the defendant, although the witness was induced, through the fraud of defendant, to part with the possession and the property in the money. And there was no error in the further instruction: "If you find, therefore, that the mere possession of the money, with the owner's consent, was fraudulently obtained by the defendant, with intent to steal it from the owner, it is larceny."

This last instruction, however, was the predicate of a proposition which had been given in explanation of the first instruction, to wit, "while the manual possession of money may be in one person, the legal technical property may still be in another; and a bailment, or possession of goods and chattels obtained by a trick or fraud, does not transfer the property to the person practicing the trick or fraud." Whether this, as an abstract proposition of law, be true or false, it was certainly misleading in the case as it was made in the evidence. The jury could not well have understood it otherwise than as a declaration by the court that the transaction, as detailed by the prosecuting witness, amounted to a mere contract of bailment, which left the right of property remaining in the prosecuting witness.

Now, if the common law at all recognizes a class of bailments, corresponding to the *mutuum* of the civil law — to wit, where a loan is made

[1] 2 Bish. Cr. L., secs. 812, 813, 818, and authorities cited; 2 Whart. Cr. L., secs. 1853, 1854; Ennis *v.* State, 3 Iowa, 67; Welch *v.* People, 17 Ill. 339; Wilson *v.* State, 1 Port. 118; 15 Serg. & R. 93. Nor does it change the rule when the consent is obtained by fraud. 2 Bish. Cr. L., sec. 811; Rex *v.* Summers, 3 Salk. 194; 2 E. P. C. 668; 15 Serg. & R. 93; Cary *v.* Hotailing, 1 Hill (N. Y.), 311.

of money, wine, or other thing that may be valued by number, weight, or measure, which is to be restored only in kind of equal value or quantity—it is not true that the right of property in such bailments remains in the bailor; but on the other hand, the absolute property passes with the possession and rests with the borrower. In such cases the fraud of the borrower no more prevents the passing of the title to the thing loaned upon delivery, than does fraud on the part of a purchaser of goods. The contract in either case is not void, but only voidable at the election of the lender or seller. The better opinion, however, seems to be that such a loan is not a regular bailment at common law but falls more properly under the innominate contract, *do ut facies*, and results in a debt and not in a trust.

The testimony before the jury in the court below tended to prove a loan of money from the prosecuting witness to the defendant whereby the borrower became indebted to the lender and assumed to make payment in other money. The testimony of the witness was, that he voluntarily delivered the money to the defendant and never expected to get the same money again. It is true he was induced to make the loan through the fraud and false pretenses of the defendant. No doubt a crime was thus committed by the defendant, but it was the crime of obtaining money under false pretenses and not a larceny. To constitute larceny in a case where the owner voluntarily parts with the possession of his property, two other conditions are essential. 1. The owner at the time of parting with the possession must expect and intend that the thing delivered must be returned to him or disposed of under his direction for his benefit. 2. That the person taking the possession must, at the time, intend to deprive the owner of his property in the thing delivered. But where the owner intends to transfer, not the possession only but also the title to the property, although induced thereto by the fraud and fraudulent pretenses of the taker, the taking and carrying away do not constitute a larceny.

In such case the title rests in the fraudulent taker and he can not be convicted of the crime of larceny, for the simple reason that at the time of the transaction he did not take and carry away the goods of another person, but the goods of himself.

Had the law been thus stated to the jury there is no doubt the verdict would have been not guilty, as he stood charged in the indictment.

Judgment reversed and cause remanded for such further proceeding as may be lawfully had in the premises.

WELCH, WHITE, REX and GILMORE, JJ. concurred.

## LARCENY — INTENT TO STEAL MUST BE FOUND BY JURY

## R. *v.* Deering.

[11 Cox, 298.]

*In the English Court of Criminal Appeal, 1869.*

**Money was Given to the Prisoner** for the purpose of paying turnpike tolls at two gates on his journey. Twelve days afterwards, on being asked if he had paid the toll at one of the gates, the prisoner said he had not — that he had gone by a parish road which only crossed the road at that gate, and so no toll was payable there, and that he had spent the money on beer for himself and his mates. The prisoner having been convicted of larceny of the money, but it not appearing on a case reserved that the question of felonious intention had been distinctly left to the jury, this court quashed the conviction.

Case reserved at Quarter Sessions for the opinion of this court.

The prisoner was tried at the adjourned Quarter Sessions for the county of Kent, held on the 4th of March, 1869, on an indictment for stealing 6s, the money of Henry Simmons, his master.

The following facts must be taken to have been proved: —

The prisoner was a wagoner in the employment of the prosecutor. On the 13th of February last the prosecutor's bailiff sent out four teams of horses with wagons, one of them being in charge of the prisoner.

The prisoner and the other persons in charge were ordered to go with the teams to a place called Snodland to fetch coal.

For the journey which these teams were to take they should have gone through two turnpike gates called the Loyal Oak and Snodland gate, and before starting the said bailiff delivered to the prisoner money to the amount of 8s 8d for the purpose of paying the tolls at the said gates in respect of all the teams.

On the 25th of February last, the bailiff asked the prisoner if he had paid the tolls at the Snodland gate. The prisoner said he had not. The said bailiff asked him why he had not paid the said tolls, and the prisoner replied that by the road they went no toll was payable, and that he had spent the money amounting to 5s on beer for himself and the other wagoners and mates. The prisoner stated that the teams had gone by a parish road which only crossed the turnpike road at the gate, and thus no toll was payable.

The jury convicted the prisoner; but, having some doubt whether these facts prove a larceny on the part of the prisoner, the court reserved the point for the opinion of the court for the consideration of Crown Cases Reserved, and admitted the prisoner to bail to appear and receive judgment when called upon.

The question for the consideration of the court is, whether under the above facts the prisoner could properly be convicted of larceny.

JOHN G. TALBOT, *Chairman.*

No counsel appeared for the prisoner.

*Barrow*, for the prosecution. The conviction was right. The law is thus laid down in 2 Russell on Crimes.[1] "The clear maxim of the common law established by a variety of cases, is, that where a party has only the bare charge or custody of the goods of another, the legal possession remains in the owner; and the party may be guilty of trespass and larceny in fraudulently converting the same to his own use. And this rule appears to hold universally in the case of servants whose possession of their master's goods by their delivery or permission, is the possession of the master himself." In this case the prisoner had only a bare charge of the money to pay the turnpike gates with, and the possession remained in the master. No doubt, if a master gives his servant money for his second-class railway fare, and also for refreshments, and the servant was to go third-class and not return the difference to his master, that might not be larceny, as the money was given to the servant's own use. [COCKBURN, C. J. Suppose the master gives the servant money for his railway fare, and he walks and saves the money and spends it?] That is not this case. If the master gives the money to a servant to pay a bill with, and the servant does not pay the bill, and appropriates the money to his own use, that is larceny. Here the toll is imposed on the wagons and horses, and the master was liable for it. For the journey these teams were to take, the case states that they should have gone through two turnpike gates. In 2 Russell on Crimes[2] it is said: "The correct distinction in cases of this kind appears to be that if the owner parts with the custody only, and not with the possession, and the prisoner converts the chattel to his own use, it is larceny, although he had no felonious intent at the time he received it; but if the owner parts, not only with the custody, but also with the possession of the chattel, and the prisoner converts it to his own use, it will not be larceny, unless the prisoner had a felonious intent at the time he received the chattel. A servant going off with money given to him by his master to carry to another, and applying to his own use, has been holden guilty of larceny. * * * Where ou an indictment for stealing a shilling, it appeared that the prisoner, who was the servant of the prosecutor, was ordered by him to go for twelve hundred weight of coals, and that the prisoner received from the daughter of the prosecutor 6s which she had received from her father to give to the prisoner to pay for the coals, and the prisoner, instead of getting twelve hundred weight of coals, got only nine hundred weight, the price of which was 3s 3d, and gave 4s

p. 382. p. 393.

to pay for the coals and received 9d in change, and on his return gave the prosecutor's daughter 1s and made a false statement as to the quantity of coals he had bought, and appropriated the remaining shilling to his own use, Patteson, J., held that the prisoner was guilty of larceny of that shilling.[1] So where the prisoner was indicted for stealing a sovereign, the property of the prosecutor, his master, who had engaged him to take a canal boat on a voyage, and had paid £5 for his wages in advance, and for the keep of the towing horse, and had given him a separate sum of three sovereigns to pay the tonnage dues on the canal. The prisoner took the boat about sixteen miles, and paid tonnage dues amounting to rather less than £2, but appropriated the remaining sovereign to his own use. It was urged that the relation of master and servant did not exist. Patteson, J. Taking that to be so, it does not appear to me to be material in this case. The prosecutor distinctly swears that he gave this man three sovereigns to pay the tonnage dues, and it appears that he has made away with one of the sovereigns. To constitute a larceny in this case there is no occasion to show that the relation of master and servant existed. If I give a man money to apply to a particular purpose, and he appropriates it to another purpose he is guilty of larceny. If a man were to employ another to go somewhere with his horse for a certain price, that other is for that purpose his servant, but if in addition to this he gives him a distinct and separate sum of money to be disbursed in a particular way, and if instead of so disbursing it he appropriate it to his own use, that is felony.[2] [M. Smith, J. Where is the evidence of the felonious intent here?] The jury must be taken to have found the prisoner's intent. The only question reserved, is whether the prisoner could properly be convicted of felony. [Cockburn, C. J. The facts are stated, and the prisoner may have thought that by going another road he could save the toll, and that it would make no difference to his master, which way he went, and that he was entitled to spend what he so saved in beer. That no doubt was very wrong, but did it make him guilty of larceny? M. Smith, J. He spent the money openly among the other men. Bramwell B. The mere spending the money, unless done with a thievish mind or fraudulent intent, was not larceny.]

Cockburn, C. J. We think that the right question was not left to the jury in this case; if it had been, in all probability, the prisoner would have been acquitted. We come to this conclusion on the special facts in the case.

Bramwell, B. It is not to be assumed that the court has answered the question submitted in the negative, but we infer from this case that the proper question was not left to the jury. *Conviction quashed.*

[1] Reg. *v.* Beaman, R. & M. 433.

[2] Reg. *v.* Good, C. & M. 582.

## LARCENY — INTENT TO STEAL ESSENTIAL — TAKING GOODS FROM OFFICER.

## COMMONWEALTH *v.* GREENE.

[111 Mass. 392.]

*In the Supreme Judicial Court of Massachusetts, 1873.*

**One is not Guilty of Stealing Goods** from an attaching officer, if he, being owner, intended at the time to leave and did leave with the officer goods enough to satisfy the claim of the attaching creditor.

MORTON, J. The indictment charges the larceny of certain goods alleged to be the property of Ephraim W. Farr. It appeared at the trial that the defendant was the general owner of the goods; that they had been attached by Farr, who is a constable of the city of Boston, upon a writ duly sued out of the Superior Court by a creditor of the defendant; and that while they were under attachment the defendant took and carried them away. There is no doubt an attaching officer has a special property in the goods attached, so that he may maintain trespass or trover if they are taken from him; and so that, if they are stolen from him, the property in them may properly be alleged to be in him.[1] And if the general owner, unlawfully and without the consent of the officer, takes and carries away the goods, the question whether he can be convicted of larceny depends upon the intent with which he does the act. If his intent is to charge the officer with the value of the goods taken, the taking is larceny. Mr. East says: "If A. bails goods to B., and afterwards *animo furandi* steal them from him with design probably to charge him with the value, or if A. send his servant with money; and afterwards waylay and rob him, with intent to charge the hundred, in either case the felony is complete."[2]

An attaching creditor acquires by the attachment a qualified right to so much of the property attached as is necessary to satisfy his debt; and if the general owner takes and carries the whole or a part of the property, with the intent to defraud him of this security, we think it would be larceny. But if his design is merely to prevent other creditors from attaching the goods, and he has no intent to defraud the officer or the attaching creditor, the act, though unlawful, would not be larceny.

The case at bar seems to have been tried upon this view of the law. The only question was as to the intent with which the defendant took the goods. He was a witness in his own behalf, and was permitted to

1 Gen. Stats., ch. 172, sec. 12; Bond *v.* Padelford, 13 Mass. 394; Brownell *v.* Manchester, 1 Pick. 232.

2 2 East's P. C. 654; 1 Hale's P. C. 513; 4 Bla. Com. 231; Palmer *v.* People, 10 Wend. 165.

testify that he took them for the purpose of protecting himself against other creditors, and not for the purpose of defrauding the officer. But he offered also to testify that "his intention was to leave and that he did leave, five or six hundred dollars worth of the goods in the store, enough to satisfy the suit already commenced," which testimony was excluded by the court.

The defendant in a criminal case may be a witness and may testify directly to his motives and intent; but he also has the right to prove, by his own or other testimony, any competent facts which tend to show his intent.

The fact, if proved, that the defendant purposely left in the store enough of the goods to satisfy the debt of the attaching creditor, would tend to explain and qualify the transaction of which it was a part, and to show that his purpose was not to defraud the officer or creditor.[1] It would tend to corroborate his statement as to the intent with which he took the goods. The weight of the testimony was for the jury to consider, but we think it was competent and should have been admitted.

*Exceptions sustained.*

---

## LARCENY — FELONIOUS INTENT NECESSARY.

## JOHNSON *v.* STATE.

[36 Tex. 375.]

*In the Supreme Court of Texas, 1871.*

**To Constitute Larceny,** there must be a felonious intent to deprive the owner permanently of his property.

APPEAL from Hays. Tried before Hon. J. P. RICHARDS.

The opinion of the court sufficiently states the case.

WALKER, J. The appellant has been twice tried upon an indictment charging him with feloniously stealing a roan gelding, the property of some unknown person. He has been twice convicted and each time sentenced to five years in the penitentiary.

The evidence establishes the fact that the horse alleged to have been stolen had been running upon the range in Hays County for a number of years, during which time people were in the habit of catching him and riding him for temporary purposes.

1 Com. *v.* Rowe, 105 Mass. 590.

About the latter part of February, 1872, the defendant, in company with three others, were hunting beeves near a place called Pitt's Pond, in Hays County, where the horse was seen grazing, when Johnson remarked that he would catch the horse and ride him awhile; that he had as much right to ride him as other people; whereupon, Jim Carson, one of the party, roped the horse for the defendant, and he mounted and rode him off.

Johnson was then in the employ of Henry Bittick; Bittick was a butcher living in San Marcos, and the beeves which they were hunting were for his use.

Some jocular remarks were made between Bittick and Johnson at the time the horse was taken up, Bittick telling Johnson that he had better take care or he might get himself into the penitentiary; and Johnson replying, that it was a great ways to the penitentiary, and that it would take smarter men than were in Hays County to send him to the penitentiary for taking up and riding the old stray pony.

But it appears from the evidence that Johnson rode the pony to San Marcos, and then turned him into a lot; afterwards he told Bittick that he had traded the horse to Clay Ernest; Bittick again admonished him that he might get into trouble, to which he replied, we have traded in such a way that we can untrade again.

It seems further from the evidence that Ernest had the roan horse in his possession for some time, and that the defendant subsequently traded off the horse which he got from Ernest to a third party, giving six dollars boot money, and afterwards sold the horse he got on the second trade for thirty dollars, to the same man, Clay Ernest.

In a recent English case, Mr. Baron Parke defined the term "felonious" to be an act where there is no color of right or excuse for it.[1] In larceny the taking must be with a felonious intent to deprive the owner, not temporarily, but permanently of his property.

At the time of the trial the old pony was back on the range, running at large. In order to determine whether the defendant is guilty of larceny or not, we must look to the *quo animo* of the taking. He could not have intended to deprive the owner of his property. No owner of the horse was known to be in existence. The horse had run for years at large upon the range without an owner, and different persons had used him at pleasure. To make the case one of larceny, it must be shown that, at the time of taking, Johnson had formed the felonious intention. This the evidence does not show; if the taking the horse had been felonious, Carson, who roped the animal for the

[1] In Reg. *v.* Holloway, 2 C. & K. 942.

defendant, and Bittick and Baker, who were also present, were all *participes criminis*, but the evidence leads to no such legal conclusion.

The verdict of the jury is unsupported by and contrary to law.

The judgment of the District Court is therefore reversed and the cause dismissed.

*Reversed and dismissed.*

---

## LARCENY — ANIMUS FURANDI MUST BE PROVED.

## WESTON *v.* UNITED STATES.

[5 Cranch, C. C. 492.]

*In the United States Circuit Court, District of Columbia, 1838.*

**It is Error in the Judge to Instruct the Jury** that certain facts constitute larceny, unless the *animus furandi* be expressly stated as one of those facts; and unless the fact be also stated that the goods were taken without the consent of the owner.

ERROR from the Criminal Court of the District of Columbia.

The prisoner was indicted for stealing twenty-six silver coins of the value of fifty cents each, sixteen silver coins of the value of twenty-five cents each, and nine silver coins of the value of one dollar each, of the goods and chattels of one Sophia Brasey.

Upon the trial the attorney for the United States, prayed the following instruction, namely: —

"If the prisoner is believed, by the jury, to have come into the witness' house and found her counting money; and that he then conceived the intention to obtain the money under a fraudulent and false pretense of changing it for her into gold, meaning at the time to appropriate it to himself under this pretense; and that, having falsely stated himself to be a clerk in the post-office, of the name of Wilson, he thereupon, in pursuance of his said intention, talked and acted, in relation of the said money, so as to induce the witness to believe that he had the gold about him, and would then give her the gold for the money; and thereupon the witness being so induced to believe that the prisoner was about to give her gold, in exchange for her money, allowed him to take the money from the table and put it in his pocket; and that after he had so taken it up and put it into his pocket, he said he would go and bring her the gold, and was permitted by her to go away with it, upon his promise to return and bring her the gold; then the taking up and pocketing the money, under the circumstances of

the case above stated, if believed by the jury to be true, with the intent and in the manner above stated, is larceny."

Whereupon, the defendant's counsel prayed the court the following addition be made to said instruction, if given, namely: —

"But should the jury believe, from the evidence, that the prosecutrix proposed to the defendant to take the money and get gold for it, and that he said he would try to do it, but as gold was hard to be got, or words to that effect, he did know if he could, and that said money was delivered to him for that purpose, with the consent of the prosecutrix, notwithstanding the defendant may not have returned the money so proposed to be changed, it is not larceny, and the defendant is entitled to a verdict of acquital."

The instruction, with the addition, as prayed, was given by the judge, and the defendant's counsel took a bill of exceptions, upon which the cause was brought up to this court by writ of error.

Two objections were made to the instruction granted at the prayer of the District Attorney.

1. That it does not require the jury to find that the money was taken *animo furandi*, or feloniously.

2. That the facts stated in the prayer, do not show that the taking was without the consent of the owner of the money, or as the books say, "*invito domino.*"

*Mr. R. J. Brent* and *Mr. Carlisle*, for the defendant, cited 2 Russell,[1] Roscoe,[2] *Rex* v. *Walsh*,[3] Dane's Abridgment,[4] *Perl's Case*,[5] *Rex.* v. *Pratley*,[6] *Six Carpenters' Case.*[7] 1 Russell,[8] *Young* v. *Rex.*[9]

*Mr Key*, for the United States, *contra*, cited, 2 Russell,[10] 2 Chitty's Blackstone.[11] See, also, 2 Russell,[12] *Phineas Adams's Case.*

Cranch, C. J. The facts stated in a bill of exceptions are to be considered by the court exactly as if they had been found in a special verdict; for the court tells the jury what the law is upon the facts to be found by them; and the only difference is, that if a special verdict be found, the court decides the law after the facts are ascertained by the jury; and in giving an instruction at the trial, the court decides the law before the facts are found. And the court, in giving an instruction, can no more infer any fact not expressly stated in the prayer, than they can infer any fact not expressly found in a special verdict.

A court can not instruct a jury that certain facts constitute a cer-

1 pp. 93, 107, 108, 109, 110, 112, 114, 117, 122, 135, 187.

2 pp. 487, 491.

3 4 Taunt. 281.

4 pp. 164, 187.

5 In this court, at March term, 1838.

6 5 C. & P. 533.

7 8 Coke, 290.

8 C. & M. 52.

9 3 T. R. 98.

10 p. 118, etc.

11 p. 108, note.

12 p. 113.

tain offense, unless every essential fact necessary to constitute the offense be included in the statement. And every instruction given to the jury upon an hypothetical statement of facts, must be as strictly justified by the hypothesis, as an opinion given upon a special verdict must be by the facts found by the jury, and in neither case can the court infer any fact from the facts stated, or found. Every fact to be inferred from facts stated, must be expressly found or stated.

There is no definition of larceny, to be found in the books, which does not include the fact of a felonious intent, or the *animus furandi*, as an ingredient necessary to constitute the offense. No other intent can be substituted. An "intention to obtain money under a fraudulent and false pretense," "meaning at the time to appropriate it to himself under this pretense," is evidence from which the jury may, when connected with other circumstances, infer the *animus furandi*, but it is not the *animus furandi* itself. There may be a fraudulent intent to obtain money, which may not be a felonious intent. So there may be a taking of money by a man, with intention to obtain it under a fraudulent and false pretense, and to appropriate it to himself under that pretense, which might not be a felonious taking, or a taking *animo furandi*. An instruction that such a case is larceny, without finding the felonious intent, or the intent to steal, is not perfectly correct in law.

There is a great difference between an instruction to the jury, and a demurrer to evidence. In the latter case the question is, whether the evidence, with aid of all the inferences which the jury may lawfully make from the facts proved, is sufficient to justify the jury in finding the defendant guilty. The same question arises upon a motion for a new trial on the ground that the verdict is against evidence.

In such cases, the judges have been in the habit of saying that such and such facts amount to larceny; when it is evidently their meaning, that the convictions were right, that is, justified by the evidence; or, in other words, that the evidence was sufficient to justify the jury in convicting the prisoner, because it justified them in finding the *animus furandi*.

It is in this way that all the English cases which have been so profusely cited, came before the courts. In all of them the question was, whether the jury could, in law, find the prisoner guilty, upon the evidence stated as in a demurrer to evidence; and, of course, leaving the jury to draw all the inferences which they could lawfully draw from the facts given in evidence; and in almost every one of them the jury was left to find the felonious intent.

Not oue of them was upon a bill of exceptions taken to an instruction to the jury by the court upon an hypothetical state of facts. In some

of them the judges were of opinion that the facts stated justified the jury in finding the felonious intent, and, consequently, in finding the prisoners guilty.

The English cases, therefore, do not apply to this part of the case now before this court; which is not upon a demurrer to the evidence, nor on motion for a new trial; but is upon a bill of exceptions to an instruction given by the judge, that certain facts *per se* are larceny, without finding a felonious intent, or the *animus furandi;* instead of instructing the jury that the facts stated were evidence from which the jury might infer that the original taking of the money by the prisoner was the felonious intent to steal it, and that if they should so find, they might find him guilty of larceny as charged in the indictment.

Upon this bill of exceptions, the question is not whether the evidence was sufficient to justify the general verdict of guilty. If such were the question, I should think there was no error as to that part of the instruction to which the defendant has excepted, for which we could reverse the judgment. But as the judge did not make it a condition of the instruction that the jury should find the felonious intent, or the *animus furandi*, we think there is error in the instruction, for which the judgment should be reversed and a *venire denovo* awarded.

2. The second objection to the instruction is, that the facts stated in that part of it to which the defendant excepted, do not show that the taking of money was without the consent of the owner.

Before the judge could correctly instruct the jury that the case stated constituted larceny, we think he should have inserted a condition that the jury should find from the evidence that the defendant took the money without the consent of the owner. The finding of facts from which that inference might be drawn, is not a sufficient finding to constitute the case stated, *per se*, larceny.

*Judgment reversed, and venire de novo awarded.*

---

## LARCENY — FINDER OF GOODS ON HIGHWAY — LOST BANK-NOTE.

## R. *v.* THURBORN.

[1 Denison, 387; Temp. & M. 67.[1]]

*In the English Court for Crown Cases Reserved, 1849.*

1. **If a Man Finds Goods** that have been actually lost or are reasonably supposed by him to have been lost, and appropriates them to his own use, believing at the time that the owner can not be found, he is not guilty of larceny.

1 Also reported *sub nom*, R. *v.* Wood in 3 Cox, 453.

2. **T. Found a Bank-Note on the Highway** and took it intending to appropriate it to his own use. The note had no mark on it to identify the owner, nor did he then know him. T. afterwards and when he had discovered who the owner was, changed the note, and appropriated the money. *Held*, that T. was not guilty of larceny.

The prisoner was tried before PARKE, B., at the Summer Assizes for Huntingdon, 1845, for stealing a bank-note.

He found the note, which had been accidentally dropped on the high road. There was no name or mark on it, indicating, who was the owner, nor were there any circumstances attending the finding which would enable him to discover to whom the note belonged when he picked it up; nor had he any reason to believe that the owner knew where to find it again. The prisoner meant to appropriate it to his own use, when he picked it up. The day after, and before he had disposed of it, he was informed that the prosecutor was the owner, and had dropped it accidentally; he then changed it, and appropriated the money taken to his own use. The jury found that he had reason to believe, and did believe, it to be the prosecutor's property, before he thus changed the note.

The learned Baron directed a verdict of guilty, intimating that he should reserve the case for further consideration. Upon conferring with MAULE, J., the learned Baron was of opinion that the original taking was not felonious, and that in the susequent disposal of it, there was no taking, and he therefore declined to pass sentence, and ordered the prisoner to be discharged, on entering into his own recognizance to appear when called upon.

On the 30th of April, A. D. 1849, the following judgment was read by PARKE, B.

A case was reserved by PARKE, B., at the last Huntingdon assizes. It was not argued by counsel, but the judges who attending the sitting of the court after Michaelmas Term, 1848, namely, the L. C. BARON, PATTESON, J., ROLFE, B., CRESSWELL, J., WILLIAMS, J., COLTMAN, J., and PARKE, B., gave it much consideration on account of its importance, and the frequency of the occurrence of cases in some degree similar, in the administration of the criminal law, and the somewhat obscure state of the authorities upon it. (The learned Baron here stated the case.)

In order to constitute the crime of larceny, there must be a taking of the chattel of another *animo furandi*, and against the will of the owner. This is not the full definition of larceny, but so much only of it as necessary to be referred to for the present purpose; by the term *animo furandi* is to be understood, the intention to take, not a partial and temporary, but an entire dominion over the chattel, without a color of right. As the rule of law founded on justice and reason is, that *actus non facit reum nisi mens sit rea*, the guilt of the accused must depend

on the circumstances as they appear to him, and the crime of larceny can not be committed, unless the goods taken appear to have an owner, and the party taking must know or believe that the taking is against the will of the owner.

In the earliest time it was held, that chattels, which were apparently without any owner, "*nulliu sin bonis*," could not be the subject of larceny.

Stamford, one of the oldest authorities on criminal law who was a judge, in the reign of Phillip and Mary, says:[1] "Treasurer trove, wrecks of the sea, waif or stray, taken and carried away is not felony." "*Quia dominus rerum non apparet, ideo cujus sunt incertum est.*" For this he quotes Fitz. Abr. Coron.;[2] these passages are taken from 22 Assizes, 22 Edward III.,[3] and mentioned only "treasure trove," "wreck" and "waif," and Fitz. says, the punishment for taking such, is not the loss of life or limb. The passage in 3 Institutes[4] goes beyond this; Lord Coke mentions three circumstances as material in larceny. First, the taking must be felonious, which he explains; secondly, it must be an actual taking, which he also explains; and thirdly, "it is not by trover or finding;" he then proceeds as follows: "If one lose his goods and another find them, though he convert them, *animo furandi*, to his own use, it is not larceny, for the first taking is lawful. So, if one find treasure trove, or waif or stray (here wreck is omitted and stray introduced), and converts them *ut supra*, it is no larceny, both in respect of the finding, and that "*dominus rerum non apparet.*" The only authority is that given before mentioned, 22 Assizes,[5] 22 Edward III.

Now, treasure trove and waif seem to be subject to a different construction from goods lost. Treasure trove is properly money supposed to have been hidden by some owner since deceased, the secret of the deposit having perished, and, therefore, belongs to the Crown; as to waif, the original owner loses his right to the property by neglecting to pursue the thief. The very circumstances under which these are assumed to have been taken and converted show that they could not be taken from any one, there being no owner. Wreck and stray, are not exactly on the same footing as treasure trove and waif; wreck is not properly so called, if the real owner is known, and it is not forfeited until after a year and a day.

The word "estray" is used in the books in different senses, as may be seen in Com. Dig., Waife, F, where it is used in the sense of cattle forfeited after being in a manor one year and one day without

1 bk. 1, ch. 16.
2 pp. 187, 265.
3 p. 99.
4 p. 108.
5 p. 99.

challenge, after being proclaimed, where the property vests in the Crown, or its grantee of estrays; and also of cattle straying in the manor, before they are so forfeited. Blackstone,[1] defines estrays to be "such valuable animals as are found wandering in any manor or lordship, and no man knoweth the owner of them, in which case the law gives them to the sovereign."

In the passage in Stamford no doubt the word is used, not exclusively in the former sense, but generally as to all stray cattle, not seized by the lord. Now treasure trove and waif properly so-called, are clearly *bona vacantia, nullius in bonis*, and but for the prerogative would belong to the first finder absolutely.

"*Cum ignitur thesaurus in nullius bonis sit, et antiquitus de jure naturali esset inventoris, nunc de jure gentium efficitur ipsius domini regis.*"[2] Wreck and stray in the sense we ascribe to those words are not in the same situation, for the right of the owner is not forfeited until the end of a year and a day; but Lord Coke in *Constable's Case*,[3] treats wreck also as *nullius in bonis* and estrays *animalia vagantia*, he terms *vacantia*, because none claims the property. Wreck and estray, however, before seizure, closely resemble goods lost, of which the owner has not the actual possession, and afford an analogy to which Lord Coke refers in the passage above cited.

Whether Lord Coke means what the language at first-sight imparts, that under no circumstances could the taking of the goods really lost and found, be guilty of larceny, is not clear; but the passage is a complete and satisfactory authority, that a person who finds goods which are lost may convert them *animo furandi*, under some circumstances so as not to be guilty. The two reasons assigned by him are, that the person taking has a right in respect of the finding, and also that they are apparently without an owner, *dominus rerum non apparet*, an owner, or the owner does not appear.

The first of these reasons has led to the opinion that the real meaning of Lork Coke was not that every finder of lost goods, who takes *animo furandi*, is not guilty of felony, but that if one finds, and innocently takes possession meaning to keep for the real owner, and afterwards changes his mind and converts to his own use he is not a felon, on the principle that Lord Coke had previously laid down, viz.: that, "the intent to steal must be when the thing stolen cometh to his possession, for if he hath the possession of it once lawfully, though he hath *animum furandi* afterwards, and carryeth it away afterwards, it is no larceny," and Lord Coke also cites Granville, "*Furtum non est ubi initium habet detentionis per dominium rei.*"

[1] vol. 2, p. 561, Stephen's ed.

[2] Bracton Coron. L. 3, ch. 3, p. 126.

[3] 5 Rep. 108 a.

It is said, therefore, that the case of finding is an instance of this, beginning with lawful title, which consequently can not become a felony by subsequent conversion; but if it be originally taken not for the true owner, but with intent to appropriate it to his own use, it is a felony, and of this opinion the commissioners for the amendment of the criminal law appear to have been, as stated in their first report.

This opinion appears to us not to be well founded, for Lord Coke puts the case of lost goods on the same footing as waif and treasure trove, which are really *bona vacantia* goods without an owner, and with respect to which, we apprehend that a person would not be guilty of larceny, though he took originally *animo furandi*, that is, with the intent not to take a partial or temporary possession, but to usurp the entire dominion over them, and the previous observations have reference to cases in which the original possession of the chattel stolen is with the consent of or by contract of the owner. But any doubt on this question is removed by what is said by Lord Hale:[1] "If A. find the purse of B. in the highway and take and carry it away, and hath all the circumstances that may prove it to be done *animo furandi*, as denying or secreting it, yet it is not felony. The like in taking of a wreck or treasure trove,"[2] "or a waif or stray." Lord Hale clearly considers that if lost goods are taken originally *animo furandi*, in the sense above mentioned, the taker is not a felon; and when it is considered that by the common law, larceny to the value of above twelve pence was punishable by death, and that the quality of the act in taking *animo furandi* goods from the possession of the owner, differs greatly from that of taking them when no longer in his possession, and *quasi derelict*, in its injurious effect on the interests of society (the true ground for the punishment of crimes), it is not surprising that such a rule should be established, and it is founded in strict justice; for the cases of abstraction of lost property being of rare occurrence, when compared with the frequent violations of property in the possession of an owner, there was no need of so severe a sanction, and the civil remedy might be deemed amply sufficient. Hawkins,[3] says: "Our law, which punishes all theft with death, if the thing stolen be above the value of twelve pence, and with corporal punishment if under, rather chooses to deal with them (*e.g.* cases of finding, and of appropriating by bailees), as civil than criminal offenses, perhaps for this reason, in the cases of goods lost, because the party is not much aggrieved where nothing is taken, but what he had lost before." It can not indeed be doubted that if at this day the punishment of death was assigned to larceny and usually carried into effect, the appropriation of lost goods would never have been

1 1 P. C. 506.

2 Citing 22, Ass. 99.

3 bk. 1, ch. 19, sec. 3, Curwood's ed.

held to constitute that offense, and it is certain that the alteration of punishment can not alter the definition of the offense. To prevent, however, the taking of goods from being larceny, it is essential that they should be presumably lost, that is, that they should be taken in such a place and under such circumstances, as that the owner would be reasonably presumed by the taker, to have abandoned them, or at least not to know where to find them. Therefore, if a horse is found feeding on an open common or on the side of a public road, or a watch found apparently hidden in a haystack, the taking of these would be larceny, because the taker had no right to presume that the owner did not know where to find them; and consequently had no right to treat them as lost goods. In the present case there is no doubt that the bank-note was lost, the owner did not know where to find it, the prisoner reasonably believed it to be lost, he had no reason to know to whom it belonged, and, therefore, though he took it with the intent not of taking a partial or temporary, but the entire dominion over it, the act of taking did not in our opinion constitute the crime of larceny. Whether the subsequent appropriation of it to his own use by changing it, with the knowledge at that time that it belonged to the prosecutor, does amount to that crime, will be afterwards considered.

It appears, however, that goods which do fall within the category of lost goods, and which the taker justly believes to have been lost, may be taken and converted so as to constitute the crime of larceny, when the party finding may be presumed to know the owner of them, or there is any mark upon them, presumably known by him, by which the owner can be ascertained. Whether this is a qualification introduced in modern times or which always existed, we need not determine. It may have proceeded on the construction of the reason of the old rule, *Quia dominus, rerum non apparet ideo cujus sunt incertum est*, and the rule is held not to apply when it is certain who is the owner; but the authorities are many and we believe this qualification has been generally adopted in practice, and we must therefore consider it to be the established law. There are many reported cases on this subject. Some where the owner of goods may be presumed to be known from the circumstances under which they are found; amongst these are included the cases of articles left in hackney coaches by passengers, which the coachman appropriates to his own use, or a pocket-book found in a coat sent to a tailor to be repaired, and abstracted and opened by him. In these cases the appropriation has been held to be larceny. Perhaps these cases might be classed amongst those in which the taker is not justified in concluding that the goods were lost, because there is little doubt he must have believed that the owner would know where to find

them again, and he had no pretense to consider them abandoned or *derelict.* Some cases appear to have been decided, on the ground of bailment determined by breaking bulk, which would constitute a trespass, as *Wyne's Case*,[1] but it seems difficult to apply that doctrine which belongs to bailment, when a special property is acquired by contract, to any case of goods merely lost and found, where a special property is acquired by finding.

The appropriation of goods by the finder has also been held to be larceny where the owner could be found out by some mark on them, as in the case of lost notes, checks or bills, with the owner's name upon them.

This subject was considered in the case of *Merry* v. *Green*,[2] in which the Court of Exchequer acted upon the authority of these decisions; and in the argument in that case difficulties were suggested, whether the crime of larceny could be committed in the case of a marked article, a check for instance, with the name of the owner on it, where a person originally took it up, intending to look at it and see who was the owner, and then as soon as he knew whose it was, took it, *animo furandi;* as in order to constitute a larceny, the taking must be a trespass, and it was asked when in such a case the trespass was committed? In answer to that inquiry the *dictum* attributed to me in the report was used; that in such a case the trespass must be taken to have been committed, not when he took it up to look at it, and see whose it was, but afterwards, when he appropriated it to his own use, *animo furandi.*

It is quite a mistake to suppose, as Mr. Greaves has done,[3] that I meant to lay down the proposition in the general terms contained in the extract from the report of the case in 7 Meeson and Welsby, which taken alone, seems to be applicable to every case of finding unmarked, as well as marked property. It was meant to apply to the latter only.

The result of these authorities is, that the rule of law on this subject seems to be, that if a man finds goods that have been actually lost, or are reasonably supposed by him to have been lost, and appropriates them, with intent to take the entire dominion over them, really believing when he takes them, that the owner can not be found, it is not larceny. But if he takes them with the like intent, though lost, or reasonably supposed to be lost, but reasonably believing that the owner can be found, it is larceny.

In applying this rule, as indeed in the application of all fixed rules,

1 Leach, C. C. 460.
2 7. M. & W. 623.
3 vol. 2, ch. 14.

questions of some nicety may arise, but it will generally be ascertained whether the person accused had reasonable belief that the owner could be found, by evidence of his previous acquaintance with the ownership of the particular chattel, the place where it is found, or the nature of the marks upon it. In some cases it would be apparent, in others appear only after examination.

It would probably be presumed that the taker would examine the chattel as an honest man ought to do, at the time of taking it, and if he did not restore it to the owner, the jury might conclude that he took it, when he took complete possession of it, *animo furandi.* The mere taking it up to look at it, would not be a taking possession of the chattel.

To apply these rules to the present case; the first taking did not amount to larceny, because the note was really lost, and there was no mark on it, or other circumstance to indicate then who was the owner or that he might be found, nor any evidence to rebut the presumption that would arise from the finding of the note as proved, that he believed the owner could not be found, and therefore the original taking was not felonious; and if the prisoner had changed the note or otherwise disposed of it, before notice of the title of the real owner, he clearly would not have been punishable; but after the prisoner was in possession of the note, the owner became known to him, and he then appropriated it, *animo furandi,* and the point to be decided is, whether that was a felony.

Upon this question we have felt considerable doubt.

If he had taken the chattel innocently, and afterwards, appropriated it without knowledge of the ownership, it would not have been larceny, nor would it, if he had done so, knowing who was the owner, for he had the lawful possession in both cases, and the conversion would not have been a trespass in either. But here the original taking was not innocent in one sense, and the question is, does that make a difference? We think not; it was dispunishable as we have already decided, and though the possession was accompanied by a dishonest intent, it was still a lawful possession, and good against all but the real owner, and the subsequent conversion was not, therefore, a trespass in this case, more than the others, and consequently no larceny.

We therefore think that the conviction was wrong.

## LARCENY — FELONIOUS INTENT AT TIME OF FINDING — FINDER MUST HAVE IMMEDIATE MEANS OF FINDING OWNER.

### R. v. Christopher.

[Bell, C. C. 27.]

*In the English Court for Crown Cases Reserved, 1858.*

**To Establish a Charge of Larceny** against the finder of a lost article two things must be shown, (1) that at the time of the finding, the finder had the felonious intent to appropriate the thing to his own use, (2) that at the time of finding he had reasonable grounds for believing that the owner might be discovered.

The case as stated by the magistrate was as follows: "It appeared from the evidence that the prosecutrix left her master's house between eleven and twelve o'clock in the morning of the 13th October to go to Dorchester (a distance of about a mile), having in her possession a purse of green leather (commonly called a port-monnaie), containing within it another smaller purse, about the size of a half crown, in which there were three sovereigns and two half sovereigns.

"In the public path between Stinsford House and the first meadow, as she supposes, she dropped the purse; but thinking she might have left it on her table, she went on and returned home about one. Finding out her loss she went in the afternoon to Dorchester, and had the property cried by the public crier, — describing it as a green leather purse and a smaller one inside, and that they contained three sovereigns and one half sovereign and a half crown, or £3 12s 6d. (This was an error, as it really contained, as she found afterwards, two half sovereigns instead of only one, £4 2s 6d.) About four o'clock the prisoner is at the Bull's Head public house with a man named Upshall whom he treats to beer, and paid for it with a sovereign which he took out of a purse. Whilst they were sitting at the table together in the tap, the crier came by and cried something. The landlady, Mary Jane Russell went to the door to hear; Upshall asked her what it was cried. Landlady, from the passage said, 'Some money lost, £3 12s 6d.' Prisoner was taken up eventually at twelve o'clock at night at another public house, and the two purses with six half sovereigns, two shillings and six pence in silver and some pence found on him. The constable said: 'These things were lost.' Prisoner said: 'Well, I know I did pick them up.' Constable said: 'There was more money than this.' Prisoner said: 'I know I've done wrong.'

"On the part of the prisoner, it was contended that at the time he took the purse (which was admitted) he had no felonious intent; that there was no name or special mark on the purse or the money, and that the

subsequent appropriation did not amount to larceny; that, though civilly, he was not criminally liable, and the cases of *Regina* v. *Mole*,[1] *Thurborn's Case*,[2] and *Regina* v. *Lathin*,[3] were cited. In summing up, I told the jury that a felonious intent was held to be a necessary ingredient in every larceny, but that intention was to be judged of by such acts subsequent as well as immediate; that if they thought the conversion of the money to his own use without inquiry was proved, and that there was though no name or mark on the purse yet such peculiarity in it as containing a second smaller one, as to warrant some inquiry and above all, if they were satisfied that the prisoner when sitting in the public house, heard the words of the landlady, which Upshall said he heard, and then did not take measures to make restitution, that I thought they might infer felonious intention, and find him guilty.

"The jury returned a verdict of guilty on the count for stealing. A previous conviction was then proved and the prisoner was sentenced six calendar months hard labor.

"On application of counsel for the prisoner, a case was granted, and execution of the judgment respited till the decision of the court above was known.

I respectfully submit the question, whether the above facts warranted in point of law, the finding of the jury in this case.

"CHARLES PORCHER,

"*Deputy Chairman of the Quarter Sessions.*

This case was argued on the 22d of November, 1858, before POLLOCK, C. B., WIGHTMAN, J., WILLIAMS, J., CHANNELL, B., and HILL, J.

*Stock*, appeared for the Crown, and *Ffooks*, for the prisoner.

*Ffooks*, for the prisoner. The facts in this case are identical with those in *Regina* v. *Thurborn*,[4] and the object of the court below in reserving it, seems to have been to procure a review of that decision.

POLLOCK, C. B. The question for us is, whether there was any evidence to go to the jury, that at the moment when the prisoner took up the purse he intended feloniously to appropriate it.

*Ffooks*. There was not any whatever. The purse was lying on a public footpath, and had evidently been lost. There was no name on it, and nothing about it or its contents to indicate the ownership. The circumstance that the purse contained a smaller one, can not of course, alter the character of the first taking, although certainly it might have facilitated the discovery of the person who had lost it. This very case is put by Lord Hale,[5] and mentioned in *Regina* v. *Thur-*

[1] 1 Car. & K. 417.

[2] 1 Den. C. C. 392.

[3] This appears to be an error, and probably the case referred to was Reg. *v.* Preston, 2 Den. C. C. 353.

[4] 1 Den. C. C. 387.

[5] Hale's P. C. 506.

*born.*[1] "If I find the purse of B. in the highway, and take and carry it away, and hath all the circumstances that may prove it to be done *animo furandi*, as denying or secreting it, yet it is not felony." But *Regina* v. *Thurborn* does not stand alone; it has been frequently recognized and acted upon. In *Regina* v. *Preston*,[2] Lord Campbell strongly expresses his approval of it.

CHANNELL, B. And in *Regina* v. *Dixon*,[3] also, it is acted upon. The observations of Lord Campbell, in *Regina* v. *Preston*, are very important, as they show what the direction to the jury ought to be.

*Ffooks.* The direction of the chairman here was to the effect that subsequent conduct might convert an innocent taking into a felonious appropriation. That was clearly wrong.

The learned counsel was stopped by the court.

*Stock*, for the Crown. The present case is distinguishable from the cases cited. In *Regina* v. *Preston*, the jury did not say that there was a felonious intention at the time of finding, and in that case the recorder had misdirected the jury in telling them to consider at what time the prisoner first resolved to appropriate the note to his own use; and that if they arrived at the conclusion that the prisoner either knew the owner, or reasonably believed that the owner could be found when he first resolved to appropriate the note, then he was guilty of larceny; and the court held that direction was wrong, because it was consistent with an honest possession on the part of the prisoner.

The facts in this case differ from those in *Regina* v. *Thurborn*, and the jury here substantially find, that the prisoner, though believing at the time of finding that the owner could be found, did intend feloniously to appropriate the purse and its contents to his own use.

WILLIAMS, J. You have this difficulty to grapple: that there is no evidence of that, except the subsequent conduct of the prisoner.

*Stock.* I submit that the nature of the property found, one purse within another, and the place where it was found, on a footpath near a market town, afford reason for believing that the owner could be found.

POLLOCK, C. B. If you examine all and each of the facts, they are consistent with the innocence of the prisoner. Is there any evidence from which the jury ought reasonably to have found a verdict of guilty?

CHANNELL, B. In *Regina* v. *Dixon*,[4] in which *Regina* v. *Thurborn*, was referred to, it was held that, if a man find lost property and keep it, and at the time of finding it have no means — no immediate means, of discovering the owner, he is not guilty of larceny because he afterwards has means of finding him, and nevertheless retains the property to his own use.

1 1 Den. C. C., 392.
2 2 Den. C. C. 353.
3 Dears. C. C. 580.
4 Dears. C. C. 580.

Pollock, C. B. I am of opinion that this conviction can not be sustained. We are bound by the authority of *Regina* v. *Thurborn.* It is necessary to bring home to the prisoner a felonious intention at the time of finding.

Wightman, J. The decision in *Regina* v. *Thurborn* has been recognized in several subsequent decisions. We can not overrule that case and are bound by it.

Williams, J. Though considering myself bound by the authority of *Regina* v. *Thurborn*, and agreeing as I do with the decision in that case, I must confess I have never been able to agree with some of the principles there laid down. Here the direction to the jury was, I think, calculated to mislead them and to induce them to suppose that although the prisoner had no felonious intent at the time of finding, yet if he subsequently had such intent he was guilty of larceny; but that is not the law.

The evidence here shows, according to my view of it, that the prisoner found the purse and took possession of it as a finder, and that the wicked intention of appropriating it came upon him afterwards. I therefore think this conviction can not be sustained.

Channell, B. I think that the case of *Regina* v. *Thurborn* was rightly decided; and I think that the cases of *Regina* v. *Preston* and *Regina* v. *Dixon*, which followed, laid down a reasonable rule and one consistent with the decision in *Regina* v. *Thurborn.*

The question is, was there a felonious intent at the time when the prisoner first took possession of the purse? I am by no means prepared to say that evidence of what subsequently occurred was not admissible to prove a felonious intention at the time of finding, but the question of intent at that time was not put to the jury. The chairman told the jury that a felonious intent was held to be a necessary ingredient in every larceny, but that intention was to be judged of by acts subsequent as well as immediate; and that, if they were satisfied that the prisoner when sitting in the public house heard the words of the landlady, and then did not take measures to make restitution, they might infer a felonious intention. Now, it is quite consistent with that direction that the jury should find the prisoner guilty, although they were of opinion that the felonious intent did not arise until subsequently to the finding. I therefore think that the conviction can not be sustained.

Hill, J. Two things must be made out in order to establish a charge of larceny against the finders of a lost article. First, it must be shown that, at the time of finding, he had the felonious intent to appropriate the thing to his own use; and this is founded on the rule laid down by Lord Coke, and referred to and acted upon in *Regina* v. *Thurborn.*

The other ingredient necessary is that, at the time of finding, he had reasonable ground for believing that the owner might be discovered, and that reasonable belief may be the result of a previous knowledge or may arise from the nature of the chattel found, or from there being some name or mark upon it; but it is not sufficient that the finder may think that by taking pains the owner may be found, — there must be the immediate means of finding him. In this case the evidence fails in both these particulars, and therefore the conviction can not be sustained.

*Conviction quashed.*

---

LARCENY — FINDER — INTENT FORMED SUBSEQUENTLY.

R. *v.* PRESTON.

[1 Den. & P. 351.]

*In the English Court for Crown Cases Reserved, 1851.*

**Where a Bank-note** is lost, and is found by a person who appropriates it to his own use, *held*, that the jury are not to be directed to consider at what time the prisoner, after taking it into his possession, resolved to appropriate it to his own use, but whether at the time he took possession of it he knew, or had the means of knowing, who the owner was, and took possession of it with intent to steal it: for if his original possession of it was an innocent one, no subsequent change of his mind, or resolution to appropriate it to his own use, would amount to larceny.

The prisoner, Michael Preston, was tried before M. D. HILL, Esq., Recorder of Birmingham, at the last Michaelmas Sessions for that borough, upon an indictment which charged him in the first count with stealing; and in the second, with feloniously receiving a £50 note of the Bank of England.

It was proved that the prosecutor, Mr. Collis, of Birmingham, received the note in question with others on Saturday, the 18th of October, from Mr. Lidsam, who, before he handed it to the prosecutor wrote on the back of it the words "Mr. Collis." It was further proved that Collis was a very unusual name in Birmingham, and almost, if not quite confined to the family of the prosecutor, the well known master manufacturer.

About four o'clock the same afternoon the prosecutor accidentally dropped the notes in one of the public streets in Birmingham, and immediately gave information of his loss to the police, and also caused hand-bills, offering a reward for their recovery, to be printed and circulated about the town.

On Monday, the 20th, about three o'clock in the afternoon, the prisoner, who had been living in Birmingham fourteen years, and keeping a shop there, went to one of the police stations, and inquired of a policeman if there was not a reward publicly offered for some notes that had been lost, and whether their numbers were known, stating that he was as likely as any person to have them offered to him, and if he heard any thing of them he would let the police know. He also inquired if the policeman could give any description of the person who was supposed to have found them, and the policeman gave him a written description of such person, who was described therein as a tall man. Afterwards, between three and four o'clock the same afternoon, the prisoner went to the shop of Mr. Bickley, in Birmingham, and after inquiring if he (Bickley) had heard of the loss of a £50 note, stated that he, the prisoner, thought that he knew parties that had found one, and then asked Bickley whether the finders would be justified in appropriating it to their own use; to which Bickley replied that they would not.

At four o'clock on the same afternoon the prisoner changed the note, and was later in the same evening found in possession of a considerable quantity of gold, with regard to which he gave several false and inconsistent accounts.

He was then taken into custody, and on the following day (October 21), stated to a constable that when he was alone in his house on Sunday, a tall man whom he did not know came in, and offered him a £50 note, for which he, the prisoner gave him fifty sovereigns.

The police officers had previously told the prisoner, that they were in possession of information that one Tay, who was known to the prisoner, had found the note; but Tay was not called, nor was any evidence given as to the part (if any) which he took in the transaction.

Upon these facts the learned recorder directed the jury, that the important question for them to consider, was at what time the prisoner first resolved to appropriate the note to his own use; if they arrived at the conclusion, that the prisoner either knew the owner, or reasonably believed that the owner could be found at the time, when he first resolved to appropriate it to his own use, that is to exercise complete dominion over it, then he was guilty of larceny; if on the other hand, he had formed the resolution of appropriating it to his own use, before he knew the owner, or had a reasonable belief that the owner could be found, then he was not guilty of larceny. He also told the jury that there was no evidence of any other person having possession of the note after it was lost, except the prisoner; but that even though the prisoner might not be the original finder, still if he were the first person who acted dishonestly with regard to it, and if he began to act dishonestly by forming the resolution to keep it for his own use, after he knew

the owner, or reasonably believed that the owner could be found, he would be guilty of larceny.

The jury found the prisoner guilty upon the first count, and the learned recorder requested the opinion of the judges as to the validity of the conviction. The prisoner was discharged on the recognizance of himself and sureties, to appear and receive judgment at the next Sessions.

On the 22d of November, A. D. 1851, this case was argued before Lord Campbell, C. J., Alderson, B., Platt, B., Talfourd, J., and Martin, B.

*Bittlestone*, for the Crown. *O'Brien*, for the prisoner.

*O'Brien*. The jury found the verdict under the direction of the learned recorder, and I submit that that direction was wrong in law. The jury were told, that the important question for them to consider, was at what time the prisoner first resolved to appropriate the note to his own use. If they arrived at the conclusion, that the prisoner either knew the owner, or reasonably believed that the owner could be found at the time when he first resolved to appropriate it to his own use, then he was guilty of larceny. But the real question is whether the prisoner knew who the owner was or had reasonable means of knowing who was the owner at the time of his taking the property into his possession? Unless at the time of taking it, there was a knowledge or a reasonable means of knowing who was the owner *animus furandi*, on the part of the finder, there could be no larceny. This is distinctly laid down in the judgment of Parke, B., in *Regina* v. *Thurborn*.[1] In the case of *Merry* v. *Green*,[2] which was an action for false imprisonment, the question was much discussed, and the difficulty was to find the precise time when the taking became a trespass. The conditions are laid down, in *Regina* v. *Thurborn*, with great precision. In that case it was found, that when the prisoner picked up the note, he had the *animus furandi*, but had not the means of knowing who was the owner; and it was there held, that unless at the time of taking, the finder had an *animus furandi*, and the knowledge or the means of knowing who the owner was, he was not guilty of larceny. In the present case, it is not found by the jury that the prisoner, when he picked up the notes, knew who the owner was or that he intended to steal them. It may well be that he had originally taken them innocently and "dispunishably."

Alderson, B. The recorder told the jury that even if the prisoner were not the original finder, still if he were the first person who acted dishonestly with regard to the note, he would be guilty of larceny.

*O'Brien*. There was ample evidence to show that he was not the original finder.

1 1 Den. C. C. 387. 2 7 Mee. & W.

Lord CAMPBELL, C. J. The first part of the recorder's direction is consistent with this, that the prisoner may have received the property honestly, and have kept it for some time for the right owner, and afterwards have yielded to temptation, and appropriated it to himself.

ALDERSON, B. When the finder first takes it into his possession, — in order to constitute larceny — there must be an intention of "taking" it the moment he knows what it is.

PLATT, B. There must, at that moment be a felonious taking.

Lord CAMPBELL, C. J. If the original possession was a lawfu. possession, then there was no *asportavit.* If the prisoner, when he took the notes originally into his possession, had not the means of knowing who the owner was, and had not then the *animus furandi*, when was the "taking?"

*O'Brien* cited *R.* v. *Leigh*,[1] *R.* v. *Mucklow.*[2]

*Bittlestone*, for the Crown.

The direction of the recorder is supported by the judgment of the court in *Regina* v. *Thurborn.*

Lord CAMPBELL, C. J. Do you contend that if the prisoner once had the property honestly in his possession, he would be guilty of larceny by afterwards appropriating it to his own use?

*Bittlestone.* The question can not be governed by the intention of the finder at the very moment he takes the thing into his possession There must be time to examine it.

Lord CAMPBELL, C. J. Assume that he has full time for examination, and has examined it. The recorder tells the jury to consider at what time the prisoner first resolved to appropriate it to his own use, and that if when he resolved to appropriate it to himself he had the means of knowing who the owner was, he was guilty of larceny, although he may have before then received it *bono anima.* When was the taking?

ALDERSON, B. The direction of the recorder does not exclude the supposition that the prisoner might have got the notes honestly, kept them for three or four days, and then resolved to appropriate them to his own use.

*Bittlestone.* I should submit that as long as the prisoner's possession of the property was an innocent one, his possession was that of the owner. If a person find a bank-note marked, so that it may be traced to the owner, the possession of the finder is the possession of the owner, so long as the finder deals honestly with the property. But as soon as the finder resolves to convert it to his own use he alters the possession, and then can only be said, for the first time, to take the note for the purpose of exercising dominion over it.

[1] 2 East's P. C. 694.

[2] 1 Mo. C. C. 160.

Alderson, B. There is no proof here that the prisoner could read any marks which may have been on the note.

*Bittlestone.* But there is evidence that he took them and showed them to other persons who could read. He went about making inquiries whether he could safely keep them for himself or not.

Lord Campbell, C. J. That might have been strong evidence for the jury that the prisoner originally took the property *animo furandi*, and with the means of knowing who the owner was.

*Bittlestone.* Parke, B., lays it down in *Regina* v. *Thurborn*, that the mere taking up of a note to look at it is not a taking possession of the chattel. The taking is when the finder takes it intending to exercise complete dominion over it.

Lord CampbellC. J. Your position is that the finder, while he holds the property honestly, holds it for the right owner, and that when he resolves to appropriate it to his own use there is a new taking, and that he then takes it *animo furandi?*

*Bittlestone.* It is laid down in Blackstone's Commentaries,[1] that although the finder of a chattel has a good title to it against all the rest of the world, he has no property or right of possession in a chattel which has been lost, adverse to the owner. The finder has a mere custody of it for the owner; and when he resolves to appropriate it *animo furandi* adversely to the owner, it is submitted that it is larceny.

Martin, B. Suppose a man takes an article, — an umbrella for instance, — by mistake, and three or four days afterwards discovers who the owner is, by the name which is upon it, and yet resolves to keep it as his own property, would that be larceny.

*Bittlestone.* I should say so; but this is the case of a fifty pound note. In *Wynn's Case*,[2] it was held that if a hackney coachman convert to his own use a parcel left by a passenger in his coach by mistake it is felony if he knew the owner, or if he took him up or set him down at any particular place where he might have inquired for him.

Alderson, B. This differs from a case of bailment, where the tortious breaking bulk determines the bailment. According to the direction of the Recorder, the notes might have passed through a dozen innocent hands before they came to the prisoner, who may have got them innocently, and yet the prisoner, he rules, was guilty of larceny.

Lord Campbell, C. J. I am of opinion that this conviction can not be supported. Larceny necessarily supposes a taking *animo furandi.* The rule, as to taking is somewhat technical, but it is not likely to be departed from, In the case before us the direction to the jury is consistent with an honest possession on the part of the prisoner. The re-

[1] 1 Bla. Com. (ed. Chitty) 296; Armory *v.* Delamerle, Strange, 505.

[2] 1 Leach, C. C. 413.

corder says that the question for them to consider was, at what time the prisoner first resolved to appropriate the note to his own use. What, then, was the taking? It is supposed to be a thought which passed through the prisoner's own mind; but I do not think that can amount to a taking, when nothing was in fact done, and when it may be, that the prisoner was lying in bed at a distance from the article. There is no taking *animo furandi* in this case; consequently, there is no larceny. It is unnecessary for us now to enter further into the question, after the elaborate judgment of my Brother Parke, on the subject of larceny in *Regina* v. *Thurborn.*

ALDERSON, B. If there must be both a taking and the *animus furandi* to constitute a larceny, the difficulty is, how the changing a man's mind, *ex post facto*, can render an honest taking larceny.

According to the summing up of the Recorder to the jury, if a man gets a note honestly, keeps it for a week, with an intention of restoring it to the owner, and then changes his mind and resolves to appropriate it to his own use, it may be, as the Lord Chief Justice remarks, while he is in bed, that converts a lawful taking into a dishonest one. To uphold such a doctrine would be to refine in such a way as to destroy the simplicity of the criminal law.

TALFOURD, J. A mere movement of the mind can not amount in law to a taking.

PLATT, B. The case where there has been a bailment stands on a different principle, that of breaking bulk, but to constitute larceny, in every other case, something must be taken, *animo furandi* and *invito domino.*

MARTIN, B. It is of great importance that the rules of the criminal law should be plain and intelligible; and considering that the prisoner may originally have become innocently possessed of the note, I do not think that this can be held to be a case of larceny.

---

## LARCENY — LOST BANK-NOTE — FINDER.

## R. *v.* KNIGHT.

[12 Cox, 162.]

*In the English Court for Crown Cases Reserved, 1871.*

**Prisoner Received from his Wife** a £10 Bank of England note, which she had found, and passed it away. The note was indorsed "E. May" only, and the prisoner, when asked to put his name and address on it, by the person to whom he passed it, wrote on it a false name and address. When charged at the police station, the prisoner said he knew nothing about the note. The jury were directed that, if they were satisfied that the prisoner could, within a reasonable time, have found the owner, and if, instead of

waiting, the prisoner immediately converted the note to his own use, intending to deprive the owner of it, it would be larceny. The prisoner was convicted. *Held*, that the jury ought to have been asked whether the prisoner, at the time he received the note, believed the owner could be found; and that the conviction was wrong.

Case reserved for the opinion of this court.

At the general quarter session of the peace, holden by adjournment, at St. Mary, Newington, in and for the county of Surrey, on Wednesday, the 26th July, 1871, William George Green Knight, was tried and convicted on an indictment, charging him in the first count with feloniously stealing £10 in money, of the property of John Willimot Morgan; and in the second count, with feloniously receiving the same money, well knowing it to have been stolen, upon the following evidence: —

Richard Adye Bailey, clerk in the Bank of England, having been sworn, produced a canceled note of such bank for £10, paid 31st May, 1871, No. 30,483, dated 22d March, 1871, indorsed E. May; E. Randall, 8 Cowland Terrace, Wandsworth Road; G. Hollyman, 345 Wandsworth Road.

John Willimot Morgan, on his oath stated as follows: "I am traveler and collector. On the 26th of May last, I received a £10 note at Deptford, between one and half past one o'clock, indorsed E. May. I put it in my left-hand waistcoat pocket. I went to South Bermondsey station, a quarter of a mile from where I received the note, and thence to Loughborough Park station. I called upon a customer in the Brixton Road. I walked from there to Clapham. I got there about three o'clock. It was the Oaks day. I walked along the Clapham Road. I put the note in my waistcoat pocket with my watch. I did not take out the note after. I missed it when I arrived at the office, Arthur Street, London bridge. I went from Clapham station to the Borough Road station. I went the same night to Scotland Yard and gave information to the police. When at Clapham, I went down High Street to Muswell's, the butcher. I came up Acre Lane. I left Clapham at four o'clock by train."

George Hollyman, on his oath stated: "I am a clothier, carrying on business at 345 Wandsworth Road. On the 26th of May last, the prisoner came to me between seven and eight o'clock in the evening; I knew him by sight. I did not know his name. He purchased a waistcoat, two pairs of drawers, and other things, together of the value of 12s 9d. He tendered a Bank of England note for £10. The note produced by the witness Bailey is the one. I asked prisoner to indorse it, which he did, "E. Randall," as on the note produced, I put my initials under his name and gave him change. The articles produced by witness Tucker are of the same description as those I sold to prisoner. I will swear they are the same.

George Tucker, Metropolitan Police Constable, 53 W., on his oath, stated: I received a communication from the witness Hollyman. I apprehended the prisoner in the Wandsworth Road, about 7:15 on Saturday, the 24th of June. I said to him, "I shall place you under arrest for some illegal proceedings or transactions in passing a £10 Bank of England note, and a gentleman will charge you at the station." He did not say anything. I took him to the station. The sergeant there said to him, 'You are charged with illegally converting this note to your own use!' The prisoner said, 'I know nothing about the note.' He gave me his address, 2 Pensbury Street, Wandsworth Road, and gave me his latch key to be given to his wife. I took one pair of drawers from the prisoner, and Detective Lonsdale, brought me the waistcoat and other pair of drawers, which I now produce. When I apprehended him he said, 'All right, I will go with you.' It is wrong in the deposition, 'I know nothing about it.' "

The prisoner's statement before the committing magistrate was read as follows: "My wife found it in Clapham Road on the Oaks day, from half past four to five, between Manor Street and the Two Brewers. She left it till I came home from work at half past six, and then told me what she had found. I said I did not think it was a good one, but I would take it to Mr. Hollyman, and see if he could change it. I took it to him and thought no more about it. I had money to pay for the things in my pocket if it had not been all right. I did not come by it by dishonest means."

The counsel for the prosecution presented the case to the jury as a larceny of lost property by the finder.

The prisoner's counsel contended there was no evidence to show that the prisoner at the time when the note came into his possession had the intention of wrongfully and feloniously depriving the owner of his property, or that he knew or had any reasonable means of ascertaining to whom the note belonged (the only mark on the same when found being "E. May," not the name of the owner), and consequently, upon the authority of *Regina* v. *Thurborn*,[1] *Regina* v. *Moore*,[2] and *Regina* v. *Glyde*,[3] the prisoner ought to be acquitted, it being laid down that on each of those points (as well as the conversion) there must be evidence to satisfy the jury.

The court, however, left the case to the jury, telling them that, if they were satisfied that the prisoner could within a reasonable time have found the owner, but, instead of waiting at all, he immediately converted the note to his own use by changing it, and that he intended to deprive the owner of the note against his will, it would be larceny; and

[1] 1 Den. C. C. 388; 3 Cox, C. C. 453, *nomine* Reg. *v.* Wood.

[2] 8 Cox, C. C. 416.

[3] 11 Cox, C. C. 103.

in considering their verdict it would be right for them to remember the conduct of the prisoner, viz., that when asked by the person who changed the note to write his name and address on the back of the note, he wrote a false name and a false address, and when charged at the police station with the offense, he said, "I know nothing about the note."

The jury returned a verdict of guilty.

The court thereupon reserved for the decision of the Court for Crown Cases Reserved the question whether, under the circumstances, the conviction was right?

Judgment upon the prisoner was respited, and he was committed to the custody of the governor of the common gaol at Newington, in the said county, until the decision of the Court for Crown Cases Reserved should be known.

E. Richards Adams, *Chairman.*

No counsel appeared to argue for the prisoner.

*Oppenheim*, for the prosecution. The question in this case is whether there was evidence to show that the prisoner, at the time he appropriated the note to his own use, believed he could find the owner of it. The case of *Regina* v. *Glyde* decided that the finder of a sovereign in the high road who, at the time of finding, had no reasonable means of knowing who the owner was, but who, at that time, intended to appropriate it even if the owner should afterwards be discovered, and to whom the owner was speedily made known, when he refused to give it up to him, was not guilty of larceny. That decision was come to on the ground that there was no evidence to show that when the prisoner picked up the sovereign he had any reason to believe that the true owner could be found. Here the evidence is different. [Lush, J. But that point was not put to the jury.] The question reserved for this court is whether, under the circumstances, having regard to the prisoner's conduct in dealing with the note and denying all knowledge of it, the conviction was right. Now, may not the court, after verdict, infer that the jury substantially found that point.

Kelly, C. B. It is quite clear that this conviction can not be sustained. There was no evidence that the prisoner, at the time when he first received this note from his wife, believed that the owner of it could be found; and if there had been, the proper question has not been left to the jury.

Byles, J. I also am of opinion that this conviction can not be sustained. The prisoner found the note in his wife's hands, and he did not know who the owner was; and there is no evidence that he had the means of knowing. The appropriating it under these circumstances is not larceny.

PIGGOTT, B. The question left to the jury, and which they have found, is whether they were satisfied that the prisoner could have found the owner within a reasonable time. That finding is quite consistent with this, that the prisoner himself believed he could not have found the true owner.

LUSH, J. The real question for the jury in this case was what was in the mind of the prisoner when the bank-note first came into his possession. But without regard to his belief, the jury were asked whether they were satisfied that the prisoner could, within a reasonable time, have found the owner. The jury have thought that he could; the prisoner might have thought that he could not. The conviction can not be sustained.

HANNEN, J., concurred.

*Conviction quashed.*

---

LARCENY — FINDER — SUBSEQUENT INTENT.

## PEOPLE v. ANDERSON.

[14 Johns. 294; 7 Am. Dec. 462.]

*In the Supreme Court of New York, August, 1817.*

**Larceny by Finder.** — The *bona fide* finder of a lost article, as a trunk lost from a stage coach and found on the highway, is not guilty of larceny by any subsequent act in secreting or appropriating to his own use the article found.

Indictment for stealing a trunk. The cause came before this court on a writ of *habeas corpus*. The case is stated in the opinion.

*Seeley* and *Starkweather*, for the prisoner.

*Van Buren*, *contra.*

*By the Court* SPENCER, J. The prisoner was convicted at the last court of Oyer and Terminer and gaol delivery held in and for the county of Otsego; and a question of law having arisen on the trial sentence was respited and he has now been brought up on *habeas corpus* to receive the judgment of this court. On the trial it came out in proof that the articles for the stealing of which the prisoner was indicted were contained in a trunk and that he found this trunk on the highway. The court below instructed the jury that if the prisoner took the trunk with intention to steal it, they ought to find him guilty, and that in determining that question they had a right to take into consideration the prisoner's subsequent conduct as well as all the circumstances of the case.

We assume it as an undisputed fact that the prisoner found the trunk

*bona fide* and consequently that it had been lost by its proprietor; and we proceed on the ground that if any subsequent embezzlement of the contents of the trunk would make the act a larceny of those articles, that then the conviction is correct. But the court are of the opinion that the *bona fide* finder of a lost article or of a lost trunk containing goods, can not be guilty of larceny by any subsequent act of his, in concealing or appropriating to his own use the article or the contents of a trunk thus found. In *Butler's Case* in 28 Elizabeth, this doctrine is fully established. In that case it was decided that the intent to steal must be when it comes into the hands or possession of the party; for if he hath the possession of it once lawfully; though he hath *animum furandi* afterwards and carry it away, it is no larceny.[1] Again Lord Coke lays down the law as drawn from the year books,[2] to be that if one lose his goods and another find them, though he convert them *animo furandi*, to his own use, yet it is no larceny, for the first taking is lawful. So he says if one find treasure trove or waifs or stray, and convert them, *ut supra*, it is no larceny, both in respect of the finding and also for that *dominus rerum non apparet.* The same doctrine will be found in 1 Hale's Pleas of the Crown,[3] and 1 Hawkins.[4] In 2 East's Pleas of the Crown,[5] it is expressly stated that where one finds a purse in the highway which he takes and carries away, it is no felony although it may be attended with all those circumstances which actually prove taking with a felonious intent, such as denying or secreting it.

It can not be doubted that an indictment for a larceny must charge that the goods were feloniously taken as well as feloniously carried away, and hence it is an established position that if the taking is not an act of trespass, there can be no felony in carrying away the goods.[6] There can be no trespass in taking a chattel found in the highway, and the finder has a right to keep the possession against every one but the true owner. How then can it be said that a thing found *bona fide* and of which the finder had a right to take possession, shall be deemed to be taken feloniously in consequence of a subsequent conversion by denying and secreting it, with an intention to appropriate it to the use of the finder?

It was urged on the part of the People that the same test ought to be applied in the case of the finding of a chattel and its subsequent conversion to the use of the finder, to ascertain the felonious intention, as has been applied where goods, and particularly horses and carriages, have been feloniously obtained under the pretense that the person applying for and obtaining them would use them for a certain specific pur-

1 3 Inst. 107.
2 3 Inst. 107.
3 p. 506.
4 p. 208, secs. 1, 2.
5 p. 663.
6 1 Hawk, ch. 33; Kel. 24; Dal. 3.

pose, and then has gone off with them and converted them to his own use. On a slight examination the cases will be found to be very dissimilar; in the latter case, there must have been an original felonious intention, and unless this case be fairly deduced from all the facts in the case, it is no felony. Where that original felonious intention exists, although the person having it has obtained the consent of the proprietor to let him have the possession for one purpose, he intended to get it for another and far different purpose, and he, therefore, never had the possession for this different and fraudulent purpose, and may be fairly said to have acquired possession feloniously.

It is not so with regard to a person coming fairly into the possession by finding. No fraud is practiced on any one in first acquiring the possession. It, therefore, never can be a question with a jury, how far forth a person who found a chattel intended to find it for the purpose of stealing it. The very nature of the case excludes a premeditated or already formed intention to steal. That depends as matter of fact upon a variety of circumstances, such as the value, the facility of concealment, etc., which are matters of after consideration. Hence we do not find a single case in the reports of criminal trials, or in the treatises on criminal law, in which it has ever been intimated that a person actually finding a chattel has been held to have stolen it, from the circumstances of denial, concealment or appropriation; nor from the happening of any of those facts which in reference to the taking of chattels ordinarily shows a felonious intention. It is true that there are cases in which though the party apparently had the possession of the chattel, yet the taking has been adjudged felonious. The case of a guest at a tavern or of a gentleman's butler who have taken the things committed to their use or care are mentioned in the books as illustrative of the principle that the mere naked possession for a special purpose will not protect the party, if he take it away feloniously. So if a bailee of a bale or trunk of goods, break the bale or trunk and take and carry away a part of the goods with intent to steal them, it is larceny; but if he carry them to a different place than the one agreed upon, and convert the whole to his use, it is not larceny. East[1] observes that this distinction seems to stand more upon positive law, not now to be questioned, than upon sound reasoning, and he adopts Lord Hale's reasoning, that the privity of contract is determined by the act of breaking the package, which makes him a trespasser, and that then it makes no difference whether he takes all or part only of the goods after the package is broken. There can be no analogy between this case and that of the carrier who breaks the package or opens a trunk, *animo furandi*,

[1] 2 C. L. 695.

because the finder of goods has them not in virtue of any contract, and violates none, in opening a bale or trunk.

The court believe that it would by an innovation on the criminal law to consider this as a case of larceny; and they therefore direct the prisoner to be discharged.

THOMPSON, C. J., dissented.

*Prisoner discharged.*

---

## LARCENY — FINDER.

## STATE *v.* DEAN.

[49 Iowa, 73; 31 Am. Rep. 143.]

*In the Supreme Court of Iowa, 1878.*

**One who Finds Lost** goods which have no marks or indications of ownership and who does not know the owner is not bound to exercise diligence to ascertain the owner and is not guilty of larceny in retaining the goods.

Conviction of larceny. The opinion states the facts.

*Pollock & Shields*, for appellant.

*J. F. McJunkin*, Attorney-General, for the State.

ADAMS, J. The evidence shows that in July, 1876, a great flood occurred in the Catfish Creek at the village of Rockdale in the county of Dubuque, whereby nearly the whole village was swept away and destroyed. Two stocks of merchandise were swept away and the goods swept to a great distance. A part of these goods as well as articles of household furniture, etc., were gathered up by different persons immediately after the flood and carried to different houses in the neighborhood. The defendant found on the banks of the Catfish, about three-fourths of a mile below Rockdale, some papers belonging to one Horn, also a lady's muff, a piece of flannel, a piece of muslin, and a coat, and took the same to his house. They were at the time very much soiled by wet and dirt, and his wife washed them and hung them out to dry on a clothes-line, by the side of public street, where they were found. The evidence shows that the defendant had previously been making inquiry as to where Horn could be found, with the ostensible purpose of restoring to him the papers. There was no evidence tending to show that the defendant knew who owned the other property, and as to a part of it the ownership does not seem to have been ascertained yet.

The defendant asked the court to give an instruction in these words: If you find from the evidence that said goods were lost; that the same

were found by the defendant; that at the time he found the same he did not know who owned them; that there were no marks upon or about the goods showing to whom they belonged, so that defendant could identify the owner at once, even though the defendant could afterwards have discovered the owner by honest diligence, then you must acquit the defendant. The court refused to give this instruction and instructed the jury as follows: Lost goods may be the subject of larceny and should receive the same protection from the civil and criminal law as goods in any other situation. Where the finder knows or has the immediate means of knowing who was the owner, and instead of returning the goods, converts them to his own use, such conversion will constitute larceny. Reasonable diligence in discovering the owner should be shown by the party finding. The intention of a party committing a larceny at first may not be felonious, but if the property is wrongfully used or converted, it is larceny. In giving these instructions and in refusing to instruct as asked, we think that the court erred. The statute upon the subject is in these words: "If any person come by finding to the possession of any personal property of which he knows the owner, and unlawfully appropriates the same or any part thereof to his own use he is guilty of larceny." [1] The crime, if committed, must consist in the original taking. It can not consist in a subsequent lack of diligence in attempting to find the owner, nor in a subsequent conversion. The statute does, indeed, provide a penalty for converting lost goods. It provides a penalty of twenty dollars. In addition, the owner may recover for any damage which he may sustain.[2] The statute also provides what steps the finder of lost goods should take, and how he may be compensated.[3] But where the original taking is lawful, as where the finder is ignorant of the owner, the omission to take the steps pointed out by the statute, and the conversion, do not constitute larceny. This is not only the plain meaning of the statute, but it is the doctrine of the decisions. It is stated in Bishop's Criminal Law,[4] in these words: "A man knowing the owner of goods can not lawfully pick them up without returning them to him, but a man not knowing the owner can. The doctrine, therefore, is that if when one takes goods into his hands he sees about them any marks, or otherwise learns any facts by which he knows who the owner is, yet with felonious intent, appropriates them to his own use, he is guilty of larceny, otherwise not."

In *People* v. *Cogdell*,[5] the defendant was indicted for larceny of a lost pocket-book and money contained therein. He made no effort to find

[1] sec. 3907 of the Code.

[2] Code, sec. 1522.

[3] Code, secs. 1514, 1515, 1516, and 1518.

[4] vol. 2, sec. 882 (5th ed.).

[5] 1 Hill, 94.

the owner, and converted the property to his own use. The court held that it was a mere case of trover, and not larceny. The same doctrine is held in *People* v. *Anderson*,[1] *State* v. *Conway*,[2] *Wright* v. *State*.[3] The rule that the use of property by the finder without reasonable diligence upon his part to find the owner would constitute larceny, would often be oppressive. Scarcely any effort, short of a successful one, might be deemed by juries sufficient. In the meantime the finder must care for the property, and if, through his negligence, it is lost, he becomes liable to the owner.

The rule here held is in harmony with that held by this court in *State* v. *Wood*,[4] in which substantially the same principle was involved. In that case the defendant had innocently come into the possession of a guitar, and afterward sold it, with the design of appropriating the proceeds; it was held not to be larceny. The same doctrine was held in *Abrams* v. *People*,[5] and *Wilson* v. *People*." [6]

*Reversed.*

---

## LARCENY — SUBSEQUENT CONVERSION OF HIRED PROPERTY.

## HILL *v.* STATE.

[57 Wis. 377]

*In the Supreme Court of Wisconsin, 1883.*

**A Person Hired a Horse Intending at the time to return it according to his agreement. Subsequently he changed his mind and converted it to his own use. *Held*, that he was not guilty of larceny.**

ERROR to the Municipal Court of Milwaukee County.

For plaintiff in error, *A. C. Brazee.*

For defendant in error, *H. W. Chynoweth*, Assistant Attorney-General.

ORTON, J. The information was for the larceny of a horse, the property of Silas Barber, the keeper of a livery stable in the city of Waukesha.

The defendant Lawrence, on the 10th day of September, at five o'clock in the afternoon, hired a horse with a top buggy to go to a place called Honeyakers, about three miles from Waukesha, to be returned about nine or ten o'clock that evening. The defendant Hill was taken into the buggy before leaving Waukesha, and a short dis-

1 14 Johns. 294; s. c. 7 Am. Dec. 462.
2 18 Mo. 321.
3 5 Yerg. 154.
4 46 Iowa, 116.
5 6 Hun, 491.
6 39 N. Y. 459.

tance from that place on the road to the city of Milwaukee the buggy was turned over, and the top torn off and left, and they drove on together to Milwaukee that night. The next day Hill was at Oak Creek, in Milwaukee County, on the road to Racine, with the horse and a part of the harness, and tried to sell the horse there, and was arrested, and Lawrence was arrested in Milwaukee. They both prevaricated as to their names, residence, and destination. The Municipal Court of the county of Milwaukee refused the following instruction asked on behalf of defendants: "That if the defendants, at the time said horse was hired, had no intent to steal it, the subsequent appropriation of the same to their own use is a mere conversion, and is not larceny." And the court gave the following instruction, which was excepted to on behalf of the defendants: "If you believe their statements against Barber's and his man's that was in the stable at the time, that they hired the horse for an indefinite purpose and agreed to be back before ten o'clock at night, and that they afterwards went to Milwaukee and formed a design to sell the horse after that time at any time before they were caught, you will be justified in finding that they had that intention at the time they took the horse."

The instruction refused substantially expressed the law and ought to have been given, and the instruction given was clearly erroneous, because against the law so expressed.

It may at one time have been considered the law of larceny, that although the hiring and taking in the first place might have been *bona fide*, yet if the time for which the hiring was made had expired and the property is afterwards converted, it is larceny. But such has not for a long time been considered the law, and it is now stated correctly as follows: That "when the horse was delivered on a hire or loan, and such delivery was obtained *bona fide*, no subsequent wrongful conversion pending the contract would amount to a felony." [1] "When the possession was obtained *bona fide* the mere fact of the subsequent existence of the *animus furandi* does not make the offense larceny." [2] "The exception to this rule has no application to this case. If one hires a horse and sells it before a journey is performed or sells it after, before it is returned, he commits no larceny in a case where the felonious intent came upon him subsequently to receiving it into his possession." [3]

This statement of the law should be qualified by saying if he hires the horse in the first place with a *bona fide* intention of returning it, according to the contracts of hire, the circumstances of the conversion of the property subsequently, and of not even entering upon the performance

[1] 2 Russ. Cr. (9th ed.) 237.
[2] 2 Whart. Cr. L., sec. 1860.
[3] 2 Bish Cr. L., sec. 864.

of the contract of hire, but taking the property elsewhere, and of other matters evincing it, may be evidence of an intention to convert the property at the time of the hiring. But a subsequent conversion of the property merely may not be sufficient evidence of such an original intent. In a case very similar to this in its facts, of *Regina* v. *Brooks*,[1] it is held that the subsequent offer to sell the property was not considered sufficient evidence of the felonious hiring or taking in the first place; unless from the circumstances it appears that the hiring was only a pretext made use of to obtain the property for the purpose of afterwards disposing of it.

The law applicable to this case is as well stated in *Semple's Case*,[2] as in any which can be found in the books. "It is now settled that the question of intention is for the consideration of the jury, and if in the present case the jury should be of opinion that the original taking [of the property] was with the felonious intent to steal it, and the hiring a mere pretense to enable him [the prisoner] to effectuate that design without any intention to restore it, or pay for it, the taking would amount to a felony; * * * but if there was a *bona fide* hiring and a real intention of returning it at that time, the subsequent conversion of it could not be a felony." "If it be proved that there was no trespass or felonious intent in taking the goods, no subsequent conversion of them can amount to a felony." These authorities were furnished by the learned counsel of the plaintiffs in error in his brief and are amply sufficient, we think, to show the error complained of.

On motion to correct the bill of exceptions it appears that it is the recollection of the learned judge before whom this case was tried, and that it is the recollection of some other persons that the above instruction was not given to the jury, but that the instruction orally and actually given was the reverse, and that the instruction was that you will not be justified in finding," etc.

It is especially unfortunate and dangerous in criminal cases that the statute allows instructions to be given to a jury orally by the judge, and to be regretted that judges avail themselves of the personal benefit of the statute. It is hardly possible for any judge to extemporize and orally declaim those principles of law applicable to the case which in the books are found clearly and tersely expressed in "words fitly spoken." Perspicuity and certainty are essential in legal expressions, and there should be no doubt, ambiguity, or chance of questionable construction in any language, word, or sentence in a judge's charge of the

[1] 8 C. & P. 295.

[2] 2 East's P. C. 691.

law to the jury. The law is worthy of studied and correct expressions anywhere and in all cases, and especially so when it is sought to be stated to the jury not versed in it, or over ready to apprehend its meaning. I speak for myself when I say that the practice of oral instructions to the jury not committed to memory beforehand is not only pernicious, as it affects the rights of parties to the suit, but, in the uncertainty afterwards as to what the instructions really were in word and meaning. The omission of one single word, as in this instance, may change the meaning of a whole sentence and principle of law. The judge, in the mental effort to grasp the principles and compose his sentences to express them under such disadvantage, may easily omit a word or use a wrong one, unconsciously to himself, and he can not in any case retain in memory every word he used or omitted in a charge of the usual length under such a practice. The learned judge in this case appears honestly to have but little or no doubt but that he used the word not in the above instruction, and the phronological reporter appears to have as little doubt but that he did not use it, and he therefore insists upon the correctness of his verbatim report of the instruction. One of the jurors states his recollection that that word was not used in that connection in the charge of the court, and the phronographic report with the not omitted was read to the jury on their coming into court for further instructions.

The instruction was a vital one, and if one of the jury understood the instruction as it is the bill of exceptions it might have affected the verdict. But, besides the error of this instruction, we think the above instruction asked and refused ought to have been given in order to meet that particular phase of the case which involved the legal effect of a subsequent conversion of the property upon the question of the original intent with which it was taken or hired, and as to the time when the felonious intent must be formed to constitute the crime of larceny. The learned judge may be correct in his recollection and the reporter may have wrongfully reported in this particular, but the error is as great and material by the reading of the report to them and the understanding of the jury of the instruction as it now appears in the record, as if it had been wrongly given in the first place.

*Judgment reversed.*

## LARCENY — DOGS NOT SUBJECT OF LARCENY — NOR ARE THEY "CHATTELS" WITHIN STATUTE.

### R. *v.* ROBINSON.

[Bell, C. C. 34.]

*In the English Court for Crown Cases Reserved, 1859.*

**Dogs are not the Subject of larceny at common law nor are they "chattels" within the statute.**

The following case was reserved by the Recorder of Liverpool: —

The prosecutor who resided at Hartlepool, was the owner of two dogs, which he advertised for sale. The prisoner, Samuel Robinson, having seen the advertisement, made application to the prosecutor to have the dogs sent to him at Liverpool on trial, falsely pretending that he was a person who kept a man servant. By this pretense the prosecutor was induced to have the dogs sent to Liverpool, and the prisoner there obtained possession of them with intent to defraud, and sold them for his own benefit. The dogs were pointers, useful for the pursuit of game, and of the value of £5 each.

At the Liverpool Borough Sessions, holden in December, 1858, the prisoner was indicted, convicted and sentenced to seven years' penal servitude under the statute 7 and 8 George IV.[1] On behalf of the prisoner a question was reserved, and is now submitted for the consideration of the justices of either bench and Barons of the Exchequer, viz., whether the said dogs were chattels within the meaning of the said section of the statute, and whether the prisoner was rightly convicted.

The prisoner remains in Liverpool Borough gaol, under the sentence passed at Sessions.

GILBERT HENDERSON,
*Recorder of Liverpool.*

This case was argued on the 29th of January, 1859, before Lord CAMPBELL, C. J., MARTIN, B., CROWDER, J., WILLES, J., and WATSON, B.

*Brett*, appeared for the Crown, and *Littler* for the prisoner.

*Littler*, for the prisoner. A dog is not a "chattel" within the meaning of the statute. At common law no larceny could be committed of a dog. It is laid down,[2] that "it is felonie to steal any of the movable goods of any person; but because it may in some cases be doubted whether the things so taken are to be numbered amongst movable goods or no, I will proceed to particularitie." Then he says "to take

[1] ch. 29, sec. 53.

[2] Lambard's Eirenarche, 267.

dogges of any kind, apes, parots, singing birds, or such like, though they be in the house, is no felonie;" and Dalton adds:[1] "No, not by taking a blood-hound or mastiff, although there is good use of them and that a man may be said to have a property in them, so as an action of trespass lieth for taking them." And by statute it is not to this day made larceny to steal a dog, but it is a misdemeanor only.[2] And by section 31 of the very same statute under which the prisoner has been convicted, the stealing of a dog is made punishable by fine only, and by a three months' imprisonment in default; and, yet, if the intention of the Legislature were, that section 53 should be applicable to dogs, the obtaining a dog by false pretenses would involve, as in this case, seven years' penal servitude. But this section is applicable solely to the obtaining of such articles by false pretenses as might be either, at common law or by previous statute, the subject-matter of an indictment for larceny, if the facts were such as would support it. The preamble to the section says: "Whereas, a failure of justice frequently arises from the subtle distinction between larceny and fraud, for remedy," etc.; and the clause concludes with this *proviso*, "Provided, that if upon the trial of any person indicted for such misdemeanor, it shall be proved that he obtained the property in question in such a way, as to amount in law to larceny, he shall not by reason thereof, be entitled to be acquitted of such misdemeanor, and no such indictment shall be removable by *certiorari*, and no person tried for such misdemeanor shall be liable to be afterwards prosecuted for larceny upon the same facts." From this it is clear that the Legislature throughout, looks at the probability and actually provides for the objection being raised that the facts amount to larceny.

The present dog stealing act,[3] by section 1 repeals the provisions of 7 and 8 George, IV.;[4] so far as it relates to dog stealing and by section 2 enacts that to steal a dog shall be a misdemeanor, for which the offender shall be liable on summary conviction to imprisonment and hard labor not exceeding six months; and the same statute enacts that a second offense shall be an indictable misdemeanor.

*Brett*; for the Crown. It can not be disputed that for some purposes dogs are chattels. They are chattels which pass to the executor, and for which trover will lie; [5] but it is said they are not chattels within this section, because they are not the subject of larceny at common law. The statute relating to false pretenses was passed to provide a remedy in cases of cheating. The reason which is assigned why dogs should not be the

[1] Country Justice, 372.

[2] 10 Geo. III. ch. 18; 7 & 8 Geo. IV., ch. 29, sec. 31; 8 and 9 Vict., ch. 47.

[3] 8 & 9 Vic., ch. 47.

[4] ch. 29.

[5] Williams on Executors, Com. Dig. Action Sur. Trover; Ireland v. Higgins, Cro. Eliz. 125; Wright v. Rainscot, 1 Wm. Saund. 83; The Case of Swans, 7 Rep. 15.

subject of larceny at common law is, not that they were not always considered to be chattels, but because "they are of so base a nature that a man shall not die for them;" but death never was the punishment for cheating; and, therefore, the reason why dog stealing should not be a larceny does not apply. Words sufficiently large to include this offense are introduced into 38 Henry VIII.,[1] 30 George II.,[2] and also into the statute now under consideration.

Lord CAMPBELL, C. J. It is clear that dog stealing was not felony at common law; the reason why it was not is immaterial.

*Brett.* Assuming that dogs are not the subject of larceny, they may well be within the section in question. They are within the words of the section, and there is no reason why the words should not have their full effect.

Lord CAMPBELL, C. J. It is admitted that dog stealing is not larceny at common law, and a specific punishment of a milder character has been enacted by the latter statute, which makes the offense a misdemeanor. That being so, it would be monstrous to say that obtaining a dog by false pretenses comes within the statute 7 and 8 George IV.,[3] by which the offender is liable to seven years' penal servitude. My brother Coleridge used to say that no indictment would lie under that section, unless, if the facts justified it, the prisoner could be indicted for larceny and that is now my opinion.

MARTIN, B. I think this conviction can not be sustained. The question is one entirely of the construction of the statute.

WILLES, J. From the Year Books downwards including *The Case of Swans*,[4] dogs have always been held not to be the subject of larceny at common law.

The other learned judges concurred.

*Conviction quashed.*

---

## DOGS NOT SUBJECTS OF LARCENY.

## STATE *v.* LYMUS.

[26 Ohio St. 400.]

*In the Supreme Court of Ohio, 1875.*

**A Dog is not the subject of larceny.**

REX, J. The defendant was indicted at the March term, 1872, of the Court of Common Pleas of Logan County, for burglary.

1 ch. 1.
2 ch. 24, sec. 1.
3 ch. 29, sec. 53.
4 7 Rep. 15b.

The burglary consisted of breaking and entering a stable in the night season with intent to steal property of value contained therein, to wit, a dog found therein, the property of the owner of the stable, of the value of twenty-five dollars. The defendant moved to quash the indictment, on the ground that it did not charge him with the commission of an offense which was punishable by the criminal laws of this State.

The court sustained the motion and ordered the defendant to be discharged, holding "that there is no law authorizing the indictment, and that it does not charge a crime, offense or misdemeanor."

The prosecuting attorney excepted to the ruling and decision of the court, and presented a bill of exceptions, embodying the indictment, motion, ruling and decision of the court, and the exceptions taken thereto, which was signed and sealed by the court, and made part of the record in the case.

The only question presented by the exception is: Is the stealing of a dog a crime in this State.

The property intended to be stolen by the burglar must be property of which a larceny may be committed. We have no statute that, in express terms, declares a dog to be the subject of larceny; but it is claimed that inasmuch as the right of property in dogs is protected by civil remedies, and as a recent statute of this State requires them to be listed for taxation, they are property, and, therefore, properly the subjects of larceny. We do not think so. Neither the fact that the right of property in dogs is protected in this State by civil remedies, nor the fact that recent legislation requires them to be listed for taxation, has the effect of enlarging the operations of the statutes defining and punishing larceny.

At the common law, although it was not a crime to steal a dog, yet it was such an invasion of property as might amount to a civil injury, and be redressed by a civil action.[1] In describing the property of which a larceny, either grand or petit, may be committed, the statutes of this State use the words "goods and chattels." These words at the common law have a settled and well defined meaning, and when used in statutes defining larceny, are to be understood as meaning such goods and chattels as were esteemed at the common law to be the subjects of larceny. As dogs, at the common law, were held not to be the subjects of larceny, they are not included in the words "goods and chattels," as used in the statutes referred to.

Bonds, bills, notes, etc., are goods and chattels, and yet, as they were held not to be the subjects of larceny at common law, it was deemed necessary to so enlarge the larceny statutes as to declare the

[1] 2 Chit. Black. 393, 394; 1 Bish. Cr. L. 1080.

stealing or malicious destruction of them punishable in the same manner, and to the same extent, as the larceny of money, or other goods and chattels of the same value. So with dogs. It will be time enough for the courts to say that a dog is the subject of larceny when the law-making power of the State has so declared. "Constructive crimes are odious and dangerous." [1]

We are, therefore, of opinion that the Court of Common Pleas did not err in the ruling and decision excepted to.

*Exceptions overruled.*

White and McIlvaine, JJ., concurred.

Welch, C. J., and Gilmore, J., dissented.

---

## LARCENY — ANIMALS.

## R. *v.* Townley.

[12 Cox, 59.]

*In the English Court of Criminal Appeal, 1871.*

**Rabbits were Netted and 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 game-keepers who had previously found the rabbits and lay in wait for the poachers. *Held*, that this did not amount to larceny.

Case reserved for the opinion of this court by Mr. Justice Blackburn.

The prisoner and one George Dunkley were indicted before me at the Northampton Spring Assizes for stealing one hundred and twenty-six dead rabbits.

In one count they were laid as the property of William Hollis; in another as being the property of the Queen. There were also counts for receiving.

It was proved that Selsey Forest is the property of Her Majesty.

An agreement between Mr. Hollis and the Commissioners of the Woods and Forests on behalf of Her Majesty was given in evidence, which I thought amounted in legal effect merely to a license to Mr. Hollis to kill and take away the game, and that the occupation of the soil and all rights incident thereto remained in the Queen. No point, however, was reserved as to the proof of the property as laid in the indictment.

1 Findlay *v.* Bean, 8 S. & R. 571.

The evidence showed that Mr. Hollis' keepers, about eight in the morning, on the 23d of September, discovered about one hundred and twenty-six dead and newly killed rabbits and about four hundred yards of net concealed in a ditch in the forest, behind a hedge, close to a road, passing through the forest.

The rabbits were some in bags and some in bundles, strapped together by the legs, and had evidently been placed there as a place of deposit by those who had netted the rabbits.

The keeper lay in wait, and about a quarter to eleven on the same day, Townley and a man who escaped, came in a cab driven by Dunkley along the road. Townley and the man who escaped left the cab in charge of Dunkley, and came into the forest, and went straight to the ditch where the rabbits were concealed, and began to remove them.

The prisoners were not defended by counsel.

It was contended by the counsel for the prosecution that the rabbits on being killed and reduced into possession by a wrong-doer became the property of the owner of the soil, in this case the Queen;[1] and that even, if it was not larceny to kill and carry away the game at once, it was so here, because the killing and carrying away was not one continued act.[2]

The jury, in answer to questions from me, found that the rabbits had been killed by poachers in Selsey Forest, on land in the same occupation and ownership as the spot where they were found hidden.

That Townley removed them, knowing that they had so been killed, but that it was not proved that Dunkley had any such knowledge.

I thereupon directed a verdict of not guilty to be entered as regarded Dunkley, and a verdict of guilty as to Townley, subject to a case for the Court of Criminal Appeal.

It is to be taken as a fact that the poachers had no intention to abandon the wrongful possession of the rabbits which they had acquired by taking them, but placed them in the ditch as a place of deposit till they could conveniently remove them.

The question for the court is, whether on these facts the prisoner was properly convicted of larceny.

The prisoner was admitted to bail.

COLIN BLACKBURN.

No counsel appeared to argue on either side.

BOVILL, C. J. (after stating the facts). The first question that arises is as to the nature of the property. Live rabbits are animals *feræ naturæ* and are not the subject of absolute property; though at the same time they are particular species of property *ratione soli* — or rather the

[1] Blades *v.* Higgs, 7 L. T. (N. S.) 798, 834.

[2] 1 Hale's P. C. 510, and Lee *v.* Risdon, 7 Taunt. 191, were cited.

owner of the soil has the right of taking and killing them, and as soon as he has exercised that right they become the absolute property of the owner of the soil. That point was decided in *Blades* v. *Higgs*,[1] as to rabbits, and in *Lonsdale* v. *Rigg*,[2] as to grouse. In this case the rabbit having been killed on land the property of the Crown, and left dead on the same ground, would, therefore, in the ordinary course of things become the property of the Crown. But before a person can be convicted of larceny of a thing not the subject of larceny in its original state, as *e.g.*, of a thing attached to the soil, there must not only be a severance of the thing from the soil, but a felonious taking of it also after such severance. Such is the doctrine as applied to stealing trees and fruits therefrom, lead from buildings, fixtures and minerals. But if the act of taking is continuous with the act of severance, it is not larceny. The case of larceny of animals *feræ naturæ* stands on the same principle. Where game is killed and falls on another's land, it becomes the property of the owner of the land, but the mere fact that it has fallen on the land of another does not render a person taking it up guilty of larceny, for there must be a severance between the act of killing and the act of taking the game away. In the present case we must take it that the prisoner was one of the poachers, or connected with them. Under these circumstances we might come to the conclusion that it was a continuous act, and that the poachers netted, killed, packed up, and attempted to carry away the rabbits in one continuous act, and therefore that the prisoner ought not to have been convicted of larceny.

MARTIN, B. I am of the same opinion. It is clear that if a person kills rabbits, and at the same time carries them away, he is not guilty of larceny. Then, when he kills rabbits and goes and hides them, and comes back to carry them away, can it be said that is larceny? A passage from Hale's Pleas of the Crown,[3] "If a man comes to steal trees, or the lead off a church or house, and sever it, and after about an hour's time or so, come and fetch it away, it is a felony, because the act is not continuated, but interpolated, and in that interval the property lodgeth in the right owner as a chattel, and so it was argued by the Court of King's Bench,[4] upon an indictment for stealing the lead off Westminster Abbey" — was relied on by the prosecution. There is also a *dictum* of Gibbs C. J., to the same effect in *Lee* v. *Risdon*.[5] I am not insensible to the effect of those *dicta* but here we must take it as a fact that the poachers had no intention to abandon possession of the rabbits, but put them in the ditch for convenience sake; and I concur in thinking that the true law is that, when the poachers go back for the purpose of

[1] *supra.*
[2] 26 L. J. 196, Ex.
[3] p. 510.
[4] 9 Car. 1.
[5] 7 Taunt. 191.

taking them away, in continuation of the original intention, it does not amount to larceny.

Bramwell, B. Our decision does not appear to me to be contrary to what Lord Hale and Gibbs, C. J., have said in the passages referred to. If a man having killed rabbits on the land of another, gets rid of them because he is interrupted, and then goes away and afterwards comes back to remove the rabbits, that is a larceny; and so, if on being pursued he throws them away; and it is difficult to perceive any distinction where the owner of a chattel attached to the freehold finds it on his land severed, and the person who severed it having abandoned it afterwards comes and takes it away. It is in those cases so left as to be in the possession of the true owner, and the act is not, as Lord Hale expresses it, continuated. In this case, however, the rabbits were left by the poachers as trespassers in a place of deposit, though it happened to be on the land of the owner; and it is just the same as if they had been taken and left at a public house, or upon the land of a neighbor. If they had been left on the land of a neighbor, or at a public house could it have been said to be larceny? Clearly not; and if not, why is it larceny because the poachers left them in a place of deposit on the owner's own land? It seems to me that the case is not within the *dicta* of Lord Hale and Gibbs, C. J., but that here the act was continuous, and that there was an asportation by the poachers to a place of deposit, where they remained not in the owner's possession.

Byles, J. I can not say that I have not entertained a doubt in this case; but upon the whole I think that this was not larceny. The wrongful taking of the rabbits was never abandoned by the poachers, for some of the rabbits were in their bags. It could hardly be said that if a poacher dropped a rabbit and afterwards picked it up that could be converted into larceny, yet that would follow if the conviction were upheld.

Blackburn, J. I am of the same opinion. Larceny has always been defined as the taking and carrying away of the goods and chattels of another person; and it was very early settled where the thing taken was not a chattel, as where a tree was cut down and carried away, that was not larceny, because the tree was not taken as a chattel out of the owner's possession, and because the severance of the tree was accompanied by the taking of it away. The same law applied to fruit, fixtures, minerals, and the like things, and statutes have been passed to make stealing in such cases larceny. Though in the House of Lords, in *Blades* v. *Higgs*, it was decided that rabbits killed upon land became the property of the owner of the land, it was expressly said that it did not follow that every poacher is guilty of larceny, because as Lord Cranwell said: "Wild animals, whilst living, though they are, according

to Lord Holt, the property of the owner of the soil on which they are living, are not his personal chattels so as to be the subject of larceny. They partake, while living, of the quality of the soil, and are, like growing fruit, considered as part of the realty. If a man enters my orchard and fills a wheel barrow with apples, which he has gathered from my trees, he is not guilty of larceny, though he has certainly possessed himself of my property, and the same principle is applicable to wild animals." The principle is as old as 11 Year Book,[1] where it is reported that a forester who had cut down and carried away trees, could not be arraigned for larceny, though it was a breach of trust, but it was said it would have been a different thing if the lord of the forest had cut down the trees and the forester had carried them away, then that would have been larceny. So that, in the case of wild animals, if the act of killing and reducing the animals into possession is all one and continuous, the offense is not larceny. The jury have found in this case that the prisoner knew all about the killing of the rabbits, and that they were lying in the ditch. It is clear, that, during the three hours they were lying there, no one had any physical possession of them, and that they were still left on the owner's soil; but I do not see that that makes any difference. Then there is the statement from Hale's Pleas of the Crown,[2] where it is said that larceny can not be committed of things that adhere to the freehold as trees, or lead of a house, or the like, yet that the Court of King's Bench decided that, where a man severed lead from Westminster Abbey, and after about an hour's time came and fetched it away, it was felony, because the act is not continuous but interpolated; and Lord Hale refers to Dalton.[3] And Gibbs, C. J., expressed the same view very clearly in *Lee* v. *Risdon*. Now, if that is to be understood as my Brother BRAMWELL explained, I have no fault to find with it, but if it is to be said that the mere fact that the chattel having been left for a time on the land of the owner has thereby remained the owner's property, and that the person coming to take it away can be convicted of larceny, I can not agree with it as at present advised. If we are to follow the view taken by my Brother BRAMWELL of these authorities, they do not apply here, for no one could suppose that the poachers ever parted with the possession of the rabbits. I agree that, in point of principle, it can not make any difference that the rabbits were left an hour or so in a place of deposit on the owner's land. The passage from Lord Hale may be understood in the way my Brother BRAMWELL has interpreted it, and if so the facts do not bring this case within it.

*Conviction quashed.*

[1] par. 33.
[2] p. 510.
[3] ch. 103, p. 166.

## LARCENY — WILD ANIMALS — POSSESSION.

## R. v. Petch.

[14 Cox, 116.]

*In the English Court of Criminal Appeal, 1878.*

**The Prisoner was Employed to** trap wild rabbits and it was his duty to take them, when trapped, to the head keeper. Contrary to his duty he trapped from time to time rabbits and took them to another part of the land, and placed them in a bag with intention of appropriating them to his own use, which another keeper observing, went and took some of the rabbits out of the bag during the prisoner's absence and nicked them and put them into the bag. His reason for nicking them was that he might know them again. The prisoner afterwards took away the bag and the rabbits: *Held*, that the act of the keeper in nicking the rabbits was no reduction of them into the possession of the master, so as to make the prisoner guilty of stealing them.

This was a case reserved for the opinion of this court by B. B. Hunter Rodwell, Esq., Q. C., M. P., the chairman of the Second Court of the West Suffolk Quarter Sessions.

The prisoner was indicted under the statute[1] for larceny, as a servant to the Mahrajah Dhuleep Sing, of sixty-one dead rabbits, the property of his master. There was also a count for receiving.

The prisoner was employed by the Maharajah to trap rabbits upon a part of his estate, and it was the duty of the prisoner forthwith to take daily the rabbits so trapped to the head keeper.

On the morning of the 9th day of February, about half-past eleven, an underkeeper named Howlett, also employed by the Maharajah, was out on his beat in the parish of North Stowe, where he observed the prisoner go three or four times from the places where his rabbit traps were set to a spot near a furze bush on his beat. On examining this later in the day, he found sixty-one dead rabbits in a bag hidden in a hole in the earth near a furze bush. Howlett took twenty of the rabbits out of the bag and marked them by cutting a small slit under the throat. He then placed them in the bag, and covered it up in the hole in the ground as before. In cross-examination Howlett said that his reason for marking the rabbits was that he might know them again.

Early on the following Sunday morning the prisoner was seen by Howlett, and a police constable, who had been watching the spot, to take the rabbits from the hole in the ground and put them in his cart, and he was driving the cart away along the road in a contrary direction to the head keeper's house where he should have deposited them, when he was stopped and taken into custody by the police.

Counsel for the prisoner contended that there was no evidence to go

[1] 24 and 25 Vict., ch. 96, sec. 69.

to the jury of the larceny charged in the indictment, and referred to *Regina* v. *Townley*.[1]

The court, however, held that there was evidence to go to the jury of larceny, and that the present case was distinguishable from that of *Regina* v. *Townley*, in consequence of the continuity of the possession having been broken by Howlett, the servant of the Maharajah, he having taken twenty of the rabbits out of the bag and marked them as described.

The court agreed with the contention of counsel for the prisoner that there was no evidence of any intention on the part of the prisoner to abandon possession of the rabbits and this point was not left to the jury.

The court left the case generally to the jury, who found the prisoner guilty of the larceny charged, and the prisoner was sentenced to three months' imprisonment with hard labor; execution of the judgment was respited until the decision of this court.

The court reserved for the opinion of this court the question whether upon these facts the prisoner was properly convicted of the larceny charged.

*Kingsford* (*Mulden* with him). The conviction was wrong. There was no larceny here. "Theft may be committed by taking and carrying away without the consent of the owner (even if he knows and affords facilities for the commission of the offense) of any thing which is not in possession of the thief at the time when the offense is committed, whether it is in the possession of any other person or not. * * * If the thing taken and carried away is for the first time rendered capable of being stolen by the act of taking and carrying away, and if the taking and carrying away are one continuous act, such taking and carrying away is not theft, except in the cases provided for in articles 326, 327. It seems that the taking and carrying away are deemed continuous if the intention to carry away after a reasonable time exists at the time of taking."[2] In this case the rabbits were always in the prisoner's possession and never in that of the master, and that being so, *Regina* v. *Townley* is an authority that the prisoner is not guilty of larceny. The continuity of the possession of the rabbits was not broken by the act of Howlett going and nicking the rabbits. This was done for the purpose of identifying them, not for reducing them into the possession of the master. [FIELD, J. And with the intention that the prisoner should have possession of them.] The distinction taken by the chairman is not consistent with the facts. The judgment of Blackburn, J., in *Regina* v. *Townley*, was referred to, and also the case of *Regina* v. *Read*.[3]

[1] L. R. 1 C. C. R. 315; 12 Cox, C. C. 59.

[2] Sir J. F. Stephen's Dig. Cr. L., art. 296.

[3] 14 Cox, C. C. 17; L. R. 3 Q. B. Div. 131.

No counsel appeared for the prosecution.

COCKBURN, C. J. This conviction must be quashed. The case is really governed by that of *Regina* v. *Townley*, where the law on the subject is fully stated in the judgment of Blackburn, J. At common law to constitute larceny it was necessary that there should be a taking and carrying away of the chattel, and among the instances put in the old books are those of growing trees, and lead fixed to a building, which constitute part of the freehold, where a severance was necessary to turn them into chattels, and unless there was an interval between the one act of turning them into chattels, and the other act of taking them away, during which there was a change in the possession from the person who severed them from that of the owner, the final act of carrying them away by the person who severed them did not form the subject-matter of larceny. So, in the present case, although property in wild animals, as decided in *Blades* v. *Higgs*,[1] becomes that of the owner by being killed on his land, it does not follow that, when a man without right goes upon the land and kills wild animals they become so reduced into the possession of the owner of the land as to render the man liable to the charge of larceny for carrying them away. In *Regina* v. *Read*, the principle was the same as that which governs this case. It is true that in that case the prisoner was employed to trap rabbits, and had authority to kill rabbits, and that availing himself of that authority he trapped and killed rabbits, but that was not in fulfillment of his duty, but with the intention of taking the rabbits for his own purposes and not for his master's. In no sense did he reduce them into the possession of his master, for he took them direct from the trap to where the bag was concealed, and put them into his bag. The only circumstance that appears to distinguish this case is the fact that the keeper Howlett marked some of the rabbits, but that was done, not with the intention of altering the possession of them, but for the purpose of identifying them. That fact does not make any difference in the case. I am of opinion that the conviction should be quashed.

POLLOCK, B. I am of the same opinion. This case was reserved that it might be determined whether there was any distinction between it and *Regina* v. *Townley*, and whether the nicking of rabbits by the keeper could be considered as a reducing of them into the possession of the master. There is really no distinction. It is impossible to say that all that the prisoner did was not in his conduct as a thief.

FIELD, J. I am of the same opinion. There is no question raised as to any reduction of the rabbits into the possession of the master by the act of trapping them, but it is said that the continuity of possession by

[1] 11 H. L. Cas. 621.

the prisoner was broken by the act of the keeper in going to the trap and nicking the rabbits. It appears to me that there is no foundation for any distinction between this case and *Regina* v. *Townley*.

HUDDLESTON, B. I am of the same opinion. There was no intention on the part of the prisoner to abandon his possession of the rabbits. I agree that the act of the keeper in nicking the rabbits was not for the purpose of reducing them into the possession of the master, but for identifying them. I do not agree in the distinction of this case from *Regina* v. *Townley*, drawn by the chairman of the Court of Quarter Sessions. There was no evidence from which it might have been inferred that the rabbits had been reduced into the possession of the master.

LINDLEY, J. I am of the same opinion.

*Conviction quashed.*

---

## LARCENY—PROSECUTOR MUST HAVE POSSESSION OF AND PROPERTY IN GOODS.

## R. *v.* SMITH.

[1 Den. & P. 447.]

*In the English Court for Crown Cases Reserved, 1852.*

**The Prisoner took out of his Pocket** a piece of blank paper properly stamped with a sixpenny stamp, having led the prosecutor to believe that he was about to pay him the sum of £4 11s 1½d due to him from one P. The prosecutor wrote upon the paper a receipt for the money; whereupon the prisoner took up the receipt, and left the prosecutor without paying him; and the jury found that he took it with intent to defraud. *Held*, that the prisoner could not be convicted of larceny, the prosecutor never having had such a possession of the paper as would have enabled him to maintain trespass.

At the Ephiphany Quarter Sessions held by adjournment at Swansea, in the county of Glamorgan, on the 9th January, 1852, the prisoner, John Smith, was indicted before H. A. BRUCE, Esq., and other justices of the same county, for having, on the 3d December, 1851, "one piece of paper stamped with a certain stamp denoting payment of a duty to our sovereign lady, the Queen, of sixpence of the property, etc., of Thomas Henderson, feloniously stolen," etc.

The prosecutor, Thomas Henderson, had been timekeeper and general clerk to Isaac Powell, a railway contractor, whose employment he left in November, 1851. The prosecutor applied frequently, and without success, to Powell for payment of wages due to him. On the 3d December, 1851, prosecutor went to a public house where be saw Powell and the prisoner, who was a gauger (or foreman) in the employ of Powell. Prosecutor asked Powell if he was going to settle with him.

Powell answered, "Yes," and said that he would send the prisoner up to his house to his (Powell's) wife for the money. Powell then left the house and prisoner followed him. In about two minutes prisoner returned, and beckoned the prosecutor to come to him into the front parlor. Prosecutor went there. They were alone, and made up between them the balance of wages due to prosecutor, which they fixed at £4, 11s, 1½d. Prisoner then took out of his pocket a sixpenny stamp, and put it on the table. Prosecutor took the stamp and pulled it towards himself, and asked the prisoner whether he (prosecutor) should write a receipt for the full sum of £10, 16s, or for the balance. Prisoner said, "for the balance." While prosecutor was writing he observed the prisoner pull out a fist full of silver, and turn it over in his hand. When prosecutor had written out the receipt, prisoner took it up and went out of the room. Prosecutor followed him and said, "Smith, you have not given me the money." Prisoner said: "It's all right." Prosecutor repeatedly asked prisoner for the money, but in vain. On the evening of the same day prosecutor met Powell and the prisoner together, and asked Powell if he had given prisoner any money for him. Powell said: "No; but my wife has." Prosecutor said he had not had the receipt. "Well," answered Powell, "he (the prisoner) would not have the receipt if you (the prosecutor) had not had the money."

The learned chairman told the jury, after much doubt, that if they believed the evidence, the stamped receipt was the property and was in possession of the prosecutor at and after the time of his writing the receipt; and that if they believed the prosecutor's statement, and should be of opinion that the prisoner took the receipt out of such possession with a fraudulent intent, they might convict him of larceny.

The jury returned a verdict of guilty, and the prisoner was sentenced to imprisonment for four calendar months, with hard labor.

The counsel for the prisoner raised the following objections: —

1st. That there was not such a property and possession in the prosecutor as to support the charge laid in the indictment.

2d. That there was no evidence of a felonious taking.

The chairman thereupon reserved the case for the consideration of the judges, and begged their opinion thereon.

On the 24th April, A. D. 1852, this case was considered by POLLOCK, C. B., PARKE, B., ERLE, J., TALFOURD, J., and CROMPTON, J.

*Terry*, for the Crown, read the case and cited *Rex.* v. *Phipoe.*[1] There the prosecutor was compelled by duress to sign a promissory note which had been previously prepared by the defendant, who produced it

[1] 2 Leach, C. C. 673.

and withdrew it again as soon as it was signed, and a great difference of opinion existed among the judges as to whether there was a larceny or not.

PARKE, B. The stamped paper never was in the prosecutor's possession, and the prisoner can not be convicted of stealing it unless the prosecutor had such a possession of it as would enable him to maintain trespass. It was merely handed over for him to write upon it.

*Terry*. But it is found that it was obtained from the prosecutor by the prisoner with an intent to defraud.

PARKE, B. It is like the case of *Rex* v. *Hart*,[1] where the prisoner was indicted for stealing an imperfect bill of exchange. There the prisoner produced from his pocket ten blank stamps, and the prosecutor wrote on each of them the words "payable at Messrs. Praed & Co., 189 Fleet Street, London." Nothing was written on the stamps at that time but these words; and the prisoner took the stamps away. The prosecutor saw him again several days afterwards, when he said that the prosecutor had omitted to sign his name; and he again produced the ten pieces of paper; the prosecutor signed them and wrote "accepted" on each of them, and gave them to the prisoner again. He said he would send the money in a few days by the mail, but it was never sent. Littledale, J., observed, in giving judgment: "If a person, by false representation, obtains the possession of the property of another, intending to convert it to his own use, this is felony; but the property must have been previously in the possession of the person from whom it is charged to have been stolen. Now, I think that these papers, in the state in which they were, were the property of the prisoner. He took them from his pocket, and the prosecutor never had them except for the purpose of writing upon them; they were never out of the prisoner's sight; the prosecutor writes upon them as he intended, and the prisoner immediately has them again. I think that the prisoner can not be convicted as having committed a trespass in the taking, as they were never out of his possession at all." In the same way here, the prosecutor never had the possession of the stamped paper.

*Terry*. In the case of *Rex* v. *Hart*, the articles alleged to have been stolen were imperfect bills of exchange. Here the case is somewhat different: a receipt for a sum of £4, 10s, 1½d — a debt due to the prosecutor, is obtained from the prosecutor by fraud.

PARKE, B. But there was never any property in the stamped paper in the prosecutor. It was never delivered to him to keep.

*Terry*. It is submitted that he had a property in it as a bailee?[2]

1 6 C. & P. 106.

2 As to the cases where a man may commit larceny by stealing his own goods from a bailee, see 4 Bla. Com. 231, and note by Chitty.

PARKE, B. No. It was never intended that he should retain it. It was merely handed to him to write upon it.

POLLOCK, C. B. Could the prosecutor have brought an action to trover for the stamped paper?

*Terry.* I apprehend he could.

PARKE, B. That is another question. Littledale, J., says that he could not maintain an action of trespass.

The judges were all of opinion that this was not a case of larceny, and the conviction was ordered to be quashed.

---

LARCENY — PROSECUTOR MUST HAVE PROPERTY TO GOODS.

## McNAIR v. STATE.

[14 Tex. (App.) 18.]

*In the Court of Appeals of Texas, 1883.*

1. **On a Trial for** theft the court charged as follows: "Possession of the person unlawfully deprived of property is constituted in all cases where the person so deprived of possession is, at the time of taking, lawfully entitled to the possession thereof as against the true owner." *Held,* error.

. **Intent.** — Upon the question of intent, the court charged in a theft case as follows: "The intent in all criminal cases is judged of from the act." *Held,* error, inasmuch as it confines the question of intent to the act, whereas intent is to be deduced from all the circumstances remotely or immediately attending the taking.

3. **Ownership.** — Upon the question of ownership the court charged: "If you believe from the evidence that the property as charged was not the property of the person as charged, beyond a reasonable doubt, you will acquit the defendant." *Held,* error.

4. **Possession of Recently Stolen Property** is not of itself sufficient to sustain a conviction for theft. The court charged as follows: "If the jury find that the property alleged to have been stolen was the property of the defendant, and that he had exercised actual control, care and management over the same, prior to the alleged taking, you will find the defendant not guilty." *Held,* error, inasmuch as when the evidence tended to show that the defendant was the legal owner of the property, the effect of the charge was to destroy such defense, unless the defendant could show that he exercised actual control, care and management of the property prior to the taking.

APPEAL from the County Court of Comal. Tried below before the Hon. E. KOEBIG, county judge.

The appellant was convicted of the theft of a quantity of lumber under the value of twenty dollars, alleged to be the property of Andrew Watson, and his punishment was affixed by the verdict at a fine of twenty-five dollars and confinement in the county jail for one day.

Andrew Watson was the first witness introduced by the State. He testified that on the sixteenth day of February he was notified that some

one was taking the lumber off of a house which stood about two and a half miles from where the witness was then living. Witness went to the house on that day and found that the lumber had been taken from the side room and from the floor of the house. He found fresh wagon tracks leading off in the direction of the defendant's house, which was about one mile distant. The witness followed these tracks to the defendant's house, where he found the lumber lying in the defendant's front yard. He also found two shingles on the way. Witness told the defendant that some one had taken the lumber from his house. The defendant said: "Your lumber! I would use them up for it." Witness recognized the lumber and asked him where he got it, and the defendant said: "From the house my son, Taylor McNair, built (which was the house alluded to by witness), and I bought it from Taylor McNair and paid him for it a long time ago." When the witness claimed the lumber, the defendant said, sneeringly: "Your lumber! Your lumber!" The lumber was worth nineteen dollars, and was taken in Comal County, in February, 1883, without the consent of the witness. Witness was permitted, over objection, to state that he had at home a deed conveying to him the land on which the house was situated, together with the house and improvements. The deed was not lost but could be had.

Cross-examined, the witness stated that he had no trouble tracking the wagon. When he and Daniel George arrived at defendant's house, defendant invited them into the house, and in going they had to pass near the lumber. Witness asked him why he did not come to see him before taking the lumber. Defendant replied: "I had no business to come and see you. I bought from Taylor McNair and paid for it a long time ago, and I will take my property wherever I find it." The witness heard that Taylor McNair claimed the lumber before he, witness, bought the house, but did not know it. Taylor McNair lived in this house when witness first knew him, three or four years ago. Daniel George forbade both the defendant and Taylor taking the lumber off. Witness could not say that the wagon tracks were or were not plain. He denied that on February 21, 1883, he stated that the wagon tracks were very plain; or that he stated he knew that Taylar McNair set up a claim to the lumber; or that he stated he found a pack of shingles on the road from the dismantled house to the defendat's house. Here the defendant showed the witness a written document, which he acknowledged he signed as his statemeat. It reads as follows: —

"I had never lived in the house I bought. I knew that Taylor McNair set up a claim to the lumber. Old man Daniel George had forbade Taylor McNair and the defendant both from taking the lumber.

Taylor McNair lived in the house in question about four years ago. It will soon be four years since Taylor McNair lived in said house. I bought, at the time of buying the house, three hundred acres. Daniel George gave me the balance of the land, which makes about six hundred acres. The wagon tracks were very plain from where the lumber was taken to Mr. McNair's. I found on the route a small pack of shingles about two or three hundred yards from the house where they were taken. The defendant lives about one mile from the place on an air line."

The defendant made no effort to conceal the lumber. It was lying out in the front yard where any one could see it.

Daniel George, for the State, testified, over objection, to his conveyance of the land on which the house stood to Watson, and corroborated Watson as to the discovery of the lumber at the defendant's house and the conversation that ensued between Watson and the defendant.

Cross-examined, he testified that about seven years ago Taylor McNair contracted with him for the land on which the house stood. Taylor McNair furnished the lumber and built the house in controversy. Taylor McNair lived in that house about three years. He contracted in the same manner with witness for other land, and improved a farm on it, cultivating it for the three years he occupied the house in question. About a year after he moved off he sold the fence improvements to a son of the witness, and on two separate occasions tried to sell the lumber in the house to the witness. That was the same lumber which defendant is now charged with stealing. Witness declined to buy, and told Taylor McNair, that he, witness, thought he was entitled to something for the use of the land. Taylor McNair had never, at any time, or in any manner, conveyed the lumber or the house to the witness. A year or two ago defendant told the witness that he had bought the lumber from Taylor, and witness forbade him taking it. Defendant made no effort to conceal the lumber after he took it.

John McNair testified, for the defence, that Taylor McNair partly built the house in question out of the lumber charged to be stolen by defendant. Taylor bought and paid for the lumber himself. Witness paid Taylor fifteen dollars for the defendant as part of the purchase-money for the lumber in the house. Witness went with defendant to get the lumber. They went in the day time, and made considerable noise in tearing it from the frame of the house.

J. Dickson testified that he lent the defendant his wagon for the avowed purpose of hauling this lumber home, and that the defendant used it for that purpose.

The motion for new trial, setting up some eighteen or twenty grounds, was overruled, and this appeal prosecuted.

*J. D. Guinn*, for the appellant.

*J. H. Burts*, Assistant Attorney-General, for the State.

HURT, J. This is a conviction for the theft of lumber, the appellant being fined twenty-five dollars and imprisoned in the county jail one day.

A bill of exceptions was reserved to the following charges: —

Third charge. "Possession of the person unlawfully deprived of property is constituted, in all cases, were the persons so deprived of possession is at the time of taking unlawfully entitled to the possession thereof as against the true owner."

"5. The intent in all criminal cases is judged from the act."

"7. If you believe from the evidence that the property taken, as charged, was not the property of the person as charged, beyond a reasonable doubt, you will acquit the defendant."

"9. If stolen property is traced to the recent possession of the defendant, he must show that he came lawfully by it, or the law considers him the thief."

"11. If the jury find that the property alleged to have been stolen was the property of the defendant, and that he had exercised actual control, care and mangement over the same, prior to the alleged taking, you will find the defendant not guilty."

"12. If you have any reasonable doubt as to the guilt or innocence of the defendant, you will give him the benefit of the doubt, and acquit him."

The third subdivision of the charge is abstractly correct, and if there was evidence in this case tending to show that the prosecutor was entitled to the possession of the lumber, as against the defendant, the owner, it would have been a proper charge. This, however, was not the case; hence the charge was calculated to injure defendant.

Fifth charge, to wit: "The intent in all criminal cases is judged of from the act." What act? The taking? The intent is judged of by all the circumstances attending, remotely or immediately, the taking — the facts relevant.

"7. If you believe from the evidence that the property taken, as charged, was not the property of the person, as charged, beyond a reasonable doubt, you will acquit the defendant." By this the jury are required to believe, beyond a reasonable doubt, that the property was not the property of the prosecutor. The rule is clearly and emphatically the converse of this, requiring the jury to believe, beyond a reasonable doubt, that the property was that of the prosecutor.

"9. If stolen property is traced to the recent possession of the defendant, he must show that he came lawfully by it, or the law considers him the thief." Upon this predicate, the law does not so con-

sider him; recent possession of stolen property alone, has, we believe, never been held sufficient to sustain a conviction. Recent possession unexplained, when the circumstances demanded explanation, has been and is held (we think justly) sufficient. This applies to cases in which there is no evidence except the *corpus delicti*, recent possession, a demand for explanation, and a failure to explain. If there be other evidence, either for or against defendant, it may or may not be sufficient, depending always on the nature and weight of the evidence. Though the defendant may be in recent possession of stolen property, he is not required to show his possession, lawful in the strict sense of that word. In a great many cases his acquisition of the property may not be lawful, yet amply sufficient to rebut the conclusion sought to be drawn from his possession by the prosecutor. He, in acquiring possession, may have been a mere trespasser. Some one else may have placed him in possession wrongfully and unlawfully. This is merely an illustration of the ways and means by which the possession of the property, though stolen, may be lawfully acquired, without a fraudulent or thievish intent.

"11. If the jury find that the property alleged to have been stolen, was the property of the defendant, and that he had exercised actual control, care and management over the same prior to the alleged taking, you will find the defendant not guilty." This, upon the trial of this case, was a charge of the greatest importance. Its effect, the evidence tending strongly to prove, if it did not conclusively prove, that defendant was the just and legal owner of the property, was evidently to cut him off from this defence, unless he could show that he had exercised actual control, care and management over the property prior to the taking. We will not discuss this charge, it being beyond the reach of criticism. Law, justice and the rights of the citizen, are terribly maltreated by the principle therein contained.

What shall we say of the twelfth, which is as follows: "If you have reasonable doubt as to the guilt or innocence of the defendant, you will give him the benefit of that doubt and acquit him." Notwithstanding, that the eleventh charge deprived defendant of a just and complete defence to the accusation against him, still we can not comprehend how it were possible for the jury not to acquit the defendant if they observed the instructions of his honor below contained in this twelfth charge. By it they are instructed to acquit if they have any reasonable doubt of defendant's guilt or innocence. If they doubt guilt, they must acquit; and if they doubt innocence, they must acquit. Was there no doubt of either? The jury, by their verdict, say they believe him guilty; hence of necessity, they must have doubted his innocence; and if so, under this charge they should have acquitted him. The stronger the belief of guilt, the greater the doubt of innocence.

In every prosecution, guilt is the affirmative proposition, and must be established beyond a reasonable doubt. Jurors are not required to believe defendant's innocence in order to acquit. They are not called upon to pass upon the defendant's innocence, but they are called upon to determine whether or not the State has proven beyond a reasonable doubt, the affirmative proposition, to wit, the guilt of the defendant.

The next question presented is the sufficiency of the evidence to support the verdict. We are of the opinion that this verdict is not only unsupported by any evidence, but it is very clearly and unquestionably against the evidence; and to permit it to stand would be a monstrous outrage. Not only so; its sanction by this court would tend to degrade and bring into contempt the solemn proceedings of the courts of this country.

It should be the pride and greatest effort of the courts of the country to protect the property, character, liberty and life, especially of the innocent, law-abiding and virtuous citizens. By this verdict and judgment, this citizen has not only been deprived of his property and liberty but his character and that of his family stand blasted forever. The brand of a thief has been indelibly stamped upon him, not only without law and without evidence, but directly in the face of the evidence. Shall this court permit such verdicts, with all their dire consequences, to stand? By no means; for we are vested with the power to reverse judgments upon the ground of the insufficiency of the evidence.

For the errors noted in the charge, and because the verdict is not supported by the evidence, the judgment is reversed and the cause remanded.

---

LARCENY — STEALING COFFIN — CRITERION OF VALUE IN LARCENY

## State *v.* Doepke.

[68 Mo. 208.]

*In the Supreme Court of Missouri, 1878.*

1. **It is not Larceny, at Common law,** to steal a dead body; *aliter* as to a coffin in which a body is interred.
2. **Where the Value of the Article Stolen** is material in a prosecution for larceny, its value is to be fixed by its market price, and not by what it is worth to its owner, or for the particular purpose for which it is used. It is to be regarded as worth just what it would fetch in the open market.

Henry, J. It is conceded by counsel for appellant, and fully established by the authorities, that a coffin in which the remains of a human

being were interred, was a subject of larceny at common law. It is contended, however, that sections 11, 12, 13 and 14, of our act concerning crimes and punishments,[1] "stand in lieu of the common law as it existed in reference to the question under consideration, and that the acts alleged to have been committed by the defendant in the case, amounted to nothing more than a statutory misdemeanor." Section eleven provides a punishment for removing the remains of a human being from the grave or other place of interment. Section twelve makes it a misdemeanor for any one to receive such remains, knowing them to have been disinterred contrary to the provisions of the preceding section. These sections, it might be contended with plausibility, have superseded the common law in regard to the exhumation of the remains, but have no bearing upon the question of stealing a coffin or grave clothes.

It was not larceny common law, to take a dead body from its place of interment, under any circumstances, but it was a misdemeanor, and as sections eleven and twelve expressly provide a punishment for that offense, as also for receiving the dead body, those sections may be taken to stand in lieu of the common law in relation to the removal of the remains of the dead.

Section thirteen provides that "every person who shall open the grave or other place of interment, or sepulture, with intent to remove the dead body or remains of any human being, for any of the purposes specified in section eleven of this chapter, or to steal the coffin or any vestment or other article, or any part thereof, interred with such body shall, on conviction," etc.

This section provides a punishment for an attempt to remove the remains or to steal the coffin or any article interred with the body. There is no enactment in regard to stealing a coffin, and with what propriety can it be said that the Legislature, having prescribed a punishment for one offense which was punishable at common law, has thereby repealed the common law in regard to a different and a higher grade of offense? By the common law it was larceny to steal a coffin in which the remains of a human being was interred. It was, at common law, also a misdemeanor to attempt to commit that offense, and the argument urged here is, that inasmuch as our Legislature has provided a punishment for the misdemeanor, it has thereby entirely superseded and abolished the common law as to the felony. We may not appreciate the force of the argument, but it comes far short of securing our assent to the proposition. That the stealing of a coffin is still larceny in this State is recognized in section thirteen, wherein it provides a punishment for the attempt to

1 Wag. Stats. 500, 501.

steal a coffin. We, therefore, conclude that, notwithstanding the enactment of those sections, a coffin in which the remains of a human being are interred is still a subject of larceny in this State.

It is insisted that the indictment is defective in failing to negative the exceptions contained in section fourteen. This question has been otherwise determined by repeated decisions of this court, and recently in *State* v. *O'Gorman.*[1]

The coffin was alleged, in the indictment, to be the property of one Makel, a son-in-law of the accused, and it is contended that when he had the body interred he parted with all the property he had in the coffin, and that, therefore, the conviction of defendant can not be sustained. Roscoe, in his work on Criminal Evidence, says: "A shroud stolen from the corpse must be laid to be the property of the executor, or of whoever else buried the deceased."[2] All these authorities it is true, speak only of shrouds and ornaments buried with the dead, but the principle upon which these may be alleged to be the property of the executor, or of the person who buried the deceased, will certainly sustain an allegation that the coffin is the property of the person who buried the deceased.

The court, for the State, instructed the jury that if they found that the coffin was of less value than ten dollars, and that defendant stole it, they should convict him of petit larceny. By another instruction they were told that in order to convict defendant of grand larceny they should find the coffin to have been of the value of ten dollars or more, and that it was sufficient if they found it to have been of that value to the owner, and that it was not required that it should be of that value to third persons, or that it would command that price in the open market. This latter instruction was erroneous. The authorities cited to support the doctrine it announced give it no countenance.

In 3 Greenleaf's Evidence,[3] the author says: "Nor is it necessary to prove the value of the goods stolen, except in prosecuting under statutes which made the value material either in constituting the offense or in awarding the punishment.

"But the goods must be shown to be of some value at least to the owner, such as reissuable bankers' notes, or other notes, completely executed, but not delivered or put into circulation, though to third persons they might be worthless." It is clear that in the latter clause he was speaking of other prosecutions than those under statutes which make the value material, either in constituting the offense or awarding the punishment.

By the English law, as it stood when this country was settled, lar-

1 68 Mo. 179.

2 p. 604 (6th Am. ed.); 1 Chitty Cr. L. (5th Am. ed.) 44; 1 Hawk. P. C. 144, 148; Sharswood Black., 4th vol., 235.

3 p. 140, sec. 153.

ceny was divided into grand and petit; the former being committed where the goods stolen were over twelve pence in value, the latter where they were of the value of twelve pence or under." [1]

"In these valuations (says East) the valuation ought to be reasonable; for when the statute [2] was made, silver was but 20d an ounce, and at the time Lord Coke wrote, it was 5s, and it is now higher.[3] So Lord Coke,[4] says: "The things stolen are to be reasonably valued, for the ounce of silver, at the making of this act, was at the value of 20d, and now it is at the value of 5s and above." [5] The statute of Westminster I.,[6] referred to by these authors, was that by which the distinction betwixt grand and petit larceny was made.

By statutes seven and eight, George IV.,[7] that distinction was abolished, and every larceny, without regard to the value of the goods, was made grand larceny.[8] When it is said by elementary writers, and in adjudged cases, that in order to constitute the offense of larceny it is sufficient if the thing stolen be of some value to the owner, however small, although to third persons worthless, the observations relate to the offense of petit larceny, or to simple larceny, under the statute seven and eight George IV., and similar statutes, and are wholly inapplicable to grand larceny. Where a distinction is made by statute between that and petit larceny, based upon the value of the goods stolen the remarks of East and Lord Coke, above quoted, show conclusively that the value of the goods was to be measured by the current coin of the realm, and that the cash value was that to be ascertained in determining whether the theft was grand or petit larceny.

If the criterion of the value, given by the court in the second of the above instructions be correct, one might be convicted of grand larceny for stealing a finger ring of the intrinsic or market value of five dollars, only because, forsooth, being a gift to the owner by a departed friend, or wife, or other loved one, he placed an estimate upon it far beyond its value, although of no greater value to third persons than another ring of the same kind which could be purchased wherever kept for sale for five dollars. The criterion of value by which the jury were told in that instruction they might be governed, does not apply, as a general rule, in civil proceedings, and when the statute requires that property stolen shall be of the value of ten dollars, in order to constitute the theft thereof grand larceny, the term "value" is to be taken in its legal sense, which does not differ from its common acceptation, and there is no warrant for allowing any other mode for ascertaining the

1 Bish. Cr. L. vol. 1, sec. 679.
2 of West I., ch. 15.
3 2 East's P. C. 736.
4 2 Inst. 189.
5 See, also, Bla. Com., vol. 4, p. 237.
6 ch. 15.
7 ch. 29, sec. 2.
8 Sharswood's Black., vol. 4, p. 230.

value of stolen property in a criminal prosecution than that which prevails generally in civil proceedings. It is not the fancy estimate of value placed upon the property by the owner which is to determine whether the theft is grand or petit larceny, but its actual value, as that value is usually ascertained in other proceedings.

If one sue another for conversion of personal property, he recovers not what the property was worth to him, but its value in the market; and it would be strange enough if, when the statute declares that no one shall be adjudged guilty of grand larceny, unless the goods stolen were of the value of ten dollars, a criterion of value should be adopted which would authorize a conviction for that offense, when the goods stolen are worthless to third persons, and of no market value, but possess a value which can only be measured by fancy or sentiment — a measure of value as uncertain and variable as the whims and caprices of the owner of the goods, or the witnesses he may introduce to prove their value.

We can not substitute this for the stable and certain measure furnished by the price which such goods command in the market.

In some civil cases we are aware, the jury are allowed to consider *pretium affectionis*, in estimating the value of property, but the reason for the departure from the general rule in those cases does not apply in a prosecution for stealing such property. The purpose of the prosecution is to punish the thief, not to compensate the owner of the property for his loss.

The judgment of the Court of Appeals is reversed, and cause remanded.

All concur.

*Reversed.*

---

## LARCENY — LUCRI CAUSA ESSENTIAL.

## PEOPLE *v.* WOODWARD.

[31 Hun, 57.]

*In the Supreme Court of New York, 1883.*

1. **To Constitute Larceny,** an intention of benefit or gain by the taking is essential.
2. **A. and B. Being on bad Terms** on account of lawsuits between them, A. took B.'s horse from the stable killed and buried it. The act injured B. but was not intended to and could not benefit A. *Held,* that A. was not guilty of the larceny of the horse.

APPEAL from a judgment of the Court of Sessions of Saratoga County convicting the defendant of grand larceny.

The evidence tended to show that the defendant took a horse belong-to one Ambrose Jewell from the latter's stable and killed and buried it in a pit. Jewell and the defendant had been on bad terms for a long time and had had lawsuits, one of which was pending at the time the horse was taken.

*W. J. Miner* and *J. S. L'Amoreaux* and *H. L. Grose*, for the appellant.

*John Van Rensselaer*, District-Attorney, for the People.

BOARDMAN, J. The court below did not properly state the legal questions before the jury. Upon the evidence it is certainly a grave question whether the act charged and proved was larceny or malicious mischief. To constitute larceny there must have been a felonious intent, *animo furandi* or *lucri causa*. The malicious killing of a horse is a misdemeanor.[1] The offenses are quite distinct. In either case there is a trespass. In larceny the taking must be for the purpose of converting to the use of the taker. In malicious mischief no such intent is necessary. In the present case the evidence tends to show a taking of the horse to kill him, with a sole desire to injure the owner. It was incumbent on the court then to point out to the jury the legal elements in the crime of larceny, so as to distinguish it from malicious mischief. This we think, was not done. The jury was told, in substance, if defendant took or procured to be taken this horse, and killed or aided in killing him, he must be found guilty.[2] In no part of the charge is this language modified or qualified.

The seventh request to charge is as follows: —

"There must have been a felonious intent, for without such an intent there was no crime, and the felonious intent, must have been formed before the taking; and that if, before the taking of the horse, the intent was to take it and kill it, the crime would not be a felony, but an offense under the statute, classed among misdemeanors under the term of malicious mischief." The defendant excepted to the refusal to charge as requested. The request to charge, the refusal to charge, and the exception are all very informal and inartificial, but sufficient, we think, to present the important point in the case.

The defendant was entitled to have the jury instructed in substance as requested. Mr. Wharton in his work on Criminal Law,[3] has considered whether larceny can exist where there is no intent on the part of the taker to reap any advantage from the taking. He has reviewed the decisions from the case of *Rex* v. *Cabbage*,[4] cited by the district attorney, to the time of his writing, and concluded that the qualification, *lucri causa*,

[1] Penal Code, sec. 654; 2 Rev. Stats. *695, and ch. 682, Laws of 1866.

[2] Fols. 283, 284, 296.

[3] secs. 1781, 1784.

[4] Russ. & Ry. C. C. 292.

has been accepted by our courts as an unquestioned part of the common law. He says:[1] "Thus it has been frequently held to be a misdemeanor, of the nature of malicious mischief, to kill an animal belonging to another, though it has never been held larceny so to kill and take, unless some benefit was expected by the taker." And he cites, in support of such statement, among other cases, *Commonwealth* v. *Leach*,[2] *People* v. *Smith*,[3] *Loomis* v. *Edgarton*.[4] The conclusion is sustained by the authorities.

It was a serious matter for the defendant whether he should be convicted of grand larceny upon facts which he claimed could only constitute malicious mischief. He had the right to have the distinction pointed out to the jury. He requested it, but it was not done. Thus the court neglected and refused to point out the essential ingredient of the crime of grand larceny, whereby the defendant may have been convicted of a felony, while the facts and the charge were equally applicable to a misdemeanor. The learned county judge very properly and fully recognized the serious importance of this question when he stayed the execution of the sentence pending an appeal.

There are various other questions presented, but it is unnecessary to consider them, since, upon the point already discussed, a new trial must be granted. The judgment and conviction are reversed, and a new trial is granted.

BOCKES, J., concurred.

LEARNED, P. J., dissenting.

---

## LARCENY—JOINT OWNERSHIP OF PROPERTY.

## BELL *v.* STATE.

[7 Tex. (App.) 25.]

*In the Court of Appeals of Texas, 1879.*

1. **Joint Owner of Property.**—The Code provides that, "if the person accused of theft be part owner of the property, the taking does not come within the definition of theft, unless the person from whom it was taken be wholly entitled to the possession at the time." *Held*, applicable to a renter or cropper on shares, whose contract with his landlord did not entitle the latter to the exclusive possession of the crop, and who, without the landlord's consent, took part of the crop before it was divided.
2. **By Contract Between Appellant** and one T., the former became a cropper on the latter's land, and each was to be entitled to one-half of the crop when gathered. The

[1] sec. 1784.
[2] 1 Mass. 59.
[3] 5 Cow. 258.
[4] 19 Wend. 420.

crop was bound to T. for any advances made by him to appellant. Before the crop was gathered or divided, the appellant, in the absence of T., pulled and sold a bushel of the corn. *Held*, that the taking was not theft.

APPEAL from the County Court of Gregg. Tried below before the Hon. J. F. WITHERSPOON, County Judge.

WHITE, J. Appellant was tried and convicted under an information charging him with the theft of one bushel of corn, worth seventy cents, and his punishment was assessed at a fine of $10, together with imprisonment in the county jail for one month.

The facts of the case are that an agreement was entered into between Bell, the appellant, and one Tankersley, by which Bell was to become a renter or cropper upon land owned by Tankersley, each party to have one-half of the produce raised, when it was gathered, and the crop to be bound for advances made by Tankersley to Bell. Before the corn crop was gathered, Bell went into the field and pulled a bushel of ears, and sold it for seventy-five cents.

On the trial, defendant's counsel asked the court to instruct the jury "that if defendant Bell was tenant on Tankersley's land, and had made a crop upon said land, and before a settlement Bell went into the field and took a bushel of corn, he is not guilty of theft; and you will so find." This instruction was refused by the court.

Our statute governing the case reads: "If the person accused of theft be part owner of the property, the taking does not come within the definition of theft, unless the person from whom it is taken be wholly entitled to the possession at the time."[1] Again, we have another statute which provides that "the taking must be wrongful, so that if the property came into the possession of the person accused of theft, by lawful means, the subsequent appropriation of it is not theft," etc.[2]

Under the facts as applied to the law quoted, it is plain that defendant's liability depends solely upon the question as to whether or not, at the time he took the corn, Tankersley was wholly entitled to the possession of it. If he was, then defendant was guilty of theft; if he was not, then defendant is not so guilty. The article of agreement for rent under which the parties were operating does not confer the right to such possession upon Tankersley. Nor is such possession, or the right to such possession, conferred by the act of 1874, giving a preference lien to landlords upon crops for advances made to renters.[3]

It seems that in North Carolina they have a statute which not only gives the landlord a "lien," but declares that the "possession" shall be deemed to be in him. And in that State, where the lessee, after gathering a crop and putting it in the crib, converted a portion thereof

1 Pasc. Dig., art. 2389.
2 Pasc. Dig., art. 2384.
3 Rev. Stats., art. 3107.

to his own use by feeding it to his own stock without the consent of the landlord, it was held an indictable offense.[1]

In Illinois the law is, that where land is leased for a share of the crops raised, to be divided after gathering, the title to the whole will be that of the tenant until the division and delivery.[2] And so in Arkansas: "The mere ownership of land confers no right to the possession and disposal of the crop raised on it by tenants." [3]

In the absence of any statute, or of any stipulation in the contract of rent, giving the right to the possession wholly or exclusively to the landlord, we are of opinion that the landlord and tenant occupy the relation to the crop and each other, under such a contract as the one in evidence, of tenants in common, or joint owners, and the rules applicable to such relationship must govern in determining their rights.[4]

With regard to such relationship, the law seems to be well settled that, "if the property was the joint property of the parties, it is clear that one of the joint owners or tenants in common could not be guilty of larceny by taking it and disposing of the whole of it to his own use; and that such taking and disposing of it would be merely the subject of a civil remeey, unless he took it out of the hands of a bailee with whom it was left for safe custody, or the like, and the effect of such taking would be to charge the bailee.[5]

Such being the law, we are of opinion that the court erred in refusing to give the special instruction asked by defendant's counsel; and for this error the judgment is reversed, and the cause remauded for a new trial.

*Reversed and remanded.*

---

## LARCENY — ONE IN LAWFUL POSSESSION OF GOODS.

## R. *v.* PRATT.

[Dears. 360.]

*In the English Court for Crown Cases Reserved, 1854.*

**One in Lawful Possession of Goods** can not be convicted of their larceny. The prisoner assigned his goods by deed to trustees for the benefit of his creditors. No manual possession was taken under the assignment, but the prisoner remained in possession of the goods himself, and while in such possession he removed the goods, intending to deprive

[1] Varner *v.* Spencer, 72 N. C. 381.

[2] Sargent *v.* Courier, 66 Ill. 245.

[3] Robinson *v.* Kruse, 29 Ark. 575.

[4] Swanner *v.* Swauner, 50 Ala. 66; Wentworth *v.* Portsmouth R. Co., 55 N. H. 540.

[5] 2 Wat. Arch. Pl. 268; 1 Hale's P. C 513; Rex *v.* Bramiey, 1 Russ. & R. 478; Rex *v.* Wilkerson, 1 Russ. & R. 470; Spivey *v.* State, 26 Ala. 90; Long *v.* State, 27 Ala. 32; Kirksey *v.* Fike, 29 Ala. 206.

**the creditors of them. The jury found the prisoner guilty of larceny, and found that the goods were not in the custody of the prisoner as the agent of the trustees. *Held*, that the conviction was wrong.**

The following case was stated by the Recorder of the Borough of Birmingham: —

The prisoner, David Pratt, was tried before me at the last January sessions for the borough of Birmingham, upon a charge of having feloniously stolen, taken, and carried away, on the 18th day of May, in the sixteenth year of our sovereign lady the Queen, one die lathe, the goods of Edward Barker and another; and on the 19th day of May in the same year, ten lathes, the property of the said Edward Barker and another, the goods and chattels of the prosecutors, and was found guilty.

The prisoner was a thimble maker and manufacturer, carrying on his business in two mills, one a thimble mill and the other a rolling mill in the borough of Birmingham, and before the occurrences hereinafter mentioned, he was the owner and proprietor of the property mentioned in the indictment.

On the 14th of May, 1853, the prisoner, being in pecuniary difficulties, arranged with the prosecutors, Edward Barker and William Wayte, creditors of the prisoner, and with Mr. Collis, an attorney at law, who acted on their behalf, to execute an assignment to trustees for the benefit of his creditors; and on the 18th of May a deed of assignment was executed by him, whereby the prisoner assigned to the prosecutors as trustees, for the purposes therein mentioned, certain property by the description following: —

"All and every the engines, lathes, rolls, boilers, furnaces, horses, carts, machinery, tools, and implements of trade, the stock in trade, goods, wares, merchandise, household furniture, fixtures, plate, linen, china, books of account, debts, sum and sums of money, and all securities for money, vouchers, and other documents and writings, and all other the personal estate and effects, whatever and wheresoever, save and except leasehold estates of the said David Pratt, in possession, reversion, remainder or expectancy, and together with full and free possession, right and title of entry, in and to all every of the mills, works, messuages, or tenements and premises wherein the said several effects and premises then were, to have and to hold the said engines and other the premises unto the said Edward Barker and William Wayte, their executors, administrators, and assigns, absolutely."

The deed was executed by the prisoner in the presence of, and was attested by, James Rous, who was a clerk of Mr. Collis', and who was not an attorney or solicitor.

On the 19th of May the said deed was again executed by the prisoner

in the presence of the said Mr. Collis, and in all respects, in conformity with the provisions of the sixty-eighth section of the bankrupt law consolidation act, 1849, with the view of preventing the deed from operating as an act of bankruptcy.

The deed had been duly stamped on its first execution, but no stamp was affixed on its second execution, which omission was made the ground of an objection to its receipt in evidence. I admitted it, however, subject to the opinion of this honorable court, which I directed should be taken if it became necessary.

At the time of the first interview with Mr. Collis on the 14th of May, the prisoner said he had stopped work altogether; but on the 16th it was arranged between him and Mr. Collis that the rolling business should be allowed to go on to complete some unfinished work. Mr. Collis then told him to keep an account of the wages of the men employed on the rolling work, and to bring it to the trustees. This the prisoner did on the 19th of May, when the wages were paid by the trustees, and the rolling business finally stopped.

In the nights of Monday the 16th of May, and of every other day during that week, the prisoner removed property conveyed by the deed, including the articles mentioned in the indictment, from the thimble and rolling mills (some of the heavier machines being taken to pieces for the purpose of removal), and hid them in the cellar and other parts of the house of one of the workmen. Some time afterwards, and after the sale by the trustees of the remainder of the property, a Mr. Walker, who had been a large purchaser at the sale, recommenced the business at the thimble and rolling mills, and the prisoner acted as his manager when the property, which formed the subject of the indictment, was by the prisoner's direction brought back at intervals to the mills.

No manual possession of the property was taken by the prosecutors prior to its removal from and back to the mills, but the prisoner remained in possession after the execution of the deed in the same manner as before.

I asked the jury three questions: —

1. Did the prisoner remove the property after the execution of the deed of assignment?

2. Did he so act with intent fraudulently to deprive the parties beneficially entitled under the deed of the goods?

3. Was he at the time of such removal in the care and custody of such goods as the agent of the trustees under the deed?

I put these three questions to the jury separately, and they answered them separately as follows: —

1. He did remove the property after the execution of the assignment.

2. He did so remove it with such fraudulent intent; and lastly,

3. He was not in the care and custody of the goods as the agent of the trustees, and thereupon (being of the opinion that the two affirmative answers would support a conviction notwithstanding the third answer in the negative), I directed the jury to find the prisoner guilty, which they did.

The questions for the opinion of the court are: —

1. Whether the deed of assignment ought to have been received in evidence?

2. Whether my direction to the jury was correct?

And lastly, whether the conviction is valid?

M. D. Hill,
*Recorder.*

This case was argued on June 3d, 1884, before Lord Campbell, C. J., Alderson, B., Coleridge, J., Martin, B., and Crowder, J.

*Bittleston* (*Field* with him) for the prisoner. It is submitted that this conviction is wrong. There are two points for the consideration of the court. It is contended in the first place, that the prisoner was in the lawful possession of the goods, and the maxim, *furtum non est ubi initium habet detentionis per dominum rei*, is applicable to the present case. It is conceded that the trustees under the asssignment may have had such a possession as would have enabled them to maintain a civil action of trespass against a third person; but still they had no possession, constructive or otherwise, so as to make the prisoner guilty of larceny. The doctrine of constructive possession in relation to larceny was very fully considered in the recent case of *Regina* v. *Reid*, which was argued before the fifteen judges,[1] which shows that for the purposes of larceny, the possession of a servant is not the possession of the master until the servant has done something to determine his exclusive possession, and in that case the coats alleged to have been stolen by the prisoner were held to be sufficiently in the possession of the master when they were delivered into the master's cart. It can not be contended on the part of the prosecution that the prisoner was a bailee and broke the bulk; for the jury have by their verdict negatived the fact of bailment, and although by executing the deed he had divested himself of the property, he had done nothing to determine the possession. In the second place it is contended that the deed required restamping. On the day when it was first executed it was a perfect instrument, valid between the parties, but was an act of bankruptcy, if proceeeings were taken upon it within twelve months. This being so, the parties wished, by having it re-executed in the pres-

[1] Dears, 257.

ence of an attorney, to give it a different effect, and I contend that the deed when so re-executed required to be restamped.

Lord CAMPBELL, C. J. Would not the re-execution be a mere nullity?

*Bittleston.* Probably that would be so.

*A. Wills*, for the prosecution, contended that this was a case of bailment, and that the prisoner by breaking bulk determined his possession, and that although the jury had found that he was not an agent, that finding did not negative his being a bailee.

Lord CAMPBELL, C. J. The jury expressly find that the prisoner was not in the care and custody of the goods, as the agent of the trustees. This clearly negatives a bailment, and that is the only way in which the case can be put on the part of the prosecution. The prisoner, therefore, being in lawful possession of the goods can not be convicted of larceny. The other learned judges concurred.

*Conviction quashed.*

---

LARCENY — CONSTABLE CONVERTING PROCEEDS OF SALE — BAILEE.

## ZSCHOCKE *v.* PEOPLE.

[62 Ill. 127.]

*In the Supreme Court of Illinois, 1871.*

**A Constable Having an Execution** placed in his hands, levied upon and took possession of certain goods belonging to the judgment debtor, and put them in possession of the judgment creditor. A short time after, the constable took the goods away, with the consent of the judgment creditor, and sold them at private sale, receiving therefor the sum of $55, which he converted to his own use. In a prosecution against the constable, under an indictment charging him with having stolen divers United States notes and current bank-bills, for the payment of $55, and of that value, of divers issues and denominations to the grand jury unknown, the personal goods and property of the judgment creditor, it was *held*, that the prosecution could not be maintained under section 71 of the Criminal Code, declaring the felonious conversion of money, goods, etc., by a bailee, to be larceny.

Writ of error to the Criminal Court of Cook County; the Hon. JOHN G. ROGERS, Judge, presiding.

*Mr. Omar Bushnell*, for the plaintiff in error.

*Mr. Charles H. Reed*, States Attorney, for the People.

MR. JUSTICE MCALLISTER, delivered the opinion of the court.

The plaintiff in error was convicted in the Criminal Court of Cook County, and sentenced to two years' imprisonment in the penitentiary, upon an indictment charging him with having stolen divers United States notes and current bank-bills, for the payment of $55, and of that

value, of divers issues and denominations to the grand jury unknown, the personal goods and property of Mathias Eck.

There is no evidence in the record tending to show that any money was ever taken from the possession of Eck, and the only question is whether there is evidence sufficient to support a conviction under section seventy-one of the criminal code[1] declaring the felonious conversion of money, goods, etc., by a bailee to be larceny.

It appears that the accused, holding himself out to be a constable, and Eck, having an execution in his favor, issued upon a justice's judgment, against one Jacob Forsythe, delivered the writ to the prisoner to be executed; that, under the execution, the prisoner levied upon certain goods of the judgment debtor, and took them to Eck's house and put them into his possession; that afterwards the prisoner came and took the goods away, with Eck's consent, and sold them at private sale, receiving therefor the $55 alleged to have been stolen, which the prisoner converted to his own use.

If the prisoner was a constable, as was assumed on the trial, the levy and seizure of the goods under the execution would vest in him a special property in them; the general property would remain in the judgment debtor until a sale according to law. The plaintiff in the execution acquires no property in the goods by the seizure. He could not maintain an action of trespass or trover against a wrong-doer; such action could be brought only by the officer.

When a sale is made under the writ, pursuant to law, then the general property of the judgment debtor becomes divested, and the proceeds of the sale remain in the custody of the law until actually paid over to the plaintiffs. The specific money in the hands of the sheriff is not the property of the plaintiff in the execution until paid over to him.[2]

But in this case the goods were sold, not by authority of law, but at private sale. By such abuse of an authority given by law, the officer became a trespasser *ab initio*. We are at a loss to know how one man can, by ratifying a trespass committed by another, obtain a legal right to the fruits of such wrongful act. If Eck, knowing of the wrongful act of the prisoner, had received the money obtained, he would have become a joint trespasser with the prisoner. It can not be the law, that a constable or sheriff who becomes a tort-feasor in the manner disclosed here holds the fruits of the tort as bailee for the plaintiff in the writ, because the plaintiff, by ratifying the act, becomes himself a party to it; and then the result would always follow that one of two joint tort-feasors would become the bailee of the other, as to the proceeds of the tort, by virtue of the wrongful act itself, simply because he happened to be the first possessor. The law does not recognize even the right to con-

[1] Rev. Stats. 162.

[2] Lightner v. Steinagee, 33 Ill. 510.

tribution between wrong-doers, and much less will it the relation of bailer or bailee, from the mere fact that one is in the possession of the fruits of the wrong.

There is no view of the evidence which will support the position that the prisoner was the bailee of Eck, as to the money receiv ³ upon the private sale of the goods.

The conduct of the prisoner merits severe punishment, but we can not sustain the conviction without disregarding all distinctions between crimes.

The court below should have granted the motion for a new trial, and it was error to refuse it; for this reason, the judgment of the court is reversed and the cause remanded.

*Judgment reversed.*

---

## LARCENY BY BAILEE.

## KRAUSE *v.* COMMONWEALTH.

[93 Pa. St. 418; 39 Am. Rep. 762.]

*In the Supreme Court of Pennsylvania, 1880.*

**The Owner of Horses Delivered** them to defendant under an agreement that the defendant was to buy them, the horses to remain the property of the owner till paid for and to be returned at a specified period if not paid for. The defendant refused to pay for them, or return them. *Held,* not larceny, nor larceny by a bailee.

Conviction of larceny. The opinion states the case.

*Butz & Schwartz*, and *William H. Snowden*, for plaintiff in error.

*Milton C. Henninger*, District Attorney, for the Commonwealth.

TRUNKEY, J. The indictment contained two counts: (1) larceny; (2) larceny by bailee; the alleged stolen property was the same in both. To the first count Krause pleaded a former acquittal, on which plea, verdict and judgment were rendered in his favor. He was then tried and convicted on the second.

In the charge of the court the Commonwealth's case, as proved, was fairly stated thus: On December 13, 1878, the prosecutor sold and the defendant agreed to purchase the two horses; that the price agreed upon was $150, to be paid on delivery, the prosecutor to take the horses to the defendant's stable, at Allentown, the next day and receive the money; that other interviews and negotiations followed, continuing up to the Thursday of the next week, when the horses disappeared from the stable, and were sold or converted by the defendant to his own use. That when the horses were taken to the stable the defendant had only $25, and it was then agreed that the horses should continue to be the pro-

perty of Deemer, who would not sell them except for cash; that he would wait till the following Tuesday evening when if the defendant should not have the money to buy the horses, they were to be taken to Deemer, at Schoenersville, and with this understanding Deemer accepted the $25, that on Tuesday evening the defendant took one of the horses to Schoenersville, and the next evening went again, taking the other horse, on each occasion taking the horse back with him; that on Tuesday Deemer went to Allentown for his horses and offered to return the $25 to the defendant, but he refused to give them; and that the original contract was never changed, the horses were sold only for cash and the extension of time was given to enable the defendant to buy and pay for them. Such were the alleged facts which now must be taken as true.

Having acquitted the defendant of larceny of the horses, the Commonwealth put him to another trial and convicted him of larceny, in stealing the same horses, under section 108 of the Crimes Act of 1860. Villainous as his conduct was, this conviction ought not to stand unless he was a bailee within the intendment of the act. The word "bailee" is a legal term to be understood in its generally accepted sense among jurists, and if it be doubtful whether a case be included, it shall be excluded, in the construction of a criminal statute. Blackstone defines bailment as "a delivery of goods in trust upon a contract, express or implied, that the trust shall be faithfully executed on the part of the bailee"; Story, "a delivery of a thing in trust for some special object or purpose and upon a contract express or implied to conform to the object or purpose of the trust;" Jones, "a delivery of goods in trust on a contract, expressed or implied, that the trust shall be duly executed and the goods re-delivered as soon as the time or use for which they were bailed shall have elapsed or be performed;" and Kent, "a delivery of goods in trust upon a contract express or implied that the goods shall be duly executed and the goods restored by the bailee, as soon as the purpose of the bailment shall be answered." Mr. Edwards, in his work on Bailment,[1] remarks: "These definitions agree in nearly all essential particulars and disagree in two or three respects. Jones and Kent assume the property is to be returned, while Blackstone and Story include contracts under which no such return is contemplated. Story intends to include among contracts of bailment a delivery of goods for sale; and Kent intentionally limits his definition so as as to exclude that species of contract." In general terms it may be said that the delivery of goods or any other species of personal estate for use, keeping or on some other trust, where the general property does not pass, creates a bailment. A delivery of chattels upon a sale made on condition that the title shall pass on the payment of the purchase-money at a future

[1] sec. 2.

day, is something more than a bailment; it gives the buyer a conditional title. If the contract give the buyer a definite credit or a reasonable time within which to pay, it gives him a transferable interest in the chattels until the credit expires, and the property in them as soon as he pays the price.

Authors of received authority generally specify five sorts of bailment, namely, *depositum*, *mandatum*, *commodation*, pledge and hiring; and as severally defined, in each the entire property of the thing bailed remains in the bailor, the possession only is given to the bailee, who is to return or deliver the thing itself as soon as the purpose of the bailment shall be answered. In this State it is stated that the bailee of goods who uses and enjoys them as if his own, can not divest the title of the bailor by a sale to an innocent person; nor can a creditor of the bailee seize them in execution of his debt. When delivered under a contract of bailment the owner will be entitled to them against everybody. But a delivery on a conditional sale, the property to remain in the vendor until the goods are paid for, with right to reclaim them, is void as respects the vendor's creditors, or an innocent purchaser from him. The delivery being on the foot of a purchase the vendor's right as against the vendee's creditors is regarded as a lien for the purchase-money.[1] By the terms of the contract the seller may retain the right of property of the goods till paid for, as against the purchaser, and in default of payment, he may reclaim them or use civil remedies for recovery of possession; but the contract does not make him a bailor as respects other persons, nor the purchaser a bailee in the sense of the word as used in the statute.

Our statute as shown by Reade, J., in *Commonwealth* v. *Chathams*,[2] is taken from the English statute; and in that case the interpretation of the words "bailee" and "bailment" as fixed by the English decisions was adopted, which decisions were cited, showing that the words must be interpreted according to their ordinary legal acceptation, that "bailment relates to something in the hands of the bailee which is to be returned in specie, and does not apply to the case of money in the hands of a party who is not under any obligation to return it in precisely the identical coins which he originally received;" that "to bring a case within this clause in addition to the fraudulent disposal of the property, it must be proved: First. That there was such a delivery of the property as to divest the owner of the possession, and vest it in the prisoner for some time; Secondly. That at the expiration or determination of that time the same identical property was to be restored to the owner."

The term "bailee" is one to be used not in its large but in its limited

1 Chamberlain *v.* Smith, 8 Wright, 431; Haak *v.* Linderman, 64 Pa. St. 499; *s. c.* 3 Am. Rep. 612.

2 14 Wright, 181.

sense, as including simply those bailees who are authorized to keep, to transport or to deliver, and who receive the goods *bona fide* and then fraudulently convert. Where it does not appear that a fiduciary duty is imposed on the defendant to return the specific goods of which the alleged bailment is composed, a bailment under the statutes is not constituted.[1]

The bargain was struck for a sale of the horses for $150, payable on delivery. At the time stipulated Deemer delivered the horses, Krause paid $25, they agreed that the property should continue in Deemer, and on the next Tuesday Krause would pay the balance or return the horses. He refused to do either. The original contract was not changed — time was extended to Krause to enable him to pay the money. If there was a delivery at all it was on the footing of the sale. There was no agreement to sell at a future time, a mere contract that the buyer would pay the balance of the price or return the property, in the mean time the title to be in the seller. Payment would have been a complete performance. Krause was not bound to return the identical property. He had a transferable interest until the credit expired, and he or his transferee would have had clear title the instant of payment. This was something more than a bailment, and Krause was not a bailee in the statutory sense.

In favor of the liberty of the citizen, the court may, and in a proper case should, declare the evidence insufficient to convict.[2] We are of opinion that the defendant's first point should have beeu affirmed.

Judgment reversed and the record with this opinion setting forth the causes of reversal is remanded to the Court of Quarter Sessions of Lehigh County for further proceeding.

*Judgment accordingly.*

---

## LARCENY — MASTER AND SERVANT.

## R. *v.* BARNES.

[10 Cox, 255.]

*In the English Court of Criminal Appeal, 1866.*

**It was the Custom of the** employer's cashier to enclose in paper, in lump sum, the wages of all the men working together in one room, inside which was written the names of the men to whom the money was to be paid, and the sum due to each. By arrangement among the men in each room, one of them went to the cashier on the pay day for the wages of all the men in the room, and paid over the amount due to each. The prisoner, one of the workmen who had been sent in the usual way by his fellow-workmen, and received in a wrapper the wages of the men working in his room, instead of paying over

[1] Whart. Cr. L. sec. 1855 (8th ed.).

[2] Pauli *v.* Com., 8 Norris, 432.

the wages to each absconded and appropriated the money to his own use. *Held*, that he could not be convicted on an indictment charging him with stealing the moneys of his employers, for the prisoner was the agent of his fellow-workmen, and the handing the money over to him by the cashier was a payment by the employers.

Case stated for the opinion of this court by the Recorder of Bolton.

Robert Barnes was tried before me at the General Quarter Sessions of the Peace for the borough of Bolton, holden on the 12th April, 1866, on an indictment which charged him with stealing a sum of £13, 6s, the money of Reuben Smith and others.

The evidence was as follows: —

Reuben Smith. On the 16th December last the prisoner was a fellow workman with me at Ormrod and Hardcastle's. The prisoner, myself, and two others, worked in the same room. It had been our custom for one of us to go every fortnight to get the wages of the four from the cashier, and to pay over the amount due to each. We did this by turns. On the 16th December last it was my turn to go for the wages. The wages due to me on that day came to about £5, 0s, 6d. I can not speak to the pence. The prisoner asked me if he might fetch the wages this time. I said: "Yes; but you must fetch them again when it comes to your turn." He said he would. At twelve o'clock the prisoner went to get the wages. He did not come back, and never gave me my wages.

Cross-examined. We used to get the four men's wages in a lump, and pay them over in separate shares.

Thomas Unsworth. I worked in the same room with prisoner and Reuben Smith on the 16th December last. My share of wages on that day was about £3 18s. On that day prisoner went for my wages. He never paid them to me.

Peter Critchley. I worked in the same room with the prisoner on the 16th December last. On that day £4 8s 11d was due to me for wages. Prisoner went to get the wages. He has not paid me my share.

John Makin. I am cashier to Ormrod & Co. On the 16th December last the prisoner came to me for his wages, and those of the other witnesses. The account of wages due to each was made out in my office under my superintendence, but I can not say exactly how much was due to each on the day in question. When the prisoner came to me, I believe I said: "Whose wages are you come for?" He answered: "No. 6, Sovereign." No. 6 is the number of the room in which the prisoner and the others worked, and "Sovereign" is the name of the mill. I had the money in one sum wrapped up in a paper. Our custom was to wrap up the wages for each room in a separate paper, inside which was written the names of the parties to whom they were to be paid, and the sum due to each, and this was done on the present occasion. On the 16th December I handed the money to the prisoner wrapped up in a paper in the usual way. The sum which I handed to the prisoner was

£18 5s 1d, and it was made up of 5s 1d in copper, £10 in silver, and £8 in gold.

On this evidence it was objected by counsel for the defence that the indictment could not be sustained, because the money alleged to have been stolen was not the property of the prosecutor, but that of his employers, Messrs. Ormrod & Co., and I was of this opinion.

Counsel for the prosecution thereupon applied to have the indictment amended by alleging that the money in question was the property of Messrs. Ormrod & Co., and I ordered the indictment to be amended accordingly by inserting therein the words, "Peter Ormrod and another," instead of the words "Reuben Smith and others."

Counsel for the prisoner did not address the jury or call witnesses, but he contended that the above evidence was not in point of law sufficient to warrant a conviction on the indictment as amended, either at common law or under the 24 and 25 Victoria.[1]

I then summed up the evidence, and the jury found the prisoner guilty, but on the application of counsel for the prisoner, I admitted him to bail to come up for judgment when called upon, and I reserved the above question for the opinion of the court.

JOHN A. RUSSELL,
*Recorder.*

*Sleigh*, for the prosecution. The conviction ought to be sustained. It was the custom for the prosecutor's cashier to wrap up the wages for the men in each room, in one sum, in paper, and on the occasion in question the money so wrapped was delivered to the prisoner, and the sum due to each man was written inside. The prisoner had to give out each man's wages to him, and until he had so distributed it the money belonged to the prosecutors. [MARTIN, B. Suppose the men had sued the prosecutors for their wages, and they had pleaded payment, what answer could the men have had to the plea? They sent the prisoner for their wages, and the prosecutors paid him. That was a discharge to them.] The present case is like *Lavender's Case*,[2] where it was held that a servant going off with money given to him by his master to carry to another, and applying it to his own use, was held guilty of larceny. So where a prisoner, who was occasionally employed by the prosecutors as a clerk, having received from them a cheque payable to a creditor, appropriated it to his own use, it was held larceny.[3] In *Rex* v. *Goode*,[4] where a sum of money was given to a servent to be disbursed in a particular way, and instead of so disbursing it, the servant appropriated it to his own use, the servant was held guilty of larceny.

[1] ch. 96, sec. 3.

[2] 2 East's P. C., ch. 16, sec. 15.

[3] Rex *v.* Metcalfe, R. & Moo. 433.

[4] C. & M. 582.

Bramwell, B. In all those cases the persons to whom the money was to be paid had a claim on the masters after the felony was committed. It you could make out that the prisoner was the agent of the prosecutors until the money reached the several men, it would be a different matter.

Shee, J. There is another point here. Some of the money was the prisoner's own, and it was not separated from the rest.

No counsel appeared for the prisoner.

Erle, C. J. We are of opinion that the conviction should be quashed. The prisoner is charged with stealing the money of Messrs. Ormrod & Co. It appeared that it was the custom of Messrs. Ormrod & Co. to pay their workmen on a given day in this way. The men working together in a room sent one of themselves for their wages, which he brought back in a lump sum wrapped up in paper, with the name of each man and the amount he was to receive written inside. On the day in question the prisoner was selected as the man to be sent for the wages of the room, and the cashier had the sum wrapped up in paper ready for him, and he delivered the money so wrapped up to the prisoner. The prisoner was sent as the agent of the men in the room, and he was the agent for all those parties. Messrs. Ormrod & Co.'s cashier paid their workman, and discharged themselves from further liability the moment the cashier put into the prisoner's hands the money belonging to the other workmen. The prisoner, therefore, is not rightly convicted of stealing the moneys of Messrs. Ormrod & Co.

The rest of the court concurring.

*Conviction quashed.*

---

## LARCENY — MONEY OBTAINED BY FRAUD — ALTERING BOOKS.

## R. *v.* Green.

[Dears. 323.]

*In the English Court for Crown Cases Reserved, 1854.*

**It was the Duty of G.** as C.'s servant to receive and pay moneys for him and enter them in a book which was examined by C. from time to time. On one examination G. showed a balance in his favor of £2 by making entries of false payments, and thereupon C. paid him this £2. *Held*, that G. was not guilty of the larceny of the £2.

At the Quarter Sessions for the County of Cambridge, holden on the 3d day of January, 1854, Abraham Green was indicted for stealing, on the 10th day of September last, certain moneys of and belonging to his master, Alexander Cotton, Esq.

The prisoner was bailiff to the prosecutor, and it was part of his duty to receive and make payments on behalf of the prosecutor. An account of those receipts and payments was kept in a book in the prisoner's custody, which was examined by the prosecutor at irregular intervals. An examination was made on the day of July last, and another on the day of December last, and the account comprised within these dates, among many items, the following payments, viz.: —

"1853, August 13.

"James Ludkin . . £1, 8s, 0d.
"Samuel Pryke . . £1, 8s, 0d.
"John Brown . . £1, 8s, 0d"

and twelve other names against which stood the same amount.

There was a series of similar items under dates of the 20th and 27th of August, and the 3d, 10th, and 17th of September, and on the 17th of September this series of payments: —

"James Ludkin . . 15s, 0d.
"Samuel Pryke . . 15s, 0d"

and thirteen other names against which stood the same sum of 15s, 0d.

John Brown proved that he was engaged by the prisoner to work for the prosecutor during the last harvest. The rate of wages was not named, but the witness knew that the other laborers were to receive £1 8s a week, and he expected the same. The prisoner paid him £1 on each of the following days, viz., the 13th, 20th, and 27th of August last, and on the 3d and 10th of September last.

The witness complained on the 20th and 27th of August, of receiving no more than £1, and about ten days after the 10th of September, the prisoner paid him £1 in addition, making his wages £1 4s a week during the five weeks.

James Ludkin proved that he was engaged by the prisoner to work for the prosecutor during the harvest, and that he received £1 8s on each of the following days, viz., the 13th, 20th, and 27th day of August and on the 3d and 10th of September. On the 17th September, the prisoner paid him 11s 6d and on his complaining that he did not pay him 15s, the sum he paid the other laborers, the prisoner said it was because he was working in the barn.

Samuel Pryke gave similar evidence.

Each side of the account which extended from the day of July to the 3d day of December last, contained numerous items, amongst which were payments made for the purchase of goods by the prisoner on account of the prosecutor.

By one of these items the prisoner gave the prosecutor credit for £1 5s, which it was stated by his counsel, though no proof offered of it, he had not in fact received. There was no entry in the book in the handwriting of the prisoner.

The prisoner was present during all the time the prosecutor was examining the account, and signed his name to it on the prosecutor doing so; but his attention was not called to any particular item. There was on the account a balance of £2 due to the prisoner, which the prosecutor paid him.

At the conclusion of the evidence for the prosecution, the prisoner's counsel contended on the authority of *Queen* v. *Chapman*, that the offense charged was neither larceny nor embezzlement, and submitted to the court that on these facts the court should direct an acquittal.

The chairman directed the jury that the deduction of the five several sums of 4s, from the five weekly sums of £1 8s to be paid to Brown, and of the several sums of 3s 5d, from the weekly sums of 15s to be paid respectively to Ludkin and Pryke, amounted to larceny, and told the jury that by a recent act they were enabled to return a verdict of either larceny or embezzlement, as their minds might be directed by the evidence; on which the jury found a verdict of guilty, whereupon judgment was postponed, and the prisoner discharged on bail, to appear and receive judgment at the next Quarter Sessions for this county. The opinion of the judges is asked whether the jury could on these facts properly convict the prisoner of larceny.

ELIOT THOS. YORKE,
*Chairman Q. S.*

This case was argued on the 11th day of February, 1854, before JERVIS, C. J., MAULE, J., WIGHTMAN, J., WILLIAMS, J., and PLATT, B.

*Tozer*, for the prisoner. There was no evidence of larceny or embezzlement. There was no evidence that he received any money from his master except the £2.

MAULE, J. For aught that appears the payments may all have been out of his own money.

WILLIAMS, J. The prisoner falsified the account, but the question is, was he guilty of larceny?

WIGHTMAN, J. The evidence is, he entered money as paid which he had not paid.

JERVIS, C. J. And that he did so for the purpose of obtaining thereby a portion of the sum of £2. We are all of opinion that the offense of which the prisoner was guilty was not larceny, whatever else it may have been.

*Conviction quashed.*

## LARCENY — FALSE REPRESENTATION BY SERVANT TO OBTAIN MONEY.

## R. *v*. THOMPSON.

[L. & C. 233.]

*In the English Court for Crown Cases Reserved, 1862.*

**It was the Duty of T., who was E.'s** clerk, to ascertain daily the amount of dues payable by E. on the exportation of E's goods, and having obtained the money from the cashier to pay it over. T. falsely represented that a larger sum was due on a certain day, and appropriated the difference. *Held*, that he was not guilty of larceny.

The prisoner was convicted of larceny on the facts above, but his case was reserved for this court, where it was argued, on the 15th of November, 1862, before POLLOCK, C. B., WIGHTMAN, J., WILLIAMS, J., CHANNELL, B. and MELLOR, J.

*Littler*, for the prisoner. *Regina* v. *Barnes*,[1] which was relied upon at the trial, is very similar to this case. There the prisoner falsely pretended to his masters that he had paid a sum of money on their account, and thereby obtained the money from them. The court held that that was a case of false pretenses, and that an indictment for larceny could not be sustained, as the clerk delivered the money to the prisoner with the intention of parting with it wholly to him. *Mitchell's Case*[2] is precisely in point. There the prosecutors, from whom the prisoner was charged with obtaining money by false pretenses, were clothiers; the prisoner was a shearman in their service, and to take an account of the persons employed, and of the amount of their wages and earnings; at the end of each week he was supplied with money to pay the different shearmen, by the clerk of the prosecutors, who advanced to him such a sum as, according to a written account or note delivered to him by the prisoner, was necessary to pay them. The prisoner was not authorized to draw for money generally on account, but merely for the sums actually earned by the shearmen; and the clerk was not authorized to pay him any sums except what he carried in his account or note as the amount of what was due to the shearmen for the work they had done. The prisoner on the 9th of September, 1796, delivered to the prosecutor's clerk a note in writing in the following form: "9th September, 1796, shearmen £44 11s 0d;" which was the common form in which he made out his account of the amount of their week's wages; and in a book in his handwriting, which was his business to keep (of the men employed, of the work they had done, and of their earnings), there were the names of

[1] 2 Den. C. C. 59; 20 L. J. M. C. 34.    [2] 2 East's P. C. 839.

several men who had not been employed, who were entered as having earned different sums of money, and also false accounts of the work done by those who were employed, so as to make out the sum stated in the note to be due to the shearman. Upon this evidence the jury found therisoner guilty, and the judges supported the convction.

Williams, J. It is impossible to particularize the coin which the prisoner is alleged to have stolen, because some of the money was rightly paid to him.

*Littler*. Yes. The prisoner might have been convicted of obtaining money by false pretenses. He was not guilty of larceny. (He was then stopped.)

*L. Temple*, for the Crown. The false pretense made by the prisoner was not within the statute, inasmuch as it was a pretense as to something future only, viz., that he would pay a certain sum for dock dues.

Pollock, C. B. There was both a misrepresentation of what he would do, and also of what was owing for dues; and this latter was a misrepresentation as to an existing fact.

*Temple*. In *Regina* v. *Robins*,[1] a quantity of wheat was in the possession of the prosecutors as bailees, and was deposited in one of their storehouses, under the care of one of their servants, who had authority to deliver it only on the order of the prosecutors or their managing clerk. The prisoner, who was also a servant of the prosecutors, by a false statement, induced the servant under whose care the wheat was to allow him to remove part of the wheat, which he carried away and appropriated to his own use. It was held that, under those circumstances, the prisoner was properly convicted of larceny. In the present case, moreover, the prisoner had only the custody of the money, for, being a servant, his possession was the possession of the master.

Wightman, J. Which part of the money do you say that he stole?

*Temple*. The excess beyond the amount which he actually paid.

Wightman, J. How can you specify the coins he stole?

*Temple*. In *Rex* v. *Murray*,[2] the prisoner was indicted for embezzling £1 0s 6d. The prisoner, who was clerk to the prosecutors, had received £5 from another clerk to pay for an advertisement. The prisoner paid only £1, but charged his master with £2 0s 6d. There it was held that the prisoner could not be convicted of embezzlement because the receipt from the other clerk was in fact a receipt from the master, but it seems to have been admitted that he might have been convicted of larceny.

Pollock, C. B. The act of the prisoner did not amount to larceny, but to the offense of obtaining money by false pretenses.

[1] Dears. C. C. 418.

[2] 5 C. & P. 145, note a.

WILLIAMS, J. I am of the same opinion; and I prefer to rest my decision on the broad ground that this was an obtaining by false pretenses, rather than on the narrower ground suggested in the course of the argument, that the coin alleged to have been stolen can not be particularized.

The other learned judges concurred.

*Conviction quashed.*

---

LARCENY — FARM-HAND — SERVANT.

## STATE *v.* WINGO.

[89 Ind. 204.]

*In the Supreme Court of Indiana, 1883.*

1. **Larceny is the Felonious** stealing, taking and carrying away of the personal goods of another. When property, lawfully in the custody of an employee or bailee, is criminally appropriated to the use of such employee or bailee, the offense is not larceny.
2. **A, a Farmer, Sent B.,** his farm-hand, to haul a load of corn to market, with orders to sell it, B. using two mules and a wagon for that purpose. B. sold the mules to C. who supposed he had a right to dispose of them. *Held*, that B. was not guilty of larceny.

From Vigo Circuit Court.

HAMMOND, J. This is an appeal by the State upon questions of law reserved at the trial.

The appellee was charged in the indictment with the larceny of two mules from David Pugh. There was a trial by jury and a verdict of acquittal. The evidence is in the record, and shows without conflict the following facts: —

In the spring of 1881, the appellee was in the employ of David Pugh as a farm hand, and in hauling corn to market for Pugh to Terre Haute. On the day of the alleged larceny, in March, 1881, Pugh sent him to that city with the two mules and a wagon, loaded with corn, directing him to sell the corn and collect the money for it, and return the same day. The appellee did not have permission to sell the mules. On reaching the city, before selling the corn, William R. Hunter met him and proposed to buy the mules. Appellee informed him that he would sell them after disposing of his load of corn. Afterwards, on the same day, he met Hunter again, and informed him that he was ready to sell the mules, and drove to Hunter's livery stable. The price, $250, was agreed upon, and he sold and delivered the mules to Hunter, and received for them money through a check on the bank. He gave Hunter a bill of sale signed with his own name. He left the wagon and harness at the livery stable, saying that he would soon return for them. When next heard from he was in Kentucky.

Hunter was acquainted with the appellee and with the mules, and knew they belonged to Pugh. He supposed the appellee had a right to sell them, but made no inquiry of and received no statement from the appellee as to his authority in this respect.

The attorney for the appellant requested the court to give the jury this charge: "If the jury find, from the evidence, that the defendant, in the year, 1881, in Vigo County and State of Indiana, was in the employment of David Pugh, as servant or teamster, and had in his custody the team of mules of said Pugh to haul to the city of Terre Haute a quantity of corn, and, on the day of said hauling, was directed by said Pugh to deliver the corn in said city and return the same day with said team of mules, and that the defendant, while having the mules in his custody as aforesaid, took and carried or drove the same to the livery stable of Foultz & Hunter, in the city of Terre Haute, and then and there sold and delivered the same to said Foultz & Hunter, or to William R. Hunter, without the knowledge, consent or authority of said David Pugh, and with the felonious intent of then and there converting said mules to his own use, then he is guilty of larceny of said mules, and you should so find."

This instruction the court refused to give, but gave the jury at the request of the appellee, the following: —

"1. If the jury find from the evidence, that the defendant was in the employ of the prosecuting witness, Pugh, and was working for Pugh upon his farm, and that Pugh sent the defendant to Terre Haute with a load of corn in a wagon, with the mules charged to have been stolen, and that the defendant while he still had possession of the mules sold them, then he is not guilty of larceny, and you should find him not guilty.

"2. Larceny is the felonious stealing, taking and carrying away of the personal goods of another. If you find from the evidence that the defendant had the possession of the mules with the consent of the owner, and sold them, you should find for the defendant.

"3. If the defendant had the lawful possession of the mules and sold them, then there was no such felonious taking as the law requires in a case of larceny, and you should find the defendant not guilty.

"4. If the servant while in the employment of his master has entrusted to his care any personal property of his master, and he feloniously sells and converts the same to his own use, he is, under the law of Indiana, guilty of embezzlement, but is not guilty of larceny."

The refusal of the court to give the instruction asked by the State, and the giving of those requested by the appellee, were duly excepted to by the appellant's attorneys, and these rulings are assigned for error in this court.

The principle is well settled that to constitute a larceny there must

be a felonious taking of the property. When property which is lawfully in the custody of an employee or bailee is criminally appropriated to the use of such employee or bailee, the offense may be embezzlement, but it can not be larceny.[1]

The evidence shows tnat the appellee was entrusted with the property by the owner. There is no evidence that he used fraud in procuring possession of it, nor is there any evidence of a criminal intent until after he arrived in the city. The criminal purpose probably entered his mind for the first time when Hunter proposed to purchase the mules. There was an entire absence of proof of a felonious taking of the property.

As the possession of the servant is the possession of the master, it may be that in the absence of a statute upon the subject of embezzlement, the evidence in this case would authorize a conviction for larceny.[2] But the evidence clearly brings the appellee's act of converting to his own use his employer's property within the provisions of the embezzlement act of March 21st, 1879, which was in force when he committed the wrong complained of.[3] .This act was later than the one then in force relating to larceny, and it can hardly be thought that the Legislature intended to make the same act criminal under different statutes, defining separate offenses. The rule is familiar that a statute, so far as it covers the same subject matter of a former statute, repeals the previous enactment by implication.

Our conclusion is that the court below did not err in refusing the instruction tendered by the State, nor in giving those requested by the appellee. The appeal is, therefore, not sustained

---

## LARCENY — PROPERTY STOLEN IN A FOREIGN COUNTRY AND BROUGHT INTO STATE.

## COMMONWEALTH v. UPRICHARD.

[3 Gray, 434.]

*In the Supreme Judicial Court of Massachusetts, March Term, 1855.*

**The Bringing into this** Commonwealth, by the thief, of goods stolen in one of the British Provinces, is not larceny in this Commonwealth.

SHAW, C. J. The defendant, together with Thomas Carey, was indicted in the Municipal Court for larceny, in stealing a large number of

[1] Kelley v. State, 14 Ind. 36; Hart v. State, 57 Ind. 102; Umphrey v. State, 63 Ind. 223; Starck v. State, 63 Ind. 285; Jones v. State, 59 Ind. 229; Moorse's Cr. L., sec. 918.

[2] 2 Bish. Cr. L., secs. 853, 856; 2 Whart. Cr. L,, sec. 1840.

[3] Acts, special session 1879, p. 126.

sovereigns and other gold and silver coins, properly enumerated and described. The indictment charges that the two defendants, at Boston, on the 27th of July 1854, the gold pieces and other coins the property of George D. Twinning, in his possession then and there being, feloniously did steal, take and carry away.

The evidence failing to prove a joint possession of the stolen property in this Commonwealth, the prosecuting attorney submitted to a verdict in favor of Carey, and proceeded against Uprichard; and afterwards a new indictment was found by the same grand jury, so that each was tried upon a separate indictment for the goods found in his separate possession.[1]

The defendant Uprichard was convicted upon the evidence and under the instructions of the court; and the judge, finding the case to involve important questions of law, with the consent of the defendant, and conformably to the provision of law in that behalf, reported the same for the consideration of this court.

By the report it appears that Uprichard and Carey were soldiers in the service of the Queen of England, at Sidney, in the Province of Nova Scotia; that the coins alleged to be stolen were partly the property of George D. Twinning, a deputy commissary at the military station in Sidney, and partly the property of the Queen, in the care and control of said commissary; that the property was taken from the military chest, without right, said chest being in the possession of said Twinning; that the defendants deserted about at the same time, with certain of said coins in their possession, and were found in this State, each having a part of the stolen property in his possession.

Upon the evidence offered, the counsel for the defendants asked the court to rule that the indictment could not be supported by the evidence: 1st. Because the law in force at Sidney was not proved. 2d. Because said property, if stolen at all, was stolen at Sidney, out of the State of Massachusetts, and out of the United States; and the bringing of said stolen property into, and the possession of it in Boston, would not constitute the crime of larceny in this Commonwealth, and would not support the allegation that the coins and other property were feloniously stolen in this county; and therefore the court had no jurisdiction of the offense. But the court overruled the motion, and Uprichard was convicted.

This is briefly stated; but we understand, and so it has been understood in the argument, that the court instructed the jury that if the property was stolen by the defendant at Sidney, in Nova Scotia, one of the colonies and possessions of the Queen of Great Britain, and the

1 See Rex *v.* Barnett, reported in 2 Russ. on Cr. (7th Am. ed.) 117.

property, so stolen, and continuing in the possession of the defendant, was brought by him into this Commonwealth, and into this county, the indictment charging him with stealing them, being in possession of the owner, in this county, was legally sustained, and that the defendant could be convicted and punished for this offense by our laws.

We do not perceive that it makes any difference whether the property, stolen in a foreign country, was the property of the sovereign, or of a subject. Indeed, it seems that a part of it was of the one character, and a part of the other. Nor does it make any difference that the defendant deserted the military service at the same time that he plundered the property of his sovereign.

This case presents an extremely interesting and important question; and the precise question, we think, comes up now for the first time in this Commonwealth. The main argument in support of the conviction is founded on the well known rule and practice of the common law, that all trials must be had in the county where the offense is committed; that when property has been proved to have been stolen in one county, and the thief is found, with the stolen property in his possession, in another county, he may be tried in either county. It proceeds on the legal assumption that when property has been feloniously taken, every act of removal or change of possession by the thief may be regarded as a new taking and asportation; and as the right of possession, as well as the right of property, continues in the owner, every such act is a new violation of the owner's right of property and possession, and so it may be said, at each removal, to be taken from his possession.[1] But in principle these cases are not strictly analogous. If the offense is committed anywhere within the realm of England, in whatever county, the same law is violated, the same punishment is due, the rules of evidence and of law governing every step of the proceedings are the same, and it is a mere question where the trial shall be had. But the trial, wherever had, is exactly the same, and the results are the same. A conviction or acquittal in any one county, is a bar to any indictment in every other; so that the question as to the place of trial is comparatively immaterial. But even in England, a crime, being an offense against the laws of England, committed on the high seas, and not within the body of any county, can not be tried in any county, but only in the courts of admiralty jurisdiction; and *a fortiori* an offense committed in a foreign country, by persons not there amenable to the laws of England, could not, upon principle, be tried and punished in England; and the rule, that when the goods are feloniously taken and brought into a county, it may be charged and tried as an offense in that county, did not anciently

[1] 2 Russ. on Cr. (7th Am. ed.) 115, 116.

extend to goods stolen in any place not within the common-law jurisdiction.[1] And a similar exception took place in regard to goods stolen in Scotland or Ireland, and brought into England, until altered by statutes 13 George III.[2] and 7 and 8 George IV.[3] And the effect of these English statutes was, that where goods were stolen in one part of the United Kingdom, and carried into another by the thief, or received by one knowing them so to have been stolen, the thief or receiver might be indicted and tried in that part of the United Kingdom where the goods were found. This was within the principle, that, in whatever part of the same government the offense was first committed, the same law was violated, the same rule and measure of punishment attached, and with the same consequences, in whatever part of the territory of the same government the trial was had. But, even under the English statutes, one who steals goods in Jersey, and carries them into England, can not be tried there for larceny, Jersey not being in the United Kingdom within the meaning of those statutes.[4]

Such being the rule of the English law, we are next to inquire how it stands in this State, and in the other States of the Union. In some of the States it is held that according to the English rule in respect to counties, the carrying of stolen goods by the thief into another State from the one in which they were stolen, is a new caption and a new asportation in the State into which they are thus carried. In other States a different rule is held.

In Pennsylvania it has been held that such carrying of stolen goods by the thief into another State, and possession of them there, is not larceny in the latter.[5] So in North Carolina and Tennnessee.[6] And in New York.[7]

But a different rule has been adopted in Maryland,[8] in Ohio,[9] in Vermont,[10] and in Connecticut.[11]

The same rule also that such bringing in of stolen goods is larceny, has been adopted in this Commonwealth, in two cases next to be cited.

It seems to have been considered that, although the several States are, in their administration of criminal law, regarded as sovereign and independent, yet, as they were originally English colonies, and acknowledged their subjection to the common law of England, and claimed its privileges, and all equally derived their principles of criminal jurisprudence

[1] 3 Inst. 113; 1 Hawk. P. C., ch. 33, sec. 52.

[2] ch. 31, sec. 4.

[3] ch. 29, sec. 76; Rex *v.* Anderson, 2 East's P. C. 772; Rex *v.* Prowes, 1 Moo. C. C. 349.

[4] Rex *v.* Prowes, 1 Moo. C. C. 349. See, also, Reg. *v.* Madge, 9 C. & P. 29.

[5] Simmons *v.* Com., 5 Binn. 617.

[6] State *v.* Brown, 1 Hayw. 100; Simpson *v.* State, 4 Humph. 456.

[7] People *v.* Gardner, 2 Johns. 477; People *v.* Schenck, 2 Johns. 479.

[8] Cummings *v.* State, 1 Harr. & J. 340.

[9] Hamilton *v.* Stato, 11 Ohio, 435.

[10] State *v.* Mockridge, cited in 11 Vt. 654.

[11] State *v.* Ellis, 3 Conn. 185.

mainly from that source, and as they had been, both before and since the Revolution, closely united for many purposes, there was an analogy, more or less strict, between the relations of these States to each other, and those of countries under the same government; and therefore that the same rule might be safely adopted.

The first was the case of *Commonwealth* v. *Collins.*[1] The goods were stolen in Rhode Island and brought into Massachusetts. The court instructed the jury that stealing goods in one State and carrying them into another State was similar to stealing in one county and carrying them into another, and was larceny in both; and, therefore, if the facts were proved, the jury would find the defendant guilty of stealing in Massachusetts. But this point was not argued.

In *Commonwealth* v. *Andrews,*[2] the defendaht was convicted of receiving stolen goods, which had been stolen in New Hampshire and brought into this Commonwealth; and the court held that the stealing of them was larceny in this Commonwealth, and rendered the defendant answerable for receiving the goods, knowing them to be stolen. And in the same case, Dana, C. J., mentioned the case of Paul Lord, tried in York in 1792, before the publication of reports, in which it was held that stealing goods in another State and bringing them into this were larceny in this. And that learned chief justice thought that many more cases had been determined on the same grounds. Some of the judges, however, in this case, were of opinion, upon the facts stated, that there had been a second taking of the goods in this State, so as to make it actual stealing Massachusetts.

It has been argued that the same rule ought to apply to foreign governments as to the several States of the Union, because in their respective jurisdictions, and in the laws which regulate their internal police, these are as much foreign to each other as each State is to foreign governments. Perhaps, if it were a new question in this Commonwealth, this argument might have some force in leading to another decision in regard to the several American States. But supposing it to be established by these authorities, as a rule of law in this Commonwealth, that goods stolen in another State, and brought by the thief into this State, are to be regarded technically as goods stolen in this Commonwealth, we think this forms no sufficient ground for carrying the rule further, and applying it to goods stolen in a foreign Territory, under the jurisdiction of an independent government, between which and our own there is no other relation than that effected by the laws of nations. Laws to punish crimes are essentially local, and limited to the boundaries of the State prescribing them. Indeed, this case and the cases cited proceed

[1] 1 Mass. 116.

[2] 2 Mass. 14.

on the ground that the goods were actually stolen in this State. The commission of the crime in Nova Scotia was not a violation of our law, and did not subject the offender to any punishment prescribed by our law. This indictment proceeds on that ground, and alleges the crime of larceny to have been committed in violation of the laws of this Commonwealth, and within the body of this county. It is only by assuming that bringing stolen goods from a foreign country into this State makes the the act of larceny here, that this allegation can be sustained; but this involves the necessity of going to the law in force in Nova Scotia, to ascertain whether the act done there was felonious, and consequently whether the goods were stolen; so that it is by the combined operation of the forces of both laws that it is made felony here. Were it any other offense than that of larceny, which gives an ambulatory character to the offense, by the movable character and the guilty possession of the goods stolen, there could be no doubt of the law, and no plausible pretense that our law had been violated, or the party amenable to penalties created by it. Hence the necessity, in the Constitution of the United States, establishing the Union, for a fundamental clause providing for the mutual surrender of fugitives from justice, and also for treaties of extradition providing for the mutual surrender by our government of persons charged with crimes in another.

We have not overlooked the case of *State* v. *Bartlett*,[1] in which it was held, that where oxen were stolen in Canada, and by the thief brought into Vermont, the thief might be indicted and convicted, on the ground that such had been the practice. We think the case is not supported by the current of authorities, and is contrary to principle.

If this was a mere question of jurisdiction, of the place where a party should be tried, it would be substantially a technical question; but it stands on very different grounds. Here the question is one of principle, whether the defendants have violated our law. It is said that they commit a new theft, by the possession of stolen goods in our jurisdiction. But what are stolen goods? Are we to look to our own law, or to the law of Nova Scotia, to determine what is a felonious taking, what is the *animus furandi*, and the like? If we look to the law of Nova Scotia, and that law is different from ours, in defining and prescribing theft, then we may be called on to punish as a crime that which would be innocent here. If we look to our own law, then a taking and carrying away of goods in Nova Scotia, under circumstances which would not be criminal there, might be punishable here. Foreigners, coming within our jurisdiction with goods, and complying with the customary regulations, commit no offense, and commit none in removing

[1] 11 Vt. 650.

them from place to place in the same or different counties. If they can be indicted and punished here, on the ground that such goods were stolen goods when they were brought in, it is but another mode of charging that the goods were obtained by a violation of the criminal laws of another country, and our courts must necessarily take jurisdiction of the violations of the criminal laws of foreign independent governments, and punish acts as criminal here, solely because they are in violation of the laws of such government, and which, but for such violation, would not be punishable here. It seems difficult to distinguish this from judicially enforcing and carrying into effect the penal laws of another government, instead of limiting our criminal jurisprudence to the execution of our own.

*New trial ordered.*[1]

[1] In Com. *v.* Holder, 9 Gray, 7, it was held by the same court that stealing goods in an-another of the United States, formerly a colony of Great Britain, and bringing them into this Commonwealth, may be punished as larceny here. THOMAS, J., dissenting in an exhaustive opinion.

Indictment for stealing at Milford in this county goods of Henry W. Dana. At the trial in the Court of Common Pleas there was evidence that the defendant broke and entered the shop of said Dana at Smithfield, in the State of Rhode Island, and stole the goods mentioned in the indictment, and brought them into this county. The defendant asked that the jury might be instructed that the indictment could not be maintained, because the courts of this State could not take cognizance of a larceny committed in another State. But MELLON, C. J., refused so to instruct the jury, and instructed them that the evidence, if believed, was sufficient to support the indictment. The defendant being convicted, alleged exceptions.

SHAW, C. J. A majority of the court are of opinion that this case must be considered as settled by the case of Com. *v.* Uprichard, 3 Gray, 434, and the principles stated, and the precedents cited. Though to some extent these colonies before the Revolution were distinct governments, and might have different laws, it was not unreasonable, as they all derived their criminal jurisprudence from the English common law, to regard the rule applicable to a theft, in an English county of goods carried by the thief into another, as analogous, and adopt it. We are of opinion that Massachusetts did adopt it, and this is established by judicial precedent, before and since the Revolution, and is now settled by authority as the law of this State.

THOMAS, J. The real question in this case is, whether the defendant can be indicted, convicted, and punished in this Commonwealth for a larceny committed in the State of Rhode Island. If it were a new question, it would be enough to state it. The obvious, the conclusive answer to the indictment would be, that the offense was committed within the jurisdiction of another, and, so far as this matter is concerned, independent State, of whose law only it was a violation, and of which its courts have exclusive cognizance. By the law of that State the offense is defined and its punishment measured. By the law which the defendant has violated he is to be tried. Whether the acts done by him constitute larceny, and, if so, of what degree, must be determined by that law. Its penalties only he has incurred. Its means of protection and deliverance he may justly invoke, and especially a trial by a jury of his peers in the vicinage where the offense was committed.

This obvious view of the question will be found upon the reflection, I think, to be the only one consistent with the reasonable security of the subject or the well defined relations of the States. It is well known that the laws of the States upon the subject of larceny materially differ. In most of them the common law of larceny has been greatly modified by statutes. The jurisprudence of all is not even based on the common law. In several the civil law obtains.

In cases where a difference of law exists, by which law is the defendant to be adjudged; the law where the offense (if any) was committed, or where it is tried? For example, the defendant is charged with taking with felonious intent that which is parcel of the realty, as the gearing of a mill or fruit from a tree. By the Stat. of 1851, ch.

## LARCENY — BRINGING INTO STATE PROPERTY STOLEN IN A FOREIGN COUNTRY.

## STANLEY v. STATE.

[24 Ohio St. 166.]

*In the Supreme Court of Ohio, 1873.*

**One can not be Convicted** of larceny in Ohio, for bringing into Ohio property stolen by him in Canada.

McIlvaine, J. At the November term, 1873, of the Court of Common Pleas of Cuyahoga County, the plaintiff in error, William Stanley, was convicted of the crime of grand larceny, and sentenced for a term of years to the penitentiary.

154, the act is larceny in this Commonwealth. If it appears that in the State where the act was done it was, as under the common law, but a trespass, which law has the defendant violated, and by which is he to be tried? Or suppose the defendant to be charged with the stealing of a slave — a felony in the State where the act is done, but an offense not known to our laws. The difficulty in both cases is the same. You have not only conflicting jurisdictions, but different rules of conduct and of judgment.

But supposing the definitions of the offense to be the same in the two States, the punishment may be very different. Where such difference exists, which penalty has the defendant justly incurred, and which is he to suffer? For example, the offense is punishable by imprisonment in Rhode Island, say for a year; in this State the same offense is punishable by imprisonment from one to five years; is the defendant liable to the heavier punishment? Or suppose he has been convicted in Rhode Island, and in consideration of his having indemnified the owner for the full value of goods taken, his punishment has been more mercifully measured to him, can he, after he has suffered the punishment, and because the goods were, after the larceny, brought into this State, be made to suffer the penalty of our law for the same offense? Or suppose him to have been convicted in Rhode Island and a full pardon extended to him, can he be tried and convicted and punished here?

Again; the power to indict, convict and punish the offense in this State proceeds upon the ground that the original caption was felonious. If the original taking was innocent or but a trespass, the bringing into this State would not constitute a larceny. You must therefore look at the law of the State where the first caption was made. And how is the law of another State to be ascertained? What is the law of another State is a question of fact for the jury. The jury in this way are in a criminal case made not only to pass upon the law, but to pass upon it as a matter of evidence, subject, strictly speaking, neither to the direction nor the revision of the court.

Again; the defendant is indicted here for the larceny committed in Rhode Island; while in custody here awaiting his trial, he is demanded of the executive of this State by the executive of Rhode Island as a fugitive from the justice of that State, under the provisions of the Constitution of the United States, art. 4, sec. 2, and the U. S. Stat. of 1793, ch. 45. Is he to be tried here, or surrendered up to the State where the offense was committed and tried there? Or if he has been already tried and convicted and punished in this State, is he to be sent back to Rhode Island to be tried and punished again for the same offense? And would his conviction and punishment here be any answer to the indictment there? Or if he has been fully tried and acquitted here and then demanded by the executive of Rhode Island, is he, upon requisition, to be sent to that State to be again tried, to be twice put in jeopardy for the same offense? It is quite plain no ground in law would exist for a refusal to surrender.

The defendant was indicted for larceny, not for the offense of bringing stolen goods into the Commonwealth. He was, under the instruction of the presiding judge, tried for the larceny in Rhode Island, was convicted

The indictment upon which he was convicted charged "that William Stanley, late of the county aforesaid, on the twentieth day of June, in the year one thousand eight hundred and seventy-three, at the county aforesaid, with force and arms," certain silverware, "of the goods and chattels and property of George P. Harris, then and there being, then

for the larceny in Rhode Island, and must be punished, if at all, for the larceny in Rhode Island. And, under the rule given to the jury, is presented a case where, for one and the same moral act, for one and the same violation of the rights of property, the subject may be twice convicted and punished. Nay more, if a man had stolen a watch in Rhode Island and traveled with it into every State of the Union, he might, under the rule given to the jury, if his life endured so long, be indicted and punished in thirty-two States for one and the same offense.

And it is well to observe that it is the retention of the property which is the cause of the new offense, and the carrying of it from the place of capton into another State. If the defendant had stolen property in Rhode Island, and consumed or destroyed it, and then had removed to Massachusetts, but one offense would have been committed, and that in Rhode Island.

Such are some of the more obvious difficulties attending the position that an offense committed in one State may be tried and punished in another. The doctrine violates the first and most elementary principles of government. No State or people can assume to punish a man for violating the laws of another State or people. The surrender of fugitives from justice, whether under the law of nations, treaties with foreign powers, or the provisions of the Constitution of the United States, proceeds upon the ground that the fugitive can not be tried and punished by any other jurisdiction than the one whose laws have been violated. Even in cases of the invasion of one country by the subjects of another, it is the violation of its own laws of neutrality, that the latter country punishes, and not the violation of the laws of the country invaded. The exception of piracy is apparent rather than real. Piracy may be punished by all nations, because it is an offense against the law of nations upon the seas, which are the highways of nations.

The ruling of the learned chief justice of the Common Pleas was, I may presume, based upon the decisions of this court in Com. *v.* Cullins, 1 Mass. 116, and Com. *v.* Andrews, 2 Mass. 14.

It is certainly the general duty of the court to adhere to the law as decided. Especially is this the case where a change in the decision would impair the tenure by which the rights and property of the subject are held. But even with respect to these, where it is clear a case has been decided against the well settled principles of law and of reason, it is the duty and the practice of the courts to revise such decision; and to replace the law on its old and solid foundation. This is peculiarly the duty of the courts where such decision works its injustice by impairing the personal rights of the citizen, or by subjecting him to burdens and penalties which he never justly incurred.

In my judgment, the courts of this Commonwealth have not, and never had, under the Constitution of the United States or otherwise, the rightful power to try a man for an offense committed in another State. It is in vain, it seems to me, to attempt to preserve, and make rules of conduct, decisions founded upon wholly erroneous views of the relations which the States of the Union bear to each other under the Constitution, and in conflict with well settled principles of constitutional and international laws.

I should be content to rest my dissent from the judgment of the court in the case at bar upon the principles affirmed in the recent case of Com. *v.* Uprichard, 3 Gray, 434; *ante*, p. 371. In effect that case overrules, as its reasoning thoroughly undermines, the earlier cases. They can not stand together.

But as the decision in the case at bar rests upon the authority of the case in the first and second of Massachusetts Reports, it may be well to examine with care the grounds upon which they rest. Such an examination will show, I think, not only that the cases were put upon erroneous views as to the relation of the States, but that they were also unsound at common law.

In the case of Com. *v.* Cullins, a jury trial where three judges of the court were present, the evidence showing that the goods were taken in the State of Rhode Island, Mr. Justice Sedgwick, who charged the jury, said that "the court were clearly of opinion that stealing goods in one State and conveying stolen goods into another State was

and there unlawfully and feloniously did steal, take and carry away," etc.

The following facts were proven at the trial: —

1. That the goods described in the indictment belonged to Harris, and were of the value of one hundred and sixty-five dollars.

similar to stealing goods in one county and conveying the stolen goods into another, which was always holden to be felony in both counties." Whatever the points of similarity, there was this obvious and vital difference, to wit, that conviction in one county was a bar to conviction in another, and that conviction in one State is no bar to conviction in another State.

It was a doctrine of the common law, that the asportation of stolen goods from one county to another was a new caption and felony in the second county; a legal fiction devised for greater facility in convicting the offender where it was uncertain where the first caption took place. The foundation of the rule was that the possession of the owner continued, and that every moment's continuance of the trespass may constitute a caption as well as the first taking. But in what respect was the taking in one State and conveying into another State similar to the taking in one county and conveying into another county? It could only be "similar" because the legal relation which one State bears to another is similar to that which one county bears to another; because, under another name, there was the same thing. If a man is to be convicted of crime by analogy, the analogy certainly should be a close one. Here it was but a shadow. In the different counties there was one law, one mode of trial, the same interpretation of the law and the same punishment. The rule, mode of trial, and jurisdiction were not changed.

The States of the Union, it is quite plain, hold no such relation to each other. As to their internal police, their law of crimes and punishments, they are wholly independent of each other, having no common law, and no common umpire. The provision, indeed, in the Constitution of the United States for surrendering up fugitives from justice by one State to another is a clear recognition of the independence of the States of each other in these regards. It excludes the idea of any jurisdiction in one State over crimes committed in another, and at the same time saves any necessity or reason for such jurisdiction. Nor is there any provision in the Constitution of the United States, which impairs such independence, so far as the internal police of the State is concerned. On the other hand, the widest diversity exists in the institutions, the internal police and the criminal codes of the several States, some of them, as Louisiana and Texas, having as the basis of their jurisprudence, the civil and not the common law. In the relation which Louisiana holds to this State can any substantial analogy be found to that which Surrey bears to Middlesex?

An analogy closer and more direct could have been found in the books when Com. *v.* Cullins was decided. It was that of Scotland to England, subject both to one crown and one Legislature; yet it had been decided that when one stole goods in Scotland, and carried them to England, he could not be convicted in the latter country. Rex *v.* Anderson (1763) 2 East's P. C. 772; 2 Russ. on Cr. (7th Am ed.) 119. Or an analogy might have been found in the cases of goods stolen on the high seas and brought into the counties of England, of which the courts of common law refused to take cognizance, because they were not felonies committed within their jurisdiction. 1 Hawk. P. C., ch. 33, sec. 52; 3 Inst. 113. In these cases a test would have been found, applicable to the alleged larceny of Cullins, to wit, the offense was not committed in a place within the jurisdiction of the court, but in a place as foreign to their jurisdiction, so far as this subject-matter was concerned, as England or the neighboring provinces. The case of Com. *v.* Cullins has no solid principle to rest upon.

The case of Com. *v.* Andrews, two years later, may be held to recognize the rule laid down in Com. *v.* Cullins, though it was an indictment against Andrews as the receiver of goods stolen by one Tuttle in New Hampshire; and though there is, at the least, plausible ground for saying that there was a new taking by Tuttle at Harvard in the county where the defendant was indicted and tried. Indeed, Mr. Justice Parker takes this precise ground; though he adds that "the common-law doctrine respecting counties may well be extended by analogy to the case of States, united, as these are, under one general government." If that union was with reference to or concerned the internal police or criminal jurisprudence

2. That they were stolen from Harris on the 20th of June, 1873, at the city of London, in the Dominion of Canada.

3. That they were afterwards, on the 26th day of same month, found in the possession of the defendant, in said county of Cuyahoga. It is also conceded that, in order to convict, the jury must have found that the goods were stolen by the defendant in the Dominion of Canada, and carried thence by him to the State of Ohio.

Upon this state of facts, was the prisoner lawfully convicted? In

of the several States; if it was not obviously for other different, distinct and well defined purposes; and if we could admit the right of the court to extend by analogy the provisions of the criminal law and so to enlarge its jurisdiction; there would be force in the suggestion. As it is, we must be careful not to be misled by the errors of wise and good men.

Judge Thatcher puts the case wholly on the felonious taking at Harvard.

Mr. Justice Sedgwick, though having the same view as to the taking at Harvard, does not rest his opinion upon it, but upon the ground that the continuance of the trespass is as much a wrong as the first taking. This doctrine applies as well where the original caption was in a foreign country, as in another State of the Union. If you hold that every moment the thief holds the property he commits a new felony, you may multiply his offenses *ad infinitum;* but in so carrying out what is at the best a legal fiction, you shock the common sense of men and their sense of justice. Mr. Justice Sedgwick will not admit the force of the objection that the thief would be thus twice punished, but regards with complacency such a result. But as we are to presume that the punishment is graduated to the offense, and, as far as punishment may, expiates the wrong, the mind shrinks from such a consequence. But saying that whatever he might think upon this question if it were *res integra,* he puts his decision upon the case of Paul Lord decided in 1792, and that of Com. *v.* Cullins.

Chief Justice Dana relies upon the cases before stated and a general practice, and also upon the principle that every moment's felonious possession is a new caption.

Such was the condition of the law in this State when the case of Com. *v.* Uprichard came before the court. In that case the original felonious taking was in the province of Nova Scotia. The bringing of the stolen goods into this Commonwealth was held not to be a larceny here. But if it be true that every act of removal or change of possession is a new caption and asportation; that every moment's continuance of the trespass is a new taking; if this legal fiction has any life, it is difficult to see why the bringing of the goods within another jurisdiction was not a new offense. No distinction in principle exists between this case, and a felonious taking in another State and bringing into this. So far as the laws of crimes and punishments is concerned, the States are as independent of each other as are the States and the British Provinces.

The case of Com. *v.* Uprichard rests, I think immovably, upon the plain grounds that laws to punish crimes are local and limited to the boundaries of the States which prescribe them; that the commission of a crime in another State or country is a violation of our law, and does not subject the offender to any punishment prescribed by our law. These are principles of universal jurisprudence, and as sound as they are universal.

It is sometimes said that after all the offender is only tried and convicted for the offense against our laws. This clearly is not so. It is only by giving force to the law of the country of the original caption, that we can establish the larceny. It is the continuance of the caption felonious by the law of the place of caption. In the directions given to the jury such effect is given to the laws of Rhode Island. The jury were instructed that if the defendant broke and entered into the shop of Henry W. Dana in Smithfield in Rhode Island, and thence brought the goods into this county, the indictment could be maintained. The felonious taking in Rhode Island is the inception and groundwork of the offense. The proceeding is in substance and effect but a mode of enforcing the laws of and assuming jurisdiction over offenses committed in another State.

For the reasons thus imperfectly stated, I am of opinion that the instructions of the Court of Common Pleas were erroneous, that the exceptions should be sustained, the verdict set aside and a new trial granted.

*Exceptions overruled.*

other words, if property be stolen at a place beyond the jurisdiction of this State, and of the United States, and afterward brought into this State by the thief, can he be lawfully convicted of larceny in this State?

In view of the free intercourse between foreign countries and this State, and the immense immigration and importation of property from abroad, this question is one of very great importance; and, I may add, that its determination is unaided by legislation in this State. In resolving this question, we have been much embarrassed by a former decision of this court in *Hamilton* v. *State*.[1] In that case it was held by a majority of the judges, that a person having in his possession, in this State, property which had been stolen by him in another State of the Union, might be convicted here of larceny.

The decision appears to have been placed upon the ground, "that a long-sustained practice, in the criminal courts of this State, had settled the construction of the point, and established the right to convict in such cases."

Whether that decision can be sustained upon the principles of the common law or not, it must be conceded that for more than thirty years it has stood, unchallenged and unquestioned, as an authoritative exposition of the law of this State. And although it has received no express legislative recognition, it has been so long followed in our criminal courts, and acquiesced in by other departments of the government, that we are inclined to the opinion that it ought not now to be overruled; but, on the other hand, its rule should be applied and sustained, in like cases, upon the principle of *stare decisis*.

Before passing from *Hamilton* v. *State*, it should be added that the same question has been decided in the same way by the courts of several of our sister States.[2]

The same point has been decided the same way in several subsequent cases in Massachusetts. The exact question, however, now before us has not been decided by this court; and we are unanimously of opinion that the rule laid down in *Hamilton* v. *State*, should not be extended to cases where the property was stolen in a foreign and independent sovereignty.

We are unwilling to sanction the doctrine or to adopt the practice, whereby a crime committed in a foreign country, and in violation of the laws of that country only, may, by construction and a mere fiction, be treated as an offense committed within this State, and in violation of the laws thereof. In this case the goods were stolen in Canada. They

[1] 11 Ohio, 435.

[2] State *v.* Ellis, 3 Conn. 185; State *v.* Bartlett, 11 Vt. 650; State *v.* Underwood, 49 Me. 181; Watson *v.* State, 36 Miss. 593; State *v.* Johnson, 2 Ore. 115; State *v.* Bennett, 14 Iowa, 479; Ferrel *v.* Com., 1 Duv. 153; Com. *v.* Collins, 1 Mass. 116.

were there taken from the custody of the owner into the custody of the thief. The change of possession was complete. The goods were afterward carried by the thief from the Dominion of Canada to the State of Ohio. During the transit his possession was continuous and uninterrupted. Now, the theory upon which this conviction is sought to be sustained is, that the legal possession of the goods remained all the while in the owner. If this theory be true, it is true as a fiction of the law only. The fact was otherwise. A further theory in support of the conviction is, that as soon as the goods arrived within the State of Ohio, the thief again took them from the possession of the owner into his own possession. This theory is not supported by the facts, nor is there any presumption of law to sustain it.

That the right of possession, as well as the right of property, remained all the time in the owner is true, as matter of law. And it is also true, as a matter of fiction, and the possession of the thief, although exclusive as it must have been in order to make him a thief, is regarded as the possession of the owner, for some purposes. Thus, stolen goods, while in the possession of the thief, may be again stolen by another thief; and the latter may be charged with the taking and carrying away the goods of the owner. And for the purpose of sustaining such charge, the possession of the first thief will be regarded as the possession of the true owner. This fiction, however, in no way changes the nature of the facts which constitute the crime of larceny.

What we deny is, that a mere change of place by the thief, while he continues in the uninterrupted and exclusive possession of the stolen property, constitutes a new "taking" of the property, either as a matter of fact, or of law.

Larceny under the statute of this State, is the same as at common law, and may be defined to be the folonious taking and carrying away of the personal property of another. But no offense against this statute is complete until every act which constitutes an essential element in the crime has been committed within the limits of this State. The act of "taking" is an essential element in the crime, and defines the act by which the possession of the property is changed from the owner to the thief. But the act of "taking" is not repeated, after the change of possession is once complete, and while the possession of the thief continues to be exclusive and uninterrupted. Hence, a bailee or finder of goods, who obtains complete possession without any fraudulent intent, can not be convicted of larceny by reason of any subsequent appropriation of them.

We fully recognize the common-law practice, that when property is stolen in one county, and the thief is afterward found in another

county with the stolen property in his possession, he may be indicted and convicted in either county, but not in both. This practice obtained, notwithstanding the general rule, that every prosecution for a criminal cause must be in the county where the crime was committed. The reason for the above exception to the general rule is not certainly known, nor is it important in this case that it should be known, as it relates to the matter of venue only, and does not affect the substance of the offense. We are entirely satisfied, however, that the right to prosecute the thief in any county wherein he was found in possession of the stolen property, was not asserted by the Crown, because of the fact that a new and distinct larceny of the goods was committed whenever and wherever the thief might pass from one county into another. His exemption from more than one conviction and punishment, makes this proposition clear enough. The common law provided that no person should be twice vexed for the same cause. It was through the operation of this principle that the thief, who stole property in one county, and was afterward found with the fruits of his crime in another, could not be tried and convicted in each county. He was guilty of one offense only, and that offense was complete in the county where the property was first "taken" by the thief, and removed from the place in which the owner had it in possession.

When goods piratically seized upon the high seas, were afterwards carried by the thief into a county of England, the common-law judges refused to take cognizance of the larceny, "because the original act, namely, the taking of them, was not any offense whereof the common law taketh knowledge, and by consequence the bringing them into a county, could not make the same a felony punishable by our law." [1]

The prisoner was charged with larceny at Dorsetshire, where he had possession of the stolen goods. They had been stolen by him in the Island of Jersey and afterward he brought them to Dorsetshire. The prisoner was convicted. All the judges (except Raymond, C. B., and Taunton, J., who did not sit) agreed that the conviction was wrong.[2] Property was stolen by the prisoner in France, and was transported to London, where it was found in his possession. Park, B., directed the jury to acquit the prisoner on the ground of the want of jurisdiction, which was done.[3]

A similar decision was made in a case where the property was stolen in Scotland, and afterward carried by the thief into England.[4]

[1] 13 Coke, 53; 3 Inst., 113; 1 Hawk., ch. 19, sec. 52.

[2] Rex v. Prowes, 1 Moo. C.C. 349.

[3] Reg. v. Madge, 9 Cow. & P., 29

[4] 2 East's P. C., p. 772, ch. 16, sec. 156.

whereby prosecutions were authorized in any county in which the thief was found, in possession of property stolen by him in any part of the United Kingdom. In *Commonwealth* v. *Uprichard*,[1] the property had been stolen in the province of Nova Scotia, and thence carried by the thief into Massachusetts. The defendant was convicted of larceny, charged to have been committed in the latter State. This conviction was set aside by a unanimous court, although two decisions had been made by the same court affirming convictions, where the property had been stolen in a sister State, and afterward brought by the thief into that Commonwealth. Without overruling the older cases, Chief Justice Shaw, in delivering the opinion of the court, distinguished between the two classes of cases. The following cases are in point, that a State, into which stolen goods are carried by a thief from a sister State, has no jurisdiction to convict for the larceny of the goods, and *a fortiori* when the goods were stolen in a foreign country: —

In New York: *People* v. *Gardner*,[2] *People* v. *Schenk*.[3] The rule was afterward changed in that State by statute. New Jersey: *State* v. *Le Blanch*.[4] Pennsylvania: *Simmons* v. *Commonwealth*.[5] North Carolina: *State* v. *Brown*.[6] Tennessee: *Simpson* v. *State*.[7] Indiana: *Beall* v. *State*,[8] *State* v. *Rounalls*.[9]

There are two cases sustaining convictions for larceny in the States, where the property had been stolen in the British provinces.[10] In *Barlett's Case*, the principle is doubted, but the practice adopted in cases where the property was stolen in a sister State was followed, and the application of the application of the principle thereby extended. *Underwood's Case* was decided by a majority of the judges. After reviewing the cases, we think the weight of authority is against the conviction and judgment below. And in the light of principle, we have no hesitancy in holding that the court below had no jurisdiction over the offense committed by the prisoner. The judgment below is wrong, unless every act of the defendant, which was necessary to complete the offense, was committed within the State of Ohio, and in violation of the laws thereof. This proposition is not disputed. It is conceded by the prosecution that the taking, as well as the removal of the goods *animo furandi*, must have occurred within the limits of Ohio. It is also conceded that the first taking, as well as the first removal, of the goods alleged in this case to have been stolen, was at a place beyond the limits of the State, and within the jurisdiction of a foreign and independent sover-

[1] 3 Gray, 434.
[2] 2 Johns. 477.
[3] 2 Johns. 479.
[4] 2 Vroom, 82.
[5] 5 Bin. 617.
[6] 1 Hayw. 100.
[7] 4 Humph. 456.
[8] 15 Ind. 378.
[9] 14 La. An. 278.
[10] State *v.* Bartlett, 11 Vt. 650; and State *v.* Underwood, 49 Me. 181.

This rule of the common law was afterward superseded, in respect to the United Kingdom, by the statutes of 13 George III.[1] and 8 George IV.,[2] eignty. Now, the doctrine of all the cases is that the original "taking," and the original transportation of the goods by the prisoner must have been under such circumstances as constituted a larceny. If the possession of the goods by the defendant before they were brought into this State, was a lawful possession, there would be no pretense that the conviction was proper. The same, if his possession was merely tortious. The theory of the law, upon which the propriety of the conviction is claimed, is based on the assumption that the property was stolen in Canada by the prisoner.

By what rule shall it be determined whether the acts of the prisoner, whereby he acquired the possession of the goods in Canada, constituted the crime of larceny? By the laws of this State? Certainly not. The criminal laws of this State have no extra-territorial operation. If the acts of the prisoner, whereby he came in possession of the property described in the indictment, were not inhibited by the laws of Canada, it is perfectly clear that he was not guilty of larceny there. It matters not that they were such as would have constituted larceny if the transaction had taken place in this State.

Shall the question, whether or not the "taking" of the property by the prisoner was a crime in Canada, be determined by the laws of that country? If this be granted, then an act, which was an essential element in the combination of facts of which Stanley was found guilty, was in violation of the laws of Canada, but not of this State, and it was because the laws of Canada were violated that the prisoner was convicted. If the laws of that country had been different, though the conduct of the prisoner had been the same, he could not have been convicted. I can see no way to escape this conclusion, and if it be correct, it follows that the acts of the prisoner in a foreign country, as well as his acts in this State, were essential elements in his offense; therefore no complete offense was committed in this State against the laws thereof.

I have no doubt the Legislature might make it a crime for a thief to bring into this State property stolen by him in a foreign country. And in order to convict of such crime, it would be necessary to prove the existence of foreign laws against larceny. The existence of such foreign laws would be an ingredient in the statutory offense. But that offense would not be larceny at common law, for the reason that larceny at common law contains no such element. It consists in taking and

[1] ch. 31, secs. 4, 7.

[2] ch. 29, sec. 76.

carrying away the goods of another person in violation of the rules of the common law, without reference to any other law, or the laws of any other country. It may be assumed that the laws of *meum et tuum* prevail in every country, whether civilized or savage. But this State has no concern in them further than to discharge such duties as are imposed upon it by the laws of nations, or through its connection with the general government, by treaty stipulations.

Our civil courts are open for the reclamation of property which may have been brought within our jurisdiction, in violation of the rights of the owner; but our criminal courts have no jurisdiction over offenses committed against the sovereignty of foreign and independent States.

*Judgment reversed, and cause remanded.*

DAY, C. J., WELCH, STONE and WHITE, JJ., concurring.

---

## LARCENY FROM HOUSE — PROPERTY OUTSIDE OF STORE.

## MARTINEZ v. STATE.

[41 Tex. 126.]

*In the Supreme Court of Texas, 1874.*

**Stealing Property Hanging** at and outside of a store door is simple larceny, and not larceny from a house.

REEVES, A. J. The only question in this case is presented in the brief for the State: "Is an indictment for theft from a house, sustained by proof that the stolen prowerty was taken while hanging at and outside of the store door on a piece of wood, nailed to the door, facing and projecting towards the street?"

Burglary at common law is an offense against the security of the habitation, the protection of the property being an incident, not the leading object. The precinct of the dwelling, the place where the occupier and his family resided, included only such buildings as were used with and appurtenant to it, and these only, were the subjects of burglary at common law, and to constitute this offense there must have been an actual or constructive breaking and entry into the house. The English definition of burglary has been modified by statute in this and other States so as to include offenses committed in the daytime as well as in the night under certain circumstances, and in other buildings than the dwelling

house. The idea of regarding the house as a place of security for the occupants, and a place of deposit for his goods, underlies all these statutes. By our code, burglary is constituted by entering a house by force, threats, or fraud at night, or in like manner, by entering a house during the day and remaining concealed therein until night, with the intent in either case of committing a felony.[1] It is not necessary that there should be any actual breaking, except when the entry is made in daytime.[2]

The code provides different degrees of punishment for theft without regard to place. The article under which the defendant was indicted is as follows: "If any person shall steal property from a house in such a manner of that the offense does not come within the definition of burglary, he shall be punished by confinement in the penitentiary not less than two nor more than seven years."[3] Where the house entered is a dwelling-house, the punishment of burglary is imprisonment in the penitentiary not less than three nor more than ten years. Where the house entered is not a dwelling-house, the punishment is not less than two nor more than five years. In these cases the punishment is greater than that for the theft in general, as defined by the code, where the property is under the value of twenty dollars.

We are of opinion that the goods were not under the protection of the house, so as to make the taking theft from a house in the meaning of the statute, and that the defendant was only liable to the punishment prescribed for simple theft. The goods were not deposited in the house for safe custody, but the witness says they were hanging out to attract customers or purchasers.

The statutes of the States cited in the brief of counsel, in general, punish theft in a house, while other statutes referred to punish theft from a house as does our code, and they seem to use these terms as meaning the same thing. A different rule would not admit of any definite application.

A construction that would make the stealing of goods while exposed on the street, and not in the house, the same offense as stealing from the house, would be to lose sight of the distinction between different offenses and the different grades of punishment, and would introduce a latitude of construction too uncertain to be followed in the administration of the criminal laws.

The judgment is reversed and case remanded.

*Reversed and remanded.*

1 Pas. Dig., art. 2359.

2 arts. 2360, 2361.

3 art. 2408.

## LARCENY FROM HOUSE — PROPERTY OUTSIDE OF WAREHOUSE.

## MIDDLETON *v.* STATE.

[53 Ga. 248.]

*In the Supreme Court of Georgia, 1874.*

1. **A Bale of Cotton** was stolen from an alley way outside of a warehouse and not in a warehouse; *held*, that the defendant was guilty only of simple larceny.
2. **The Court Charged** that "if the bale of cotton was in front of the warehonse, and under its control and protection, stealing it is the same offense as if the bale of cotton were actually within the walls of the warehouse;" *Held*, error.

WARNER, C. J. The defendant was indicted for the offense of "larceny from the house," and on the trial thereof the jury, under the charge of the court, found the defendant guilty. A motion for a new trial, on the ground of error in the charge of the court to the jury, and because the verdict was contrary to law and the evidence, which motion was overruled and the defendant excepted. The defendant is charged in the indictment with having taken and carried away from the warehouse of the prosecutor one bale of cotton, the said warehouse being a place where valuable goods were stored, with intent to steal the same. The evidence in the record shows that the bale of cotton was not in the warehouse, but outside of it, in an alley way. The court charged the jury "that if they found from the evidence that the bale of cotton was in front of the warehouse and under its control and protection, it would be the same criminally as if within its walls, and would be a taking from upon the same basis as if a storekeeper places goods in front of his store, and a thief take them therefrom, it would be laaceny from the house." The forty-four hundred and thirteenth section of the code defines larceny from the house to be the breaking or entering said house, stealing therefrom any money, goods, clothes, wares, merchandise, or anything or things of value whatever. The forty-four hundred and fourteenth section defines the penalty for stealing in any of the houses described in that section. Simple theft or larceny is the wrongful and fraudulent taking and carrying away by any person, of the personal goods of another, with intent to steal the same.[1] The distinction between simple larceny and larceny from the house will be readily perceived. The evidence in the record before us does not show that the defendant was guilty of the offense of larceny from the house inasmuch as it does not show that the cotton alleged to have been stolen

[1] Code, 4393.

was in any house, or that it was taken by the defendant therefrom. The charge of the court in view of the evidence contained in the record, was error.

*Let the judgment of the court below be reversed.*

---

## LARCENY FROM THE PERSON — SIMPLE LARCENY.

## KING v. STATE.

[54 Ga. 184.]

*In the Supreme Court of Georgia, 1875.*

**One can not be Convicted** of a simple larceny on evidence which establishes a larceny from the person.

WARNER, C. J. The defendant was indicted for the offense of "simple larceny," under the forty-four hundred and sixth section of the code, and charged with having wrongfully, fraudulently and privately taken and carried away, with intent to steal the same, certain described United States national currency notes, of the value of twelve dollars. The evidence upon the trial proved a technical "larceny from the person." The jury, under the charge of the court, found the defendant guilty.

A motion was made for a new trial, on the ground that the court erred in charging the jury that they could find the defendant guilty of simple larceny, as defined by the forty-four hundred and sixth section of the code, notwithstanding the evidence showed that it was a technical larceny from the person. The court overruled the motion, and the defendant excepted.

By the forty-four hundred and sixth section of the code, it is declared that if any person shall take and carry away any bond, note, bank-bill, or due bill, or paper or papers, securing the payment of money, etc., with intent to steal the same, such person shall be guilty of simple larceny. By the forty-four hundred and tenth section, theft or larceny from the person is defined to be the wrongful and fraudulent taking of money, goods, chattels or effects, or any article of value from the person of another privately, without his knowledge, in any place whatever, with intent to steal the same.

"Simple larceny," and "larceny from the person" are two distinct offenses under the code. It is true that if any person shall take and carry away any bond, note, bank-bill, etc., with intent to steal the

same, such person is guilty of simple larceny; and it is also true, that if any person shall wrongfully and fraudulently take and carry away the personal goods of another, other than bonds, notes, bank-bills etc., with intent to steal the same, he would be guilty of simple larceny, but it does not follow that if bonds, notes, bank-bills, etc., are taken from the person of another privately and without his knowledge, that the party defendant so taking the same may be indicted and punished for the offense of simple larceny. If one should take and carry away a box of jewelry, with intent to steal the same, he would be guilty of simple larceny, but if one should take a box of jewelry from the person of another, privately, without his knowledge, with intent to steal the same, he would be guilty of larceny from the person. So in this case, if the defendant had not taken the currency bills from the person of another privately, and without his knowledge, he might have been indicted and punished for the offense of simple larceny, but as the evidence shows that he was guilty of larceny from the person, he should have been indicted and punished for that offense.

Simple larceny and larceny from the person, as before remarked, are two distinct offenses and the punishment is different. Simple larceny of currency notes under the forty-four hundred and sixth section of the code, is punished as a felony by imprisonment in the penitentiary for not less than one year nor longer than four years, whereas, strange as it may appear, larceny from the person of currency notes is only punishable as a misdemeanor under the provisions of the act of 1866, reducing certain crimes below felonies. The result, therefore, is, in relation to the case now before us, that the defendant has been indicted and found guilty of a felony, for which he may be punished by imprisonment in the penitentiary for not less than one year nor longer than four years, when if he had been indicted for larceny from the person, the offense of which it is admitted the evidence proved him to have been guilty, he could only have been punished, as the law now stands, as for a misdemeanor. It might be a convenient way to indict the defendant for simple larceny and punish him as for a felony under the forty-four hundred and sixth section of the code, when the evidence proved he was guilty of larceny from the person, and could only be punished therefor as for a misdemeanor. The simple objection to this course of proceeding is, that the penal laws of the State do not authorize it. There are four distinct classes of larceny recognized by the penal code of this State: 1st. Simple larceny. 2d. Larceny from the person. 3d. Larceny from the house. 4th. Larceny after a trust or confidence has been delegated or reposed.[1]

[1] Code, sec. 4392.

If any person shall steal currency notes, or other choses in action, or any article of value from the person of another, privately, without his knowledge, in any place whatever, such person is guilty of the offense of larceny from the person, and should be indicted therefor and punished as prescribed by law for that offense. If any person shall steal and carry away any currency notes, or other valuable thing as described in section 4406, otherwise than from the person of another, such person is guilty of simple larceny, and should be indicted therefor, and punished as prescribed by law for that offense. Penal laws are to be construed strictly, therefore the defendant in this case could not legally have been convicted and punished for the offense of simple larceny, under the forty-four hundred and sixth section of the code, which is a felony, when the evidence clearly proved that he was only guilty of the offense of larceny from the person, which is not a felony, but a misdemeanor. The offense of a misdemeanor under the law can not be converted into a felony and punished as such, in that way, without a violation of the fundamental principles of the penal laws of the State. In our judgment the court erred in overruling the defendant's motion for a new trial.

Let the judgment of the court below be reversed.

---

## GRAND LARCENY — INSUFFICIENCY OF EVIDENCE FOR CONVICTION.

## People v. Wong Ah You.

[6 West Coast Rep. 438.]

*In the Supreme Court of California, 1885.*

**A Conviction for Grand Larceny** can not be sustained upon the mere proof that the defendant had access to the house and rooms in which the missing property was kept, although the evidence shows that he made a false statement in regard to a matter in no way connected with the crime for which he was accused.

Appeal from a judgment of the Superior Court of the city and county of San Francisco, entered upon a verdict convicting the defendant of grand larceny, and from an order denying him a new trial. The opinion states the facts.

*C. B. Darwin*, for the appellant.

*E. C. Marshall*, Attorney-General, for the respondent.

Sharpstein, J. Beyond the fact of the defendant having access to the house and to the rooms in which the missing money was kept, the only circumstance which militates in any degree against him, is his

statement that when he returned from Sunday-school he found the door through which he entered the house, open, while a witness who was in the house at the time, testified that the defendant unlocked the door before entering. There is no evidence that the stolen property, or any portion of it, was ever in the possession of the defendant, or that he knew where it was kept. The evidence is, that none of it has ever been discovered since it was first missed. Therefore the statement of the defendant that he found the door open, was not made for the purpose of explaining his possession of the stolen property. The most that can be claimed is, that he made it for the purpose of averting suspicion from himself. That he would naturally desire to do, whether guilty or innocent. It is not claimed that his unlocking the door had any connection with the alleged crime. Nor is it claimed that he had not a right to unlock it, or that he had not been furnished with a key for that purpose. He had been a servant in the house for a period of twenty-seven months, and seems to have been very much trusted.

We think that the bare circumstance of his having made a false statement in regard to a matter in no way connected with the crime of which he is accused, insufficient to justify the verdict, and for that reason his motion for a new trial should have been granted.

Judgment and order reversed and cause remanded for a new trial.

MYRICK, J., and THORNTON, J., concurred.

---

LARCENY — POSSESSION OF STOLEN PROPERTY.

## STATE *v.* GRAVES.

[72 N. C. 482.]

*In the Supreme Court of North Carolina, 1875.*

**On a Trial for Burglary** and larceny, evidence was given that the respondent was found in possession of the watch and chain stolen, within forty hours after the burglary. The court charged that if they believed this fact, the law presumed that he was the thief and that he had stolen the watch and chain, and he was bound to explain satisfactorily how he came by them. *Held,* error.

INDICTMENT for burglary, tried before KERR, J., at December term, 1874, Guilford Superior Court.

The burglary alleged was the breaking into and entering the house of J. I. Scales, in the city of Greensboro, North Carolina, on the night of the 8th of August, with the intent to steal, and stealing and carrying away a watch and chain, the property of J. I. Scales.

There was evidence tending to prove that between nine o'clock on that night and two o'clock a. m. of the 9th of August, Mr. Scales' house was entered by some one forcing open the blinds and raising the window sash of a room called the nursery; that between that room and the bed-chamber was the dining-room; that a lamp was left burning in the dining-room, from which a light shone into both the nursery and bed-chamber. That Scales went to bed about nine o'clock, and hung his coat and vest on the back of a chair in his bed-room, the watch being in the vest pocket, and attached thereto by the chain. That Jennie Stevens, a colored servant girl, was in the house when Scales went to bed, at what time she left the house is not shown, further than she left during the night and went to her usual place of sleeping. It was further in evidence that the prisoner was in Danville, in the State of Virginia, on the 10th of August, and had the watch and chain in his possession, and swapped them off for another watch and chain, getting boot. It was in evidence that the prisoner was in Rockingham County on the 6th of August, at the election, and also on the night of the 6th, and that he said on that night that he was going to Greensboro the next day, and did leave the house at which he was stopping the next day.

There was no evidence that he was in Greensboro on the night in which the alleged burglary was committed.

The prisoner was arrested about the 4th of September, in Rockingham, and brought to Greensboro jail. When arrested, the prisoner denied the charge. When in prison, the prisoner told Scales that he got the watch and chain from John and Dennis Sellars on Sunday night, the 9th of August, and that they told him to take them to Danville and trade them off. The prisoner at first told Scales that he did not know the watch, but in a few minutes afterwards, admitted that he did know the watch as soon as he saw it; that he had seen Scales wear it a hundred times. It was proven that the prisoner, preceding and up to July, had been a servant of Scales, and often in his house and the rooms thereof. That on the first or second day after the watch was stolen, Scales had Jennie Stevens, his servant, and one Jim Edwell, arrested on the charge of committing the crime. That on the night of the alleged burglary, Jim Edwell was seen about dark dodging behind a tree at the corner of the house, near the window alleged to have been broken open. That he was halted by a servant man twice before he did so, near the front gate of the residence of Scales. That some hour or two afterwards, this servant and Jennie Stevens went out of the front gate and saw Edwell alone again passing; that he walked before them a half mile, and Jennie Stevens had a conversation with him which the witness did not hear. That Jennie Stevens had a small bundle which she gave to witness to hold while she talked with Edwell. That about an hour

afterwards, witness saw Edwell in about one hundred yards of Scales' house talking to a colored man. It was also in evidence that when the prisoner had the watch in his possession and was offering to exchange it for another, he said that he had bought it of a broker for $40, and in a few minutes he told another person that he gave $48 for it, and said that he made a mistake when he said he gave $40. It was also shown that when the prisoner was arrested, he was concealed under a bed, and had tried to escape up a chimney.

His honor, among other things, charged the jury that if they believed from the evidence that the prisoner was in possession of the watch and chain in Danville, Virginia, on the Monday after the watch was stolen on Saturday night, the law presumed that he was the thief, and that he was bound to explain satisfactorily how he came by it.

The prisoner excepted. The prisoner's counsel asked his honor to charge "that if there was any reasonable hypothesis arising out of or suggested by the evidence by which, taking all the facts proven to be true and he not guilty, that the jury should acquit the prisoner." His honor charged the jury that in giving to the prisoner the benefit of the reasonable doubt, they should not be controlled by mere conjecture that some one else did the deed; that they must be fully satisfied that the prisoner did the deed." Prisoner excepted. There was a verdict of guilty, rule discharged, judgment of death pronounced, and the prisoner appealed.

*Scott & Caldwell*, for the defendant. Attorney-General *Hargrave*, for the State.

PEARSON, C. J. The fact that the "watch and chain" were found in the possession of the prisoner at Danville, on the Monday after the burglary on the Saturday night preceding, at Greensboro, connected with the fact that he was offering to dispose of the articles at much less than their value, and made contradictory statements as to how he got them, were matters tending to show either that the prisoner was the man who broke and entered the dwelling house and stole the watch and chain, or else that he had received the goods, knowing them to have been stolen. These facts, taken in connection with the evidence of the mysterious movements of Jim Edwell and Jennie Stevens, about the premises on the night of the burglary, were fit subjects for the consideration of the jury.

His honor committed manifest errors in taking the case from the jury and ruling that "if the jury believed from the evidence that the prisoner was in possession of the watch and chain in Danville on the Monday after the watch and chain were stolen on Saturday night in Greensboro, the law presumed he was the thief, and had stolen the watch and chain, and that the prisoner was bound to explain satisfactorily how he

came by the goods." The rule is this: "Where goods are stolen, one found in possession so soon thereafter, that he could not have reasonably got the possession unless he had stolen them himself, the law presumes he was the thief."

This is simply a deduction of common sense, and when the fact is so plain that there can be no mistake about it, our courts, following the practice in England, where the judge is allowed to express his opinion as to the weight of the evidence, have adopted it as a rule of law, which the judge is at liberty to act on, notwithstanding the statute, which forbids a judge from intimating an opinion as to the weight of the evidence. But this rule, like that of *falsum in uno, falsum in omnibus*, and the presumption of fraud, as a matter of law, from certain fiduciary relations,[1] has been reduced to very narrow proportions, and is never applicable when it is necessary to resort to other evidence to support the conclusion; in other words the fact of guilt must be self-evident from the bare fact of being found in the possession of the stolen goods, in order to justify the judge in laying it down, as a presumption made by the law, otherwise it is a case depending on circumstantial evidence, to be passed on by the jury.

In our case, so far from the fact of guilt to wit: that the prisoner broke and entered the house and stole the watch and chain, being self-evident, it is a matter which, under the circumstances proved, admits of grave doubt, for it may well be that the prisoner merely received the watch and chain after some one else had committed the burglary, which would change the grade of the crime very materially. As the case goes back for another trial, it is a matter for the solicitor of the State to consider whether it will not be well to send a new bill containing other counts to meet the differentaspects of the case, as it may be looked upon by the jury.

Error. *Venire de novo.*

---

## LARCENY—EFFECT OF RECENT POSSESSION.

## STATE *v.* WALKER.

[41 Iowa, 217.]

*In the Supreme Court of Iowa, 1875.*

**A Charge which Instructs the Jury** that proof of possession of part of the stolen goods, four months after the commission of the crime, no reasonable explanation being given of the possession, should be regarded as raising a strong presumption of guilt, is erroneous.

MILLER, C. J. The court, among other instructions to the jury, charged as follows:—

"If you find that the store of witnesses, S. E. & John Johnson, was

[1] See Pearce *v.* Lea, 68 N. C. 90.

burglariously entered, about the night of the 3d of Feoruary, 1873, and a large quantity and variety of goods stolen therefrom, and that the following June different portions and varieties of the same goods were found in the premises of the accused, and you further find that the defendant has been unable to give any reasonable explanation of how he came by such possession, then such facts should be regarded by the jury as raising a strong presumption that the defendant was himself guilty of feloniously taking the property."

This instruction is erroneous. The rule is well settled that the recent possession of stolen property, unaccounted for, is a strong presumption, or *prima facie* evidence, of guilt.[1]

What is to be termed recent possession depends very much upon the character of the goods stolen. If they are such as pass readily from hand to hand, the possession, in order to raise a presumption of guilt, should be much more recent than if they were of a class of property that circulated more slowly, or is rarely transmitted.

There may be cases where the possession is so long after the commission of the crime that a court will refuse to submit the question to the jury — deciding, as a matter of law, that the possession is not recent — but in all other cases the question is one of fact, to be submitted to the jury.[2]

The instruction was erroneous, in that it directed the jury that, as a matter of law, proof of possession of part of the stolen goods four months after the commission of the crime was recent possession, from from which a strong presumption of guilt arose, unless the possession was satisfactorily explained. The judgment must, therefore, be reversed, and a new trial ordered.

*Reversed.*

---

LARCENY — EFFECT OF RECENT POSSESSION.

## YATES v. STATE.

[37 Tex. 202.]

*In the Supreme Court of Texas, 1872.*

**Possession of a Stolen Feather** bed and some bed clothing, five months after they were stolen, is not such recent possession as of itself to raise a legal presumption that the party in possession is the thief.

OGDEN, J. The first clause of the charge of the court in this cases is in these words: "Property recently stolen being found in the possession

1 Warren v. State, 1 G. Greene, 106; State v. Taylor, 25 Ia. 273; State v. Brady, 27 *Id.* 126; Jones v. People, 12 Ill. 259; Com. v. Millard, 1 Mass. 6; Greenl. Ev., secs. 31, 32, 33.

2 See Rex v. Partridge, 7 C. & P. 551; State v. Bennett, 3 Brev. 514; State v. Jones, 3 Dev. & B. 122; Rex v. Adams, 3 C. & P. 600; Reg. v. Cruttenden, 6 Jur. 267; Com. v. Montgomery, 11 Metc. 534; Engleman v. State, 2 Ind. 91:

of a person, the law presumes that person to be the thief, and such person must rebut the presumption by proof, such as having bought the property in a public manner." We think there is error in this charge, especially when applied to the facts as proven on the trial of this case.

Easter Waggoner, on the last day of December or first day of January, had taken from her house, by some person unknown to her, a feather bed and some bed clothing, and on the first of June following the deputy sheriff found the missing articles in appellant's house. Five months had elapsed since the property had been missed from the house of the owner, before is was found in the possession of the appellant, and it may have changed hands several times during that period; and we can not subscribe to the doctrine laid down by the court, that the possession of this property, admitting it to have been stolen, was so recent after the theft as to raise the legal presumption that the party in possession is the thief. It was a circumstance which might very properly have been submitted to the jury, in connection with other evidence of guilt; but we do not think this evidence of possession, alone, sufficient to warrant a conviction, and yet the charge of the court would appear to give it that degree of importance.

Possession of stolen property, however remote from the date of the theft, may be said to raise a presumption of a guilty possession; but that presumption must necessarily greatly diminish as time elapses, until it becomes so slight as to hardly make an impression upon a reflecting mind.

Mr. Bishop, after reviewing many decisions on this question, seems to come to the conclusion that the simple possession of stolen goods, however recent after the theft, does not raise a sufficiently strong presumption of guilt to warrant a conviction for that crime. But he says there are nearly always other circumstances and evidence attending that possession, such as the character of the party, the explanation given or refused, or attempts at concealment, which may greatly increase or diminish the presumption raised by the possession.

We think the charge of the court gave too much importance to the simple fact of the possession of stolen goods five months after the same had been stolen, and that, in doing so, it was calculated to mislead the jury. The latter part of this clause of the charge is still more objectionable than the former. The jury are told that the law presumes the possessor of stolen property, recently after the theft, to be the thief; and he must rebut that presumption by proof, such as having purchased the property in a public manner. We can hardly comprehend the force of this portion of the charge, nor can we understand why a purchase made privately, if innocently made in good faith, would not protect the possessor as fully as though the purchase had been made publicly.

There is much conflict in the testimony in this case, and therefore it becomes highly important that the jury should have the law plainly and correctly given them, as a guide for their verdict.

The judgment of the District Court is therefore reversed, and the cause remanded.

*Reversed and remanded.*

---

LARCENY — EFFECT OF RECENT POSSESSION.

## People v. Noregea.

[48 Cal. 123.]

*In the Supreme Court of California, 1874.*

1. **On a Trial for Larceny,** the only evidence was, that respondent was found in possession of the stolen horse a few hours after it was stolen. *Held,* not sufficient to justify a conviction.
2. **On a Trial for Larceny,** evidence of the recent possession of stolen property is not of itself sufficient to justify a conviction.

Rhodes, J. The defendant was convicted of grand larceny for the stealing of a horse. The only evidence of defendant's guilt was, that the stolen horse was found in his possession a few hours after it was taken. *People* v. *Chambers,*[1] and *People* v. *Ah Ki,*[2] hold that the possession of stolen property is a circumstance to be considered by the jury, but it is not, of itself, sufficient to warrant a conviction. It is said by Greenleaf:[3] "It will be necessary for the prosecution to add to the proof of other circumstances indicative of guilt, in order to render the naked possession of a thing available towards a conviction."

The evidence discloses no circumstances of that character. The riding of the horse several miles beyond the point where he was first seen in possession of it is only his continued possession of it, and is not a further circumstance indicative of guilt. The leaving of the saddle with the inn-keeper does not tend to prove a larceny of the horse.

There may be an abundance of authority to sustain the point of the attorney-general, that the court erred in excluding evidence as to the defendant's confession, after the preliminary evidence as to its having been voluntary; but the point does not arise in the defendant's appeal.

Judgment reversed, and cause remanded for a new trial.

*Remittitur forthwith.*

Neither Mr. Chief Justice Wallace, nor Mr. Justice McKinstry expressed an opinion.

[1] 18 Cal. 382. [2] 20 *Id.* 178. [3] 3 Greenl. Ev., sec. 31.

## LARCENY—POSSESSION OF STOLEN PROPERTY.

## GALLOWAY *v.* STATE.

[41 Tex. 289.]

*In the Supreme Court of Texas, 1874.*

**Possession of a Stolen** pipe within a week or ten days after it was stolen, in connection with the other circumstances, *held*, insufficient to warrant a verdict of guilty.

The defendant was convicted at May term, 1873, for theft from a house of a pipe of the value of two dollars; the punishment fixed at two years in the penitentiary.

The prosecution proved by A. D. Stroud, that within twelve months next before the indictment, he lost his pipe; had laid it on the counter in his storehouse in Rusk County; that about half an hour afterwards he looked for the pipe, but could not find it; spoke of losing it to several persons at the time; several persons were in the store trading, passing in and out of the house. Witness did not see the defendant in or about the store on the day the pipe was stolen or lost; the pipe was taken without his knowledge or consent; was worth two dollars; he never saw it afterwards until it was brought to him by J. A. Poe, a week or ten days after the time he lost the pipe, when Poe brought it to witness.

Poe testified that defendant came into witness' family grocery a few days (less than a week) after he had heard Stroud had lost his pipe; that defendant was smoking a pipe he thought was Stroud's; witness offered to buy it; defendant said he would sell it; witness gave him a dollar's worth of cigars for it; defendant was smoking the pipe openly in the town of Henderson, walking up and down the streets; that Stroud, who had lost the pipe, was then doing business in the town of Henderson; defendant told witness first he "had found the pipe," but after talking awhile said he "had bought it of a negro, whose name he did not know;" defendant at the time was drunk; witness went to Stroud and gave him the pipe, and told him of whom he got it on the same day he got it from defendant.

No counsel for appellant.

*Brown*, for the State.

MOORE, A. J. The place and manner of the alleged theft; the character and value of the missing property supposed to be stolen; the facility with which it may have passed from one person to another without occasioning sufficient observation to enable appellant to prove or even remember the name of the person from whom he may have

gotten it; the slight value attached to it; the open manner in which he used and exhibited it in the immediate vicinity ofthe place where it was said to be stolen; the length of time which had elapsed after the pipe was missing until it was found in his possession, with his statement when asked how and where he got it, that he bought it from a negro, whose name he did not now remember, if not sufficient to rebut all presumption of guilt arising from the bare proof of possession of the stolen property, warrants at least such a well founded doubt of appellant's guilt, that the court below should have granted a new trial.

The judgment is reversed and the case remanded.

*Reversed and remanded.*

---

## LARCENY—POSSESSION OF STOLEN PROPERTY.

## GABLICK *v.* PEOPLE.

[40 Mich. 292.]

*In the Supreme Court of Michigan, 1879.*

**Mere Possession of** stolen property raises alone no presumption of the guilt of taking it.

Error to Berrien.

*Clapp & Fyfe*, for the plaintiff in errorr. Attorney-General *Otto Kirchner*, for the People, confessed error.

COOLEY, J. Plaintiff in error was convicted of the larceny of certain articles of clothing from a car of the Michigan Central Railroad Company. The larceny took place on or about the fourteenth day of September, 1877, while the car was in transit west from Jackson. The most important evidence supposed to connect plaintiff in error with the larceny, was several of the articles being found on premises occupied by him, and some of them in his bed. The finding took place in January, 1878. As to the articles found in the bed, it appeared that search was made for them in the house the day before without success, but on going a second time, the officer discovered them. To break the force of the evidence of this discovery, plaintiff in error called as a witness John Gablick, who had previously pleaded guilty of the same larceny, and he testified that he placed the articles where they were found after the first search was made, and that plaintiff in error had nothing to do with the larceny, or with the concealment of the goods. It also appeared from his evidence and that of others, that John Gablick occupied another part of the same house in which the things were found. This being the evidence, the court was requested to instruct

the jury that "the fact of possession of stolen property, standing alone and unconnected with any other circumstance, affords but slight presumption of guilt, for the real criminal may have artfully placed the property in the possession, or on the premises of an innocent person the better to conceal his own guilt." This request the court refused, but the jury were instructed that they must consider all the circumstances, and allow the evidence such weight as they believed it deserved.

We think the plaintiff in error was entitled to the instruction requested. It is perfectly true that the jury must judge of the proper weight of the evidence; but when evidence is laid before them which only indirectly tends to raise an inference of guilt, and the importance of which must depend altogether upon circumstances, it is the right of the respondent to have the jury instructed how these circumstances bear upon the presumption of guilt.

Possession of stolen property, if immediately subsequent to the larceny, may sometimes be almost conclusive of guilt;[1] but the presumption weakens with the time that has elapsed, and may scarcely arise at all if others besides the accused have had equal access with himself to the place where it is discovered. A jury may or may not attach importance to these circumstances; but as the law permits the inference of guilt to be drawn under some circumstances, and not under others, the jury should have some instruction how to deal with these circumstances when they are placed before them.

This is the only error we discovered in the record. The judgment is reversed, and a new trial ordered.

The other justices concurred.

---

## PRESUMPTION FROM POSSESSION OF RECENTLY STOLEN PROPERTY.

### State *v.* Hale.

[7 West Coast Rep. 141.]

*In the Supreme Court of Oregon, 1885.*

**The Presumption Raised** by the possession by the prisoner of recently stolen property is one of fact from which the jury may infer guilt. And it is error for the court to instruct them as a matter of law, to convict, upon such possession being unexplained.

Appeal from Umatilla County. The opinion states the facts.

*Wm. Ramsey*, for the appellant.

1 See Walker *v*. People, 38 Mich.

*Morton D. Clifford*, District-Attorney, and *W. H. Holmes*, for the respondent.

LORD, J. The defendant was indicted for the larceny of certain cattle, tried and convicted, and from the judgment of conviction brings this appeal to this court. There are numerous assignments of error, but after an attentive examination of them, we are satisfied that there is but one material error. The court instructed the jury that "when property recently stolen, is found in the possession of any person, such possession raises a presumption of guilt, and unless he shows that he came honestly into the possession of said property, the law will presume that he stole the same." The objection to this instruction is, that the weight to be given to fact or circumstance, is, under our statute, to be left to the jury; that the court is not authorized to pass upon the weight to be given to any circumstance, or to direct the jury in reference thereto. It is often stated that the recent possession of stolen property by the prisoner unexplained, raises the presumption that he is the thief, and that this presumption shifts the burden from the State to the prisoner. But the presumption raised by such circumstances is one of fact, from which the jury may infer guilt. There is no legal presumption of guilt from the recent possession of stolen property. In *Conkenright* v. *People*,[1] it was held error to instruct a jury upon a trial for larceny, that possession of stolen property soon after it is stolen, is of itself *prima facie* evidence of theft by the possessor and the burden of proving his possession to have been honest, is there thrown upon him. The question is undoubtedly a vexatious one; and upon it, as Mr. Bishop says, "all sorts of utterances are to be found in the books."[2] But we regard it as a question of fact and not of law, to be submitted to the jury and for them to determine whether the defendant is the guilty party or not. In *Curtis* v. *State*,[3] the court say: "The possession of such chattel as a horse, two months after the theft, is a circumstance to be considered by the jury, but it does not, even unexplained, raise a conclusive presumption of the prisoner's guilt. The jury may, and should, give it proper thought as evidence, but the matter is for them, and they are not bound in such case to convict the prisoner unless they are, upon the whole evidence, satisfied by his guilt." In *State* v. *Hooye*,[4] this whole subject and the authorities upon it, is ably and thoroughly reviewed, and the result there reached is in conformity with our views. We think the instruction was error. The judgment must be reversed and a new trial ordered.

[1] 35 Ill. 264.

[2] Bish. Cr. Pr., sec. 740.

[3] 6 Col.

[4] 50 N. H. 510.

## LARCENY — VOLUNTARY RETURN OF STOLEN PROPERTY.

## Allen *v.* State.

[12 Tex. (App.) 190.]

*In the Court of Appeals of Texas, 1882.*

**Mitigation of Penalty by Voluntary Return of the Stolen Property.** — The return of stolen property may be "voluntary" within the meaning of article 738 of the Penal Code, notwithstanding it was superinduced by the fear of detection and punishment as well as the spirit of repentance and restitution.

Appeal from the County Court of Williamson. Tried below before the Hon. George W. Glasscock, County Judge.

The indictment charged the appellant with the theft of five dollars, the property of Goodson Bryson, on December 9, 1881. The jury found him guilty, and assessed his punishment at imprisonment for one hour in the county jail. The material evidence appears in the opinion of this court. Appellant was a boy about sixteen years of age.

*Mackemson, Fisher & Price,* for the appellant.

*H. Chilton,* Assistant Attorney-General, for the State.

Hurt, J. The appellant was convicted of the theft of five dollars. The record presents but two questions deemed by us necessary to be passed upon in order to a proper disposition of the case: (1st) Were the confessions of the defendant admissible; and (2d) was the money voluntarily returned?

The following were the facts bearing upon these two questions: Mrs. Bessy Bryson, wife of the prosecutor, in response to the question, "If the five dollars was returned to her," answered, "Yes, it was returned to me that evening by the defendant, Earnest Allen; he brought it to me and said, 'Here is your money, Mrs. Bryson; this is all I got.'" * * * "The defendant was at my house about an hour before he brought the money back to me, and made a statement about it. I did not threaten him to make him confess. My little boy told him somebody had been in our house and robbed it; and defendant said, 'Is that so?' and I told him, 'yes,' and that we had evidence enough to find out who it was. I also told him, unless it was stopped, we would have to send for Esquire Ward and have the matter investigated. I did not threaten to have any one arrested, but said if the money was not brought back we would have to send for Ward and have the matter investigated. The defendant then told me he took the money from the house, and he went off and after a while came back and handed me the five dollars, and said, 'Here is your money, this is all I got, Mrs. Bryson; don't tell ma, for I would not have her to know

this for anything.' I told him I would not tell his mother, or any one else, if I could help it, and unless compelled to do so; and I did not tell her until she asked the question direct. The money had fresh dirt on it when he came back and handed it to me, as if it had been buried."

Were these confessions admissible? Upon this subject the Code of Criminal Procedure,[1] provides that "the confession of a defendant may be used in evidence against him, if it appear that the same was freely made, without compulsion or persuasion, under the rules hereinafter prescribed." "The confession must be freely made;" this, however, is modified by that which follows, viz,: "Without compulsion or persuasion." Here, if there was no compulsion or persuasion, in express terms or circumstantially, we would conclude that the confession was freely made. There was no persuasion in this case, nor was the defendant threatened, directly or indirectly. It is true we may infer that Mrs. Bryson suspected some person, and threatened an examination into the matter, but that her remarks pointed to the defendant is an inference not supported by the evidence. That the defendant, having taken back the money, believed that he was the suspected party, we have no doubt; but, it will never do to hold that, when the defendant believes that he is suspected and is in great danger of a prosecution, his confession is the result of compulsion. There should be some relation or connection between the forces used and the result, that is, the confession. In this case there was nothing said or done tending to compel the defendant to the confession, save his own knowledge of guilt and his belief that he had been discovered. The confession was admissible.

2d. Did the defendant voluntarily return the property? It may be thought that the conclusion reached on the first question settles this. This, however, does not follow. Under article 759, Penal Code, "If property taken under such circumstances as to constitute theft be voluntarily returned within a reasonable time, and before any prosecution is commenced therefor, the punishment shall be by fine not exceeding one thousand dollars."

The return must be before prosecution was commenced. This was the case. Was it voluntary? This is the question: If the return is caused by the fear that discovery has been made and a prosecution will be set on foot, would it be voluntary? Are the causes and motives inducing the return to govern? If so, of what character or quality must these be? Suppose fear of detection and punishment is the moving cause. Does it follow that the return is not voluntary? Admitting that it does, suppose that repentance and a desire for reparation, to-

[1] art. 749.

gether with fear of detection and punishment, all contribute the acting causes prompting the defendant to return the property; will he not be entitled to this generous provision of our code? This, we think, was precisely the position of defendant when he confessed that he took the money. The intention to return it was present; and, while it may be true that fear of punishment was a factor, taking all of the facts together and giving them a close examination, we believe the conclusion will be reached that there were other motives, besides fear of punishment, prompting defendant to restore the property.

The punishment assessed was imprisonment in the county jail. This punishment was not supported by the evidence, and the judgment is therefore reversed and the cause remanded.

*Reversed and remanded.*

---

VOLUNTARY RETURN OF STOLEN PROPERTY.

## BIRD *v.* STATE.

[16 Tex. (App.) 528.]

*In the Court of Appeals of Texas, 1884.*

1. **Voluntary Return of Stolen Property,** such as under the provisions of article 378 of the Penal Code will operate to reduce a theft from the grade of felony to misdemeanor, must be made under the following circumstances: 1. The return must be voluntary, that is, willingly made; not made under the influence of compulsion, fear of punishment or threats. If, however, it be made under the influence of repentance for the crime, and with the desire to make reparation to the injured owner, it will be voluntary, although it may also be influenced by fear of punishment. 2. It must be made within a reasonable time after the theft, and before prosecution for the theft has been commenced. 3. It must be an actual, not merely a constructive return of the property into the possession of the owner. 4. The property returned must be the identical property, unchanged and all of it, that was stolen.

2. **Case Stated.**—In this case the defendant drove the stolen animal about ten miles from its range, and attempted to sell it. Pending negotiations of sale, it was discovered by parties acquainted with it, when the party with whom the sale was being negotiated told the defendant to turn it loose, and that they would get it at another time. In a few days the owner told the defendant that all he wanted was the animal, and that if he would drive it back home, he, the owner, would not prosecute him, the defendant. Soon after this the owner found the animal on its accustomed range. *Held,* that under such circumstances the court should have given in charge the issue as to the voluntary return of the animal by the defendant; that, while not strictly a return of actual possession, it was such as was demanded by the owner, and therefore sufficient.

APPEAL from the District Court of Milam. Tried below before the HON. W. E. COLLARD.

The conviction was for the theft of one head of cattle, the property of Sam. McCassling, in Milam County, Texas, on the tenth day of De-

cember, 1883. The penalty awarded was a term of two years in the penitentiary.

J. B. Bryant was the first witness for the State. He testified in substance, that on the night of the tenth day of December, 1883, he got home from the town of Rogers and found the defendant and Granger Elliot in bed at his house. Next morning the defendant told witness that he had brought a steer to sell him, and that the steer was tied on the side of the road near by. Defendant, Elliot and witness started down the road to look at the animal. Witness saw that the animal was not fat enough for beef, declined to buy it, and told the boys to release it. The animal was a white and black pided steer, branded SAMY on the ribs. *En route* to the point where the steer was tied, the party saw Pinkney Bird, James Cook and another man looking at the steer. Witness and the two boys did not then go to the steer. It was then that the witness told the boys that they had better turn the steer loose, and they would get it some other time. The boys did release the steer.

Sam. McCasland testified, for the State, in substance, that he lived in Bell County, and owned a small stock of cattle in the SAMY brand. Among them was a two year old white and black pided steer. He learned that this steer had been seen by Pink. Bird and others tied to a tree near J. B. Bryant's in Milam County. He then went to defendant and told him that he had heard of his driving the steer to Jesse Bryant's. Defendant said: "Yes, I did drive one of your steers to Jesse Bryant's." Witness asked him why he did so. He replied that Bryant had promised him twelve dollars and a half to bring him a steer, and that the witness' steer was the first one he found. He told the witness that he and Granger Elliot drove the steer to Bryant's, tied it out over night, and started next morning with Bryant to see it, but saw Pink. Bird, Jim Cook and some one else looking at it, when Bryant told them they had better turn it loose and get it some other time. Defendant made these statements to witness voluntarily, without threat or persuasion. Witness afterwards told him that he only wanted the steer and that if he would drive it back, he would not prosecute, unless forced to do so by the grand jury. Bryant lived in Milam County, about ten miles from the steer's range. Witness never consented that the defendant, Elliot, or any one else, should drive the steer off. A few days after the interview with defendant, witness found his steer on its accustomed range. Witness' name was Sam. McCasland, but he was equally well and generally known as Sam. McCassling.

Pinkney Bird testified, for the State, that he saw the steer described tied to a tree on the road near J. B. Bryant's, on the morning of December 11, 1883. He saw Bryant, defendant and Elliot near it. De-

fendant turned the steer loose. Witness saw that animal again late that evening, about one hundred yards from where he saw it in the morning, feeding along in a hollow.

The motion for a new trial raised the issues considered in the opinion. The newly discovered evidence referred to in the last head-note of this report was to the effect that the witnesses L. G. and W. W. McDaniel would testify on another trial that, on the 25th day of December, 1883, they had a conversation with Sam McCasland; that in that conversation McCasland told them that he went to see the defendant about the alleged theft of the steer; that he told the defendant that he had heard that he, defendant, had driven off one of his steers; that he wanted him, defendant, to acknowledge that he did so, and bring the animal back, and that if he would do so he, McCasland, would not indict him, unless he was forced to do so by the grand jury, and that thereupon the defendant acknowledged that he drove the steer off, and promised to bring it back. The witnesses L. G. and W. W. McDaniel were called as witnesses of the State and placed under the rule, and had heard none of the evidence when they testified in the case. Since the trial they had heard that McCasland testified that defendant's confession or statement was made voluntary and without compulsion or persuasion, and it was only since the trial that they had informed defendant's counsel of their conversation with McCasland. The affidavits of L. G. and W. W. McDaniels were attached to the motion.

*R. Lyles* and *E. H. Lott*, for the appellant.

*J. H. Burts*, Assistant Attorney-General, for the State.

WILLSON, J. 1. Sam. McCassling, the alleged owner of the animal charged to have been stolen, was as well known by that name as by his true name, Sam. McCasland, and there was, therefore, no fatal variance between the name of the owner as alleged and the evidence of ownership.[1]

2. If property taken under such circumstances as to constitute theft be voluntarily returned within a reasonable time, and before any prosecution is commenced therefor, the offense is a misdemeanor, punishable by fine not exceeding one thousand dollars.[2] A return of stolen property, influenced by threat of prosecution for the theft, is not a voluntary return within the meaning of the statute.[3] Where a defendant had driven a stolen cow about thirty miles, and was overtaken in possession of the animal, and told that he must return her to her range, and he

1 Code Crim. Proc., art. 425; Rye *v.* State, 8 Tex. (App.) 163; Cotton *v.* State, 4 Tex. 260; Hart *v.* State, 38 Tex. 382; Bell *v.* State, 25 Tex. 574; Wells *v.* State, 4 Tex. (App.) 20.

2 Penal Code, art. 738.

3 Owen *v.* State, 44 Tex. 248.

drove her about ten miles back in the direction of where he had taken her from, and there left her, it was held that this was not a voluntary return within the meaning of the statute.[1] In *Grant* v. *State*,[2] this court said, referring to this provision of the Code, that "it never contemplated that a thief, caught in possession of property stolen by him, could reduce a felony to a misdemeanor by simply then offering to give up the stolen property or pay for it." In that case the defendant while he wsa caught in the act of skinning a hog he had stolen, and he then offered to return it to the owner or pay for it. In *Moore* v. *State*,[3] this court in discussing this subject, said: "To entitle the thief to the mitigated penalty for a voluntary return of the stolen property within a reasonaable time, the return must be actual, and demonstrating in itself a contrition for the act, and not a clandestine return and constructive redelivery of the property. The purpose of the statute is to extend the grace and favor of the law to such wrong-doers as promptly repent of their acts, and endeavor to make all the reparation in their power to the party injured. In such cases the law looks with mercy upon the penitent, and administers a modified punishment for its infraction. But when the thief fails in his purpose to realize from the stolen property, and, as in this case, releases the stolen animal, which, of its own motions, returns to its accustomed range, the law delivers the prisoner to justice, who sits blindfolded and inexorable, and sternly metes out the puishment affixed for the original transgression." In *Allen* v. *State*,[4] this court, in again treating upon this subject, said: "If the return is caused by fear that discovery has been made, and a prosecution will be set on foot, would it be voluntary? Are the causes and motives inducing the return to govern? If so, of what character or quality must they be? Suppose fear of detection and punishment is the moving cause. Does it follow that the return is not voluntary? Admitting that it does, suppose that repentance and a desire for reparation, together with fear of detection and punishment, all contribute the acting causes prompting the defendant to return the property, will he not be entitled to this generous provision of our Code!" It was held in that case that if the return of the property was actuated by repentance, in connection with a fear of proseution and punishment, it was nevertheless a voluntary return within the meaning of the law.

We deduce from the decisions upon this question, and from the statute itself, that a voluntary return of stolen property, within the

[1] Brill *v.* State, 1 Tex. (App.) 572.

[2] 2 Tex. (App.) 163.

[3] 8 Tex. (App.) 496.

[4] 12 Tex. (App.) 190.

meaning of the article of the code cited, must be under the following circumstances: —

1. It must be voluntary, that is, willingly made; not made under the influence of compulsion, threats, or fear of punishment. If, however, it be made under the influence of repentance for the crime, and with a desire to make reparation to the injured owner, it will be voluntary, although it may also be influenced by fear of punishment.

2. It must be made within reasonable time after the theft, and before prosecution for the theft has been commenced.

3. It must be an actual, and not merely a constructive, return of the property into the possession of the owner.

4. The property returned must be the identical property, unchanged, and all of it, that was stolen.

In this case defendant drove the animal from its range a distance of about ten miles, and, while endeavoring to sell it, was discovered by some persons who were acquainted with it, and thereupon defendant was told by the man to whom he was negotiating its sale to turn it loose, and they would get it again at some other time. Defendant turned the animal loose. In a few days thereafter, McCasland, the owner of the animal, told the defendant that all he wanted was the animal, and that if he, defendant, would drive it back home, he would not prosecute him. Soon after this, the animal was found by McCasland, in its accustomed range.

We are of the opinion that, under the peculiar facts of this case, the court should have submitted to the jury the issue as to a voluntary return of the animal by the defendant. We think there was evidence sufficient to demand instructions from the court upon this issue. If defendant did, in fact, return the animal within a reasonable time, and in such manner as to satisfy the owner thereof, and in accordance with the owner's directions, and if, in so doing, defendant was actuated by a feeling of penitence for his wrongful act, and a desire to make reparation therefor, we think he would be within thebenign operation of this merciful provision of our code. While such return would not be strictly into the actual possession of the owner, still, if it was such a return as the owner desired, and as he was satisfied with, we think it should be held sufficient. The learned judge did not charge upon this issue, nor did the defendant request him to do so, or except to the charge because of such omission; but the matter was called to the attention of the court in a motion for a new trial. We think a charge upon this issue was a part of the law of this case, and that the failure, to give it was such error as was calculated to injure the rights of the defendant, and is therefore reversible error.

We are also of the opinion that the court should have granted defendant a new trial upon the ground of newly discovered evidence. The evidence set out in the affidavits accompaying the motion was material to show that defendant's confession, which had been admitted in evidence against him on the trial, had been made under the influence of promises and persuasion, and therefore was not admissible. We think it was sufficiently shown that this evidence had been discovered since the trial, and that its not having been discovered sooner was not attributable to any want of diligence on the part of defendant. We think, also, that this evidence would probably change the result of the verdict on another trial. It would, perhaps, have the effect to exclude from the evidence the confession of the defendant, and should it have this effect there is no other inculpatory evidence against the defendant, so far as is disclosed by the record, except that of the witness Bryant, who was, unquestionably to our minds, an accomplice in the theft, and whose testimony is without corroboration, except by defendant's confession.

It appears from this record that defendant is a boy of tender years, about sixteen years of age, and that in the commission of this theft he was aided by another person, and also acted under the instructions of the witness Bryant, who was carrying on the butchering business, and to whom he had taken the animal to be used by Bryant as a beef, and for which Bryant had promised to pay the boy twelve dollars and fifty cents. It seems that this man Bryant has been permitted, in consideration perhaps of his own escape from just punishment, to testify against this boy, and thus destroy evidence which would perhaps cause him, instead of the defendant, to be incarcerated in the penitentiary for this crime.

Because of the errors we have mentioned, and because we believe that justice demands that the defendant should have another trial, the judgment is reversed and the cause is remanded.

*Reversed and remanded.*

---

## NOTES.

§ 483. **Larceny — Taking Necessary — Property Must be Removed.** — The property must be taken;[1] some asportation is necessary.[2] Turning a barrel of turpentine, which was standing on its head over on its side, is not a sufficient

[1] Anable *v.* Com., 24 Gratt. 583 (1873); R. *v.* Weekes, 10 Cox, 224 (1866); State *v.* Carpenter, 74 N. C. 232 (1876); R. *v.* Gardner, L. & C. 243 (1862); R. *v.* Walker, Dears. 280 (1854).

[2] People *v.* Murphy, 47 Cal. 103 (1873); State *v.* Hardy, Dudl. 236 (1838).

taking;[1] nor is shooting a cow and cutting off its ears a sufficient taking of the cow,[2] or coaxing a hog by bait.[3]

In *Wolf* v. *State*,[4] a witness "heard a gun fire in the woods and immediately afterwards heard a hog squeal; he saw the prisoner soon afterwards chasing the hog and pursued him; the prisoner chased the hog about one hundred yards and was in the act of striking it with his gun when witness came up and asked him what he was doing; he replied that he had shot a squirrel and hit the hog, and he wanted to see where the hog was shot." This was held not a sufficient *asportavit* of the hog to convict the prisoner of larceny.

In *State* v. *Seagler*,[5] the prisoners, after chasing and shooting a hog belonging to A., fled at his approach without taking it. It was held that the offense was not complete. "If the defendants," said EVANS, J., "after shooting the hog had voluntarily gone off and left it, I presume the act would have been nothing more than a trespass. Does the circumstance that they fled on the approach of the witness, Rogers, without removing the hog, make it felony, if the shooting was with the felonious intent to appropriate the hog to their own use? All the authorities seem to concur that the offense is not complete without some removal. In *Cherry's Case*;[6] the prisoner was indicted for stealing a wrapper and some pieces of linen cloth, and it appeared the linen was packed up in a wrapper, in the common form of a long square, which was laid lengthwise in a wagon. The prisoner set up the wrapper on one end, in the wagon, 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 this was no larceny, although his intention to steal was manifest; for the carrying away, in order to constitute felony, must be a removal of the goods from where they were, and the felon must, at least, for an instant, be in the entire possession of the goods. There are other cases in East, all illustrative of the same principle, that the offense is incomplete without some removal of the goods; and in this particular I think my instruction was wrong, and a new trial is ordered."

In *Hardeman* v. *State*,[7] it was said; "Black Hardeman was convicted of the theft of a steer, the property of Mrs. Jennie May. The evidence fails to show that the steer was ever in the possession of the defendant. To constitute theft there must be a fraudulent taking by some person. In this case the defendant did not take the animal, nor did Calvin Wear, to whom defendant sold the animal; and if Wear had taken the property, his taking would not have been fraudulent, but honest, he having bought and paid for it, and received the bill of sale for the steer. This steer, running on the range all the while was not taken fraudulently or otherwise by any person; hence there was no theft."

In *R.* v. *Lyon*,[8] the prisoner has been in the habit of buying and selling corn for his employers, and to apply to the purpose of payments for purchases made on their behalf as well moneys which he received on their account as moneys which he received from them for that purpose; he falsely entered the price of some corn which he had purchased and paid for as amounting to a larger rate by 6d a comb than it really did and retained the difference. It was held that this was not larceny. "This is no case of larceny," said WIGHTMAN, J., "as it

[1] State *v.* Jones, 65 N. C. 395 (1871).
[2] State *v.* Butler, 65 N. C. 309 (1871).
[3] Edmonds *v.* State, 70 Ala. 8 (1881).
[4] 41 Ala. 412 (1868).
[5] 1 Rich. 30 (1844).
[6] 2 East's P. C. 556.
[7] 12 Tex (App.) 207 (1882).
[8] 1 F. & F. 54 (1858).

was impossible to distinguish the moneys which the prisoner received of his employers from that which he received for them."

In *R.* v. *Frampton*,[1] A. assisted by B. had done work for the father of C. and C. told A. and B. that if they would bring a stamped receipt they should be paid. B. bought a stamp with the money of A. and they together went to C. and the blank stamp was given to C. to write a receipt on it. C. did so and as the stamp lay on C.'s desk, A. signed the receipt and B. witnessed it, but neither of them ever had the stamp in his possession after the receipt was written on it. C. under pretense of fetching his father's check-book, took away the receipt and would not pay the money it was given for. This was held no larceny. "The stamp," said WIGHTMAN, J., "was given by the creditor to the debtor for a special purpose, namely, to prepare the receipt; and it never was in the prosecutor's possession after the receipt was in a complete state."

In *R.* v. *Bird*,[2] 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. 11d, 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 1s, and refused to give her the 19s change. *Held*, that the prisoner could not be convicted upon this indictment of stealing 19s. COCKBURN, C. J., said: "The majority of the judges are of opinion that the prisoner was not properly convicted of stealing the 19s charged in the indictment, for she had not taken them from the prosecutrix, and could not therefore be convicted on this indictment. The majority of the judges do not say that she might not have been convicted on an indictment charging her with stealing the sovereign if the issue had been properly left to the jury. Upon the present indictment, however, she must be discharged."

In *R.* v. *Wadsworth*,[3] the prisoner was indicted for stealing a mare and a halter. George Muck, the prosecutor said: "I am a baker at Woolwich, the prisoner has been a commercial traveler. About six months ago he intrusted a mare to me to keep for him. I had the privilege of using it for the keep. I afterwards saw the prisoner in company with Swift and Sayer. I had three or four meetings with them about accepting a bill of exchange, at the latter end of July. The prisoner owed Swift some money, and they drew a bill and asked me to accept it. I refused three or four times because the mare was put up to a raffle. It was in my possession at the time. At last I accepted the bill, and they asked me to take an I. O. U. for the amount of the bill. I said no; an I. O. U. was of no use, and the prisoner then said I should have the mare until the bill was due, if I accepted it for Swift. It was agreed that the mare should be my property until the bill was due, and on that I accepted the bill. The words Wadsworth used were, "You won't lose much, you have got the mare." I would not have done it upon anything else. He went to the place where the raffle was to be and stopped it. I had afterwards, on the second of this month, to meet the bill. I have it not with me now. I had it yesterday; I have sent down to Woolwich for it."

*Sleigh* submitted that even supposing it to be proved that the prisoner did take the mare, yet there was no case to go to the jury, as he had never parted with his property in it.

1 2 C. & K. 48 (1846).
2 12 Cox, 257.
3 10 Cox, 557 (1867).

*Daly* contended that it was not necessary that the property should be entirely divested. If the mare was lodged as a security, and got back by a contrivance, that would amount to a larceny. He referred to *Regina* v. *Wilkinson*,[1] and *Regina* v. *Bramley*.[2]

The recorder did not stop the case on this objection; but at its close, the bill not being produced, he was of opinion that without it there was no case, therefore directed a verdict of *Not guilty.*

§ 484. —— **Goods must be Taken from Owner — Changing Piles of Ore or Manufactured Property.** — Thus for miners to remove ore from the heaps of other miners to their own, in order to increase their wages, the ore still remaining in the possession of the owner, is not larceny. And the same has been held as to manufactured gloves.[3] In *R.* v. *Webb & Moyle*,[4] the indictment charged them with stealing one hundred pounds weight of copper ore, the property of Stephen Davey and others. It appeared in evidence that Stephen Davey and others were the adventurers in a mine called the Consolidated Mine. The prisoners and two others were tributers in their mine, but not adventurers. The prosecutors of the indictment were Cornish, and three others, who were also tributers in the mine, but not adventurers. It appeared that tributers (generally in companies of four) take from the adventurers a certain number of yards in the mine, called a pitch, from which they dig out ore, and throw into a heap or pile in some level, whence they convey it along the level to a shaft, and so up to the surface. There it is taken by the adventurers, and the tributers do not interfere further. The tributers are paid according to their agreement, so much in the pound on the selling price of the ore; where it is very good they receive a smaller sum than where if is inferior, because the quantity of labor (which is what they contribute) produces a more valuable commodity in the one case than the other. The prosecutor's pitch contained better ore than the prisoner's. The prosecutors received £2 4d in the pound from the adventurers; the prisoners 5s 6d.

It was proved satisfactorily that the prisoner had taken a large quantity of ore from the prosecutors' pile and added it to their own.

*Halcomb*, for the prisoners, contended, (1) that the property was not correctly laid; for that whether the ore belonged partly to the adventurers and partly to the tributers (as the captain of the mine had stated in his evidence), or to the adventurers only, yet they were not partners, or a joint stock company, or joint tenants, or tenants in common, within the Statute 7 George IV.[5]

The learned judge thought there was nothing in this objection; but as he reserved the second point, he mentioned this also. 2. That by taking ore out of one pile and putting it in another, the prisoners did not steal from the adventurers, for both piles remain in the possession of the adventurers, if the tributers be but servants; and if the tributers be tenants in common, still as both piles were intended to come, and ultimately would come, into the hands of the adventurers, there could be no stealing from them.

*Rogers*, for the prosecutors, answered, that the adventurers were cheated, for they would have to pay 5s 6d in the pound on the ore removed to the prisoners' pile, whereas if it had remained in the prosecutors' pile, they would pay

[1] R. & R. 470.
[2] 8 Cox, C. C. 468.
[3] R. *v.* Pool, D. & B. 345 (1857).
[4] 1 Moody 431.
[5] ch. 64, sec. 14.

only 2s 4d in the pound; and besides that the unauthorized removal of the ore from the prosecutors' pile by the prisoners, with a fraudulent intention to appropriate it to their own benefit, constituted a larceny the moment it was removed, which could not be cured by returning it in any way to the adventurers.

The learned judge was of opinion that the property was correctly laid, and a larceny proved; but reserved the latter point, and requested the opinion of the judges on both points.

In Easter Term 1835, this case was considered by Lord DENMAN, C. J., TINDAL, C. J., PARK J., LITTLEDALE, J., GASSELEE, J., BOSANQUET, J., ALDERSON, B., WILILAMS, J., PATTESON. J., and they held the conviction wrong; PATTESON, J., *dissentientie*.[1]

§ 485. —— **Purchasing Property From Thief** — The purchasing of property from a thief with notice, is not a taking.[2]

§ 486. —— **Property Must be Converted by Prisoner.** — An agreement by the bearer of goods to accept a certain sum offered for them, is not such a conversion, if the party who makes the offer does not intend to purchase unless his suspicions as to the honesty and right of the vendor to sell are removed.[3]

§ 487. —— **Must be Against the Will of the Owner — Not Larceny where Owner Intends to Part with Property.** — It is not larceny where the owner intends to part with the property.[4]

"If the owner of the goods alleged to have been stolen parts with both the possession and the title to the goods to the alleged thief, then neither the taking nor the conversion is felonious. It can but amount to a fraud."[5]

As where goods are obtained by purchase through fraud.[6]

As where A. induced B. to loan him $50 upon depositing with him certain spurious pieces of gold coin, and which he represented to be such, the intention being that he should use the money to buy liquors, which he did not do, but absconded with it.[7]

Where a person employed by another is intrusted with a horse and wagon, and appropriates them to his own use, this not larceny but embezzlement.[8]

So if a servant appropriates to his own use bank bills drawn from a bank on a check given by his master.[9]

So where money is given to a person to obtain change for it and he converts it to his own use, this is not larceny.[10]

1 The conviction was held wrong on the second point.

2 McAfee *v.* State, 14 Tex. (App.) 668 (1883).

3 R. *v.* Brooks, 8 C. & P. 296 (1837).

4 R. *v.* Barnes, 1 Den. & P. 65 (1850); Lewer *v.* Com. 15 S. & R. 93 (1826); Felter *v.* State, 9 Yerg. 397 (1836); White *v.* State, 20 Wis. 236 (1866); Wilson *v.* State, 1 Port. 118 (1835); R. *v.* Wilson, 8 C. & P. 111 (1837); Miller *v.* Com., 78 Ky. 15 (1879); R. *v.* Barnes, 5 Cox, 113 (1850); R. *v.* Copeland, 5 Cox, 299 (1851); R. *v.* Brackett, 4 Cox, 274 (1850); R. *v.* Jacobs, 12 Cox, 151 (1872); R. *v.* Goodenough, 6 Cox, 209 (1853); R. *v.* Williams, 7 Cox, 355 (1857); R. *v.* Essex, 7 Cox, 384 (1857); R. *v.* Garrett, 8 Cox, 386 (1860); R. *v.* North, 8 Cox, 433 (1861); R. *v.* Nicholson, 2 Leach, 698 (1794); R. *v.* Parkes, 2 Leach, 703 (1794); R. *v.* Palmer, 2 Leach, 790 (1795); R. *v.* Jackson, 1 Moo. 119 (1826); R. *v.* Smith, 1 Moo. 473 (1836).

5 Welsh *v.* People, 17 Ill. 339 (1855); Stinson *v.* People, 43 Ill. 397 (1867).

6 Ross *v.* People, 5 Hill, 294 (1843).

7 Kelly *v.* People, 6 Hun, 509 (1876).

8 Ennis *v.* State, 3 G. Greene, 67 (1851).

9 Com. *v.* King, 9 Cush. 284 (1852).

10 R. *v.* Reynolds, 2 Cox. 170 (1847).

In *R.* v. *Savage*,[1] A. went B.'s shop and asked for shawls for Mrs. D. to look at. B. gave her five, of which she pawned two, and three were found at her lodgings. Mrs. D. was not called as a witness. It was held that A. was not guilty of larceny — the possession of the goods being in her.

In *R.* v. *Riley*,[2] the prosecutor having been decoyed into a tavern by the prisoner was induced to lend him money for the purpose of paying certain losses which he appeared to the incurring at a game of cards with one whom the jury found to be a confederate. The prisoner stated that he was abont to receive other funds, and would then repay the prosecutor. This was held not larceny.

In *R.* v. *Levy*,[3] the prisoner was indicted for stealing a watch. It appeared that the prosecutor and the prisoner had met together at a public house; when the prosecutor said to the prisoner: "My watch wants repairing, I wish you would take it and repair it." The prisoner took the watch, promising to return it in two or three days. A week afterwards, the prosecutor asked the prisoner for the watch, when the latter said, it was not ready; and when the prosecutor saw him again, he said he had sold it. To this the prosecutor replied: "I will have my watch or the money." The prisoner said: "I will give you either the watch or the money to-morrow.

*Smith*, for the prisoner, submitted that this was no felony: — the prosecutor had delivered the watch to the prisoner to be repaired, and on learning that it had been sold, had acquiesced in the sale.

VAUGHN, B. I think it would be too much to construe this to be a felony. It would have been different if the prisoner had obtained the watch by trick or fraud. Here it was voluntarily delivered to him.

*Verdict, not guilty.*

In *R.* v. *Harvey*,[4] the prosecutor had sent his servant with his horse to Harlowbush fair, in order to sell it. The prisoner met the prosecutor, to whom he was personally known. "I hear" says the prisoner, "you have a horse to sell. I think he will suit my purpose; and if you will let me have him at a bargain, I will buy him." The prisoner and the prosecutor walked together into the fair; and upon a view of the horse, the prosecutor said to the prisoner: "You shall have the horse for eight pounds;" and calling to his servant he ordered him to deliver the horse to the prisoner. The prisoner immediately mounted the horse, saying to the prosecutor that he would return immediately and pay him. The prosecutor replied: "Very well, very well." The prisoner rode away with the horse and never returned.

THE COURT. It is impossible by any construction whatsoever to make this case a felony. The case in Kelying's Reports, where a man rides away with a horse which he had obtained on pretense of trying its pace, was conditional delivery. *Major Semple's Case*, which is the most recent of the kind, and included in it a consideration. *King* v. *Pear*, was a delivery for a special purpose, or rather a contract of unlimited duration. But in the present case the delivery was unconditional, and the contract was completed. It was a sale and the possession as well as the property was entirely parted with. The prisoner has defrauded the prosecutor of the price of the horse, but not of the horse itself; and the only remedy the prosecutor has is by action to recover the eight pounds but the prisoner can not be indicted for a felony.

*And the prisoner was accordingly discharged.*

[1] 5 C. & P. 143 (1831).

[2] 1 Cox, 98 (1844).

[3] 4 C. & P. 241 (1830).

[4] 2 Leach, 523 (1788).

In *R. Adams*,[1] the prisoner was indicted for stealing a hat, the property in one count of Robert Beer, in another of John Paul. The substance of the evidence was, that the prisoner bought a hat of Robert Beer, a hat maker at Ilminster. That on the 18th of January he called for it, and was told it would be got ready for him in half an hour, but he could not have it without paying for it. While he remained with Beer, Beer showed him a hat which he had made for one John Paul; the prisoner said he lived next door to him, and asked when Paul was to come for his hat, and was told that he was to come that afternoon in half an hour or an hour. He then went away, saying he would send his brother's wife for his own hat. Soon after he went, he met a boy to whom he was not known, the prisoner asked the boy if he was going to Ilminster, and being told he was going thither, he asked him if he knew Robert Beer there, telling him that John Paul had sent him to Beer's for his hat, but added that as he, the prisoner, owed Beer for a hat which he had not money to pay for, he did not like to go himself, and, therefore, desired the boy (promising him something for his trouble), to take the message from Paul and bring Paul's hat to him, the prisoner; he also told him that Paul himself, whom he described by his person and a peculiarity of dress, might perhaps be at Beer's, and if he was the boy was not to go in. The prisoner accompanied him part the way and then the boy proceeded to Beer's, where he delivered his message, and received the hat, and after carrying it part of the way for the prisoner by his desire, the prisoner received it from him, saying he would take it himself to Paul. The fraud was discovered on Paul's calling for his hat at Beer's about half an hour after the boy had left the place; and the prisoner was found with the hat in his possession and apprehended. From these and other circumstances, the falsity of the prisoner's representation and his fraudulent purpose were sufficiently established; but it was objected to on the part of the prisoner, that the offense was not larceny, and that the indictment should have been upon the statute for obtaining goods upon false pretenses.

The prisoner was convicted, but the learned judge forbore to pass sentence, reserving the question for the opinion of the judges. In Easter term, 25th of April, 1812, all the judges were present (except Lord ELLENBOROUGH, MANSFIELD, C. J., and LAWRENCE, J.), when they held that the conviction was wrong, that it was not larceny, but obtaining goods under a false pretense.

§ 488. —— **Larceny — Property Parted with through a Fraud.** — Nor is it larceny, though the property be parted with through a fraud.[2] In *R.* v. *Adams, and Hayden*,[3] the prisoners were indicted for stealing a quantity of hams and bacon. It was proved that the prisoner, Adams, came to the shop of one Aston, and said he had come from Mr. Barker for some hams and bacon, and at the time produced a note in the following terms: —

"Have the goodness to give the bearer ten good thick sides of bacon, and four good showy hams at the lowest price. I shall be in town on Thursday next and will call and pay you.

"Yours respectfully,

"T. PARKER."

Aston, believing the note to be the genuine note of Mr. Parker, who occasionally dealt with him, delivered the hams to Adams, and they were afterwards

[1] R. *v.* R. 224 (1812).

[2] Felter *v.* State, 9 Yerg. 397 (1846); Kellogg *v.* State, 26 Ohio St. 15.

[3] 1 Den. 38 (1844).

received and sold by Haden, under circumstances which showed sufficiently a guilty knowledge on his part.

It was objected on behalf of the prisoners, on the authority of *Atkinson's Case*,[1] that the offense did not amount to larceny, and the learned judge was of that opinion. The following cases were referred to on the other side: *Rex.* v. *Campbell*,[2] *Rex* v. *Gilbert*,[3] *Rex.* v. *Pratt*,[4] *Hench's Case*[5] and a case was cited in which it was said, that Baron Parke had held such a case to amount to larceny.

The learned judge, therefore, left the case to the jury, who found both the prisoners guilty, but the learned judge forbore to pass sentence. There was also a separate indictment against Adams for uttering the forged order, on which he received sentence. The opinion of the judges was requested, whether the offense of Adams was a larceny.

November 16th, 1844. This case was considered by all the judges, except PATTESON, J., ALDERSON, B., and EARLE, J. They were all of opinion that the conviction was wrong.

In *Zink* v. *People*,[6] the prisoner by false representation and with a design to cheat the complainant, induced him to ship goods to him, with the *indicia* of ownership, on the agreement that the prisoner was to advance the freight, sell the goods, and account for the proceeds less the freight. The prisoner sold the goods and converted the proceeds. This was held not larceny.

Where the defendant went to B., who had sold cigars to C., and pretended that C. had sent for a box of them, whereupon he received the cigars and appropriated them to his own use, the court held that he was not guilty of larceny.[7]

§ 489. —— **Intent to Steal Essential.**—To constitute larceny an intent to steal is necessary,[8] and must be found by the jury.[9]

In *R.* v. *Birdseye*,[10] the prisoner was indicted for stealing some pickeled pork. some knives and a loaf of bread. It appeared that he entered the shop of the prosecutor and ran away with the pork. In about two minutes he returned, replaced the pork in a bowl which contained the knives, and took away the whole together, threatening destruction to any one who followed him. In about half an hour after, he came back to the prosecutor's shop and took away the loaf, The prisoner was acquitted, Mr. Justice LITTLEDALE telling the jury that the felonious intent was not sufficiently made out.

In *Blunt v. Commonwealth*,[11] the defendant was convicted of the larceny of a watch. On the trial the prisoner's counsel asked the instruction that if the jury should find that the prisoner had bargained for the watch with Johnson's clerk, who delivered it to him on a promise to him that he would pay for it immediately, and that the prisoner carried the watch away with him and failed to pay for it, in such case he was not guilty. But the court refused to give this instruction, and charged the jury that if they found that the prisoner had made a bargain with Johnson's clerk for the watch, in pursuance of which the

1 2 Russ. p. 117 (2d. ed.); 3d. ed. p. 34.
2 Moo. C. C. 179.
3 *Id.* 155.
4 *Id.* 250.
5 2 Russ. 120 (2d. ed.) (b), 3d ed., p. 41.
6 77 N. Y. 114 (1879).
7 United States *v.* Robertson, 5 Cranch C. C. 38.
8 Witt *v.* State, 9 Mo. 761 (1846); State *v.* Newman, 9 Nev. 48 (1873).
9 R. *v.* Deering, 11 Cox, 298 (1869).
10 4 C. & P. 388 (1830).
11 4 Leigh, 689; 26 Am. Dec. 341 (1834).

watch was delivered upon his promise to pay the price immediately, intending that the prisoner might take the watch away and return immediately and pay for it, then he was not guilty of larceny; but if the jury should find that the prisoner obtained the watch by a false and fraudulent pretense of buying it for cash and then carried it away, without the consent or knowledge of the owner's clerk, then he was guilty of larceny. The prisoner excepted.

MAY, J., delivered the resolutions of the court. 1. That the instructions asked by the prisoner's counsel was properly refused; because if the prisoner acquired possession of the watch in the manner therein stated, with a felonious intent at the time to carry it away, and appropriate it to his own use, without paying for it, he may have been guilty of larceny in so doing. 2. That the prisoner's counsel having applied to the court for an instruction on the law, and the court having refused to give it in the precise form in which it was asked, it was correct that the court should give one with such modification as, in its opinion, was legal and proper. For the court may at all times instruct the jury on any question of law arising in a cause if, in its opinion, justice shall require such interposition. 3. That the instruction, however, which was given, was erroneous in this that although the prisoner may have obtained possession of the watch in the fraudulent manner indicated in the latter part of the instruction; yet unless he so obtained it and carried it away with a felonious intent at the time, he was not guilty of larceny.

The judgment is therefore reversed and the cause sent back to the Circuit Superior Court of Henrico for a new trial to be had; in which trial if any instruction shall be moved for on the same subject, or the evidence shall require it, the court is directed to instruct the jury, that if they shall find from the evidence, that the prisoner with a felonious intent obtained possession of the watch by false and fraudulent pretenses, and afterwards carried away the same without the consent of the owner or his clerk, then the prisoner is guilty of larceny.

§ 490. —— **Goods Must be Taken with Intent to Appropriate them to Prisoner's Own Use.** — In *R.* v. *Van Muyen*,[1] the prisoner was tried on an indictment for stealing linen, geneva and other articles, in a vessel called the Paulina Maria, in the port of Weymouth, a port of entry and discharge, contrary to the statute. The goods, specified in the indictment composed part of the cargo of the Paulina Maria, a Prussian ship of which the prisoner, a native of the United Provinces, but a subject of Prussia, was master, and which had been captured by a British ship, called the Diana. The first count of the indictment alleged the property of the goods to be in the owners of the Diana; the second count, in the master of the Diana; the third count, in the agents of the Diana; the fourth count, in one Saxton, who had been appointed the ship, keeper for the prize; and the fifth count, in the king.

The Paulina Maria was taken under Prussian colors on the 6th of October, 1805, betwixt which day and the 9th of October she was brought into Weymouth. She was taken on suspicion of being Dutch property. The Diana had letters of marque and reprizal granted to her on the eight of October, but they were not against Prussian vessels. On the 8th of November, 1805, there was a decree in the Court of Admiralty for restitution; on the 6th of April, 1806, an embargo was laid on Prussian vessels; on the 14th of May, following, His Ma-

[1] R. & R. 118 (1806).

jesty's proclamation issued for reprizals against Prussia, and on the 16th of of July, the Court of Admiralty rescinded the decree of restitution of the 8th of November, pronounced the vessel and cargo at the time of the capture to have belonged to Prussian owners, and condemned them as prize to the king taken before the commencement of the hostilities against Prussia. It appeared that the prisoner, who had lodgings in Weymouth, went sometimes on board the prize, and was seen there on the 10th or 11th of July. About nine of the crew and two of the custom-house officers were kept on board; the cargo was kept below the main hatches, which were locked up and Saxton, who on the 10th of October, 1805, was appointed the ship-keeper, kept the keys of the hatches. Betwixt the 10th and 11th and the 16th of July, the property in the indictment was conveyed away from the ship, some violence having been used in breaking a bulk-head to get at part of it, and the loss was discovered on the 15th, on which day the prisoner had purchased two trunks, and on the same day had sent the trunks to a carrier to be forwarded to London, the direction being of the prisoner's handwriting. On the 15th some sea chests directed in the same manner had also been sent by the prisoner to the same carrier. The chests and trunks were forwarded to Dorchester, to the warehouse of the London carrier there on the 15th and on the 16th, on which latter day a search was made at the carrier's warehouse at Dorchester, and great part of the stolen property was found in the trunks and chests; and some Russian colors, which the prisoner on his apprehension said he had taken from the ship, were also found on searching his lodgings at Dorchester. The prisoner was found guilty; but upon a doubt whether his regaining the possession in the manner above described, of the goods, which had belonged to his owners, and had been entrusted to his care as master of the vessel, could be considered as a larceny, CHAMBRE, J., forbore to pass sentence, and reserved the point for the opinion of the judges.

At a meeting of all the judges (except MANSFIELD, C. J., and HEATH, J.), in Michaelmas term, the 15th of November, 1806, the majority of them seemed to think that if the prisoner had taken the goods for the purpose of converting them to his own private use, it would have been larceny, but not otherwise. And there was no evidence to show whether he took them for his own benefit, or for his owners. The judges did not come to any formal decision on the point, and no judgment was given; but it was agreed to be proper that the prisoner should be recommended for a free pardon.

§ 491. —— **Open Taking.** — Therefore an open taking negatives the idea of an intent to steal.[1]

§ 492. **Intent to Use and Return Property.** — A party taking property intending to use and return it is not guilty of larceny.[2]

§ 493. —— **Taking Horse with Intent to Return it.** — In *Humphrey* v. *State*,[3] the evidence tended to show that the prisoner took a horse intending to borrow it; that he turned it loose, after riding it some distance, and headed it toward

[1] Stuart *v.* People, 73 Ill. 20 (1874); Watkins *v.* State, 60 Miss. 323 (1882); McDaniel *v.* State, 33 Tex. 420 (1870); Littlejohn *v.* State, 59 Miss. 273 (1881).

[2] Com. *v.* Wilson, 1 Phila. 80 (1850); State *v.* South, 28 N. J. (L.) 28 (1859); State *v.* Self, 1 Bay, 242 (1792); Littlejohn *v.* State, 59 Miss. 273 (1881).

[3] 63 Ind. 223.

home, thinking it would return thither, and nothing appeared to indicate any felonious intention in the taking of the horse. It was held that a conviction of larceny could not be sustained. So in an English case it was held not larceny to take a horse and ride him forty miles, and then leave him, there being no attempt to sell or dispose of him.[1]

In *Berg* v. *State*,[2] it was held that the fraudulent appropriation was not proved, WINKLER, J., saying: "Theft is the fraudulent taking of corporeal personal property, belonging to another, from his possession, or from the possession of some person holding the same for him, without his consent, with intent to deprive the owner of the value of the same, and to appropriate it to the use or benefit of the person taking."

"The general rule is that 'the taking must be wrongful, so that, if the property came into the possession of the person accused of the theft by lawful means, the subsequent appropriation of it is not theft.'

"But if the taking, though originally lawful, was obtained by any false pretext, or with an intent to deprive the owner of the value thereof, and appropriate the property to the use and benefit of the person taking, and the same is so appropriated, the offense of theft is complete.'[4]

"Where the taking is originally lawful, the article of the code quoted above requires, not only that the possession be obtained by means of some false pretext, or with an intent to deprive the owner of the value thereof, and appropriate the property to the use and benefit of the person taking, but also that, in order to render the offense complete, the property must be so appropriated, as set out in the article quoted.

"In order to a proper understanding of this opinion, the following extract is taken from the testimony of the prosecuting witness. He says: "I know the defendant; he came to my stable on the morning of the 23d of last August (1875), and said he wanted to hire a horse to ride to the San Pedro Springs, and would be gone from an hour to an hour and a half. I had the bay mare saddled up for him, and he rode off. Before leaving, he asked me if it made any difference if he paid me then or on his return. I told him that it made no difference. He had a bundle in his hand, and asked if he could leave it until his return. I told him he could; he left the bundle on my desk. I waited for the defendant to return until about noon. I then went to see if I could find him or hear anything of him. I found he had not been to the San Pedro Springs at all that day. I could not find him anywhere. I did not see him again until after he was arrested and brought back from Austin. In eight or ten days after the defendant got the mare, I received a telegram from New Braunfels, from a friend of mine, stating that my mare was there, in the stable of a boarding-house or hotel. I sent for the mare and recovered her. The defendant had left New Braunfels and gone on to Austin. The mare is now in my possession. * * * I never authorized the defendant to ride the mare to New Braunfels, or any other place than San Pedro Springs. This mare was worth seventy-five dollars. * * * All this transaction took place in this (Bexar) county, in August of the present year" (1875).

"One other witness testified in the case, who corroborated the statements of the prosecuting witness as to the circumstances under which the accused ob-

[1] R. *v.* Addis, 1 Cox, 78 (1844). And see Johnson *v.* State, 36 Tex. 375 (1871).

[2] 2 Tex. (App.) 148 (1877).

[3] Penal Code, art. 745; Pasc. Dig., art. 2381.

[4] Penal Code, art. 748; Pasc. Dig., art. 2381.

tained the mare, and the purpose for which he said he wanted a horse — namely, to ride to San Pedro Springs. This is substantially the testimony, so far as it relates to the connection of the accused with the mare, and the circumstances under which he obtained possession of her.

"One of the grounds of the motion for a new trial is set out in the motion, as follows: 'Because the verdict of the jury was contrary to the law and contrary to the evidence.'

"If one person hire or borrow of another a horse or other animal to ride, the possession acquired in such a manner would be a lawful possession; but if such possession was obtained by the use of any false pretext, by which the owner was misled or deceived, and induced to part with the possession of his property, and with the intent mentioned, this would not amount to theft unless the taker of the property thus acquired would go one step further, and make an appropriation of the property so taken to the taker's use and benefit, which might be done in various ways known to the law, so as to deprive the owner of its value.

"In the present case, whilst the evidence shows that the accused obtained the possession of the mare under the false pretext of wishing to ride to the San Pedro Springs, and that he did not go to the place mentioned, but instead went to another and different place, and to a greater distance from the place where he obtained the animal, and from which the jury might well have found that, either at the time or soon after he obtained possession, he intended to fraudulently appropriate the property to his own use, and thus deprive the owner of its value, still, the possession having been obtained with the consent of the owner, he can not legally be convicted of the theft of the mare, for the reason that the evidence does not show an appropriation of the property, which is an indispensable ingredient of the offense of theft of property, the possession of which is thus acquired.

"Interpreting the intentions of the accused by his acts and conduct in relation to the animal in question, the proof, we think, tends to show an intention to ride to a different place than the one mentioned when he hired the mare rather than an intent to appropriate the property to his own use, or to permanently deprive the owner of its value — to steal a ride rather than to steal the animal. There is no proof that an appropriation, in contemplation of law, was made of the property, nor proof of any fact or circumstance which would have authorized the jury to infer that such appropriation was made.

"The case would, doubtless, have been different if the party had been taken with the property in his possession, and conveying it in a different direction or to a greater distance, than was made known to the owner at the time he parted with the possession, as, in that event, the jury might well have inferred from the conduct of the accused an intent to deprive the owner of his property or its value, and have interpreted his acts as an appropriation; but, when it is shown that he had parted with the property under such circumstances as tend to show an absence of an appropriation, the verdict was contrary to the law and the evidence. We hold, therefore, that the court erred in refusing a new trial, and for this error the judgment must be reversed.

"On the trial below, an instruction was asked, by the counsel for the accused, to be given to the jury, which embraced a correct principle of law applicable to the case, and which was refused by the court. In this we find no error, for the reason that the substance of the charge asked and refused, was given in the

main charge of the court. In view of another trial, however, and the peculiar facts of this particular case, should the evidence still be the same, the court might well give more prominence in its charge to the subject of an appropriation of the property, which is, we think, the vital point in the case.

"Counsel for the appellant insist, in argument, that the indictment in the case is sufficient to support a conviction, under the peculiar circumstances of the case, as developed by the evidence, and whilst it is conceded that it would be sufficient to charge an ordinary theft, yet, inasmuch as the proof shows the original taking to have been lawful, and could only have become criminal on account of the intention and subsequent acts of the accused, the indictment should have stated the facts as they existed; and, in support of this proposition, we are referred to the case of *Marshall* v. *State*.[1] In reply to this position, we deem it sufficient to say that in more recent decisions, the ruling in *Marshall's Case*, has not been followed, either by the Supreme Court or by this court. We regard the law as being settled against the position contended for. It is sufficient for the indictment to charge theft in the usual form, and under such an indictment proof could be admitted of a fraudulent appropriation of property, the possession of which had been lawfully acquired, but under circumstances otherwise amounting to theft. The subject is one of proof, not of pleading. See *Maddox* v. *State*,[2] and authorities there cited.

"For reasons above stated, the judgment is reversed and the cause remanded

"*Reversed and remanded.*"

§ 494. —— **Intent to Steal Essential — Other Motives — Alarm.** — In *Hadley's Case*,[3] the prisoner, intending to steal fowls, broke open a hen house in the night, but being detected, fled, carrying away the padlock in his hand. It was held that if he carried it away from fear or alarm, or any other motive except to steal, he could not be guilty of the larceny of the padlock.

§ 495. —— **Aiding to Escape.** — So a person stealing other property and taking a horse, not to keep it, but to aid his escape, is not guilty of stealing the horse.[4]

In *State* v. *York*,[5] an indentured servant, to escape from his master, mounted a horse which he found hitched on the road, and after riding him to the nearest town, abandoned him. This was held not larceny.

§ 496. —— **Taking in a Joke.** — In *Devine* v. *People*,[6] the prisoner was drinking in A.'s saloon, when one of the party gave a dollar bill to the bartender, who gave back the change and put the bill in the money drawer, which was left open. While the bartender was stooping down to get a bottle from under the counter, the prisoner reached over and took the bill from the drawer. He made no attempt to secrete it, but at once released it with the remark that it was done in fun. This was held no larceny. "The defendant," said the court, "on the trial swore that he took the bill in fun, and all the circumstances surrounding the act tend to support his assertion. Similar acts of taking money or small articles of property from associates in joke situated as these persons were at a saloon counter on a drinking bout, are of almost daily occur-

[1] 31 Tex. 471.

[2] 41 Tex. 206.

[3] 5 City Hall Rec. 8 (1820).

[4] R. *v.* Crump, 1 C. & P. 658 (1825).

[5] 5 Harr. 473 (1851).

[6] 20 Hun, 98 (1880).

rence. Such conduct is silly, and frequently leads to altercation, but it falls far short of larceny in the absence of all proof of secret action, or of evidence tending clearly to show an intent to deprive the owner of his property."

§ 497. —— **Intent to Induce Criminal Connection.** — In *R.* v. *Dickinson*,[1] the prisoner was indicted for stealing a straw bonnet and some other articles of female apparel. It appeared that he had entered the house where the things were in the night, through a window which had been left open, and took the things which belonged to a very young girl whom he had seduced, and carried them to a hay mow of his own where he and the girl had twice before been. The jury thought the prisoner's object was to induce the girl to go again to the hay mow that he might again meet her there, and that he did not mean ultimately to deprive her of them. It was held that he could not be convicted.

§ 498. —— **Taking Part of Goods Seized on Execution.** — So the owner of goods attached taking part of them from the officer, but intending to leave enough to satisfy the claim, is not guilty of larceny.[2]

§ 499. —— **Servant Giving Away Goods in Charity.** — So when a servant gave away certain old and used property of his master as an act of charity, it was held no larceny by the servant.[3] The court said: This was a prosecution upon information for petit larceny. The information charges the defendant with stealing one set of butcher's iron scales, and one butcher's meat saw, the property of George Nicholas, the prosecutor. On the trial the prosecutor testified in substance that he was a butcher, that the defendant was in his employment in February, 1873, and had charge of his slaughter-house and everything in it; that among other things there was a set of butcher's scales; that he looked for them to have them repaired, and asked defendant if he knew where they were, and he replied that he did not know; there was also an old butcher's saw, which was broken, but the bow remained; that he missed that at the same time. On the 9th of April he saw these articles in the possession of Christ Meyer, a butcher keeping a stall in the Mound Market in St. Louis.

Christ Meyer was then introduced, and in substance testified that he was a butcher; that some time in January, 1873, he went to the slaughter-house of prosecutor where defendant was employed; that he had before that time done some work there, and on this occasion he told defenfant he was about to commence butchering for himself, and as he was poor he would be thankful to him, if he would assist him a little. He asked whether there were not some old tools there which he did not use. Defendant replied there were an old set of scales and a butcher's saw lying around there, which he did not use and that witness could have them. Witness afterwards called and defendant gave him the scales and saw, and he took them and repaired them and used them; he paid $1.25 for repairing the scale and $1 for repairing the saw, When he got them they were useless, broken and battered. After they were repaired they were as good for use as new tools. Afterwards, about two weeks before the trial, the prosecutor came to witness' stall at Mound Market, and said the scales and saw were his. Witness replied that he could have them if he would pay for the repairs; the defendant who gave them to witness took them away.

[1] R. *v.* R. 419 (1820).

[2] Com. *v.* Greene, 111 Mass. 392 (1873).

[3] State *v*, Fritchler, 54 Mo. 424 (1873).

Christ Hill was introduced as a witness and testified in substance to the same purport as the preceding witness.

This was all the evidence given or offered on the part of the State. The defendant asked the court to declare that upon the evidence given he was not guilty of larceny. The court refused this instruction. The defeudant then introduced several witnesses who testified to his good character for honesty, etc. At the close of all the evidence, the defendant asked the court to declare the law to be that "if it appear from the evidence, that the defendant while in the employ of the prosecuting witness, did in good faith and out of charity, give the articles in the complaint mentioned to a poor person in need of assistance, and that these scales were of no value or of very small value, and not being used or needed by his employer and without any intent to convert them to his own use, then he is not guilty of larceny."

The court refused this declaration and found the defendant guilty, the case having been submitted to it sitting as a jury.

The defendant excepted to the several rulings of the court, and filed a motion for a new trial which was overruled, and he has appealed to this court.

There is not a particle of evidence in this record to establish the defendant's guilt, there is a total want of proof of the *animus furandi*, the very gist of the offense charged. It is the very sort of evidence upon which he might have relied to rebut the charge, if there had been any proof to establish it. It is very true that he had no legal right to exercise charity on the credit of his employer; but in doing so he only laid himself liable to a civil action for the value of the goods, there being no felonious intent whatever to convert them to his own use.

The court erred in overruling the demurrer to the evidence, and also in refusing the instructions asked by the defendant at the close of the evidence.

Judgment reversed and the cause remanded. The other judges concur.

§ 500. —— **Intention to Deprive Owner of Property Permanently Necessary.** — In *R.* v. *Guernsey*,[1] the prisoner was indicted for stealing ten pieces of paper, value one penny, the property of the Queen. A dispatch of a very important character had been received by the government from Sir John Young, the Lord High Commissioner of the Ionian Islands, on the 10th of June, 1857, and another on the 14th of July, 1858, which came into the hands of Sir Edwayd Lytton, the Colonial Minister, in the month of August. A certain number were printed at the private printing office of the government, and which were marked "private and confidential," and were intended for distribution among the members of the Cabinet; and twenty-eight copies of these dispatches were delivered at the office of the librarian at the Colonial Office for that purpose, and given to the sub-librarian. He placed them on a table in the office. The prisoner frequently visited Mr. Miller at the Colonial Office, and they were on extremely intimate terms. About the 23d of October the prisoner, it appeared, called upon him at the Colonial Office; and after that they had had some conversation together he had occasion to leave the library for a short time, and when he went out Guernsey was standing by the fire. Mr. Miller returned in a few minutes, and at this time he observed that the prisoner was standing close to the table upon which the dispatches were lying, with a large book upon them; and when the prisoner saw him, he exclaimed, "I have not been prying

[1] 1 F. & F. 394 (1858).

into your secrets;" to which Mr. Miller replied, that he did not suspect that he was doing so. The prisoner remained a short time longer with Mr. Miller, and they both left together.

Shortly afterwards the prisoner sent one of these printed copies to the editor of the *Daily News* newspaper, with a note signed by the prisoner and marked "private," requesting that the dispatch might be inserted in the *Daily News*, and stating that no other journal had received a copy. The editor had not had any previous acquaintance with the prisoner. Before he gave directions that the dispatch should appear in the *Daily News*, he wrote to the prisoner at the address in Regent Square, mentioned in his letter, and received a reply from him stating that it was "all right," but he did not wish his name to be mentioned in any way as connected with the publication of the document. After the receipt of this letter the editor directed the publication of the dispatches in the *Daily News*, aud they appeared on the 12th of November. About the middle of the following week, the editor having previously received a communication from the Colonial Office, wrote to the prisoner, requesting him to call upon him. The prisoner called on him, and introduced himself as the person who had sent the Ionian dispatches. The prisoner then stated that a person had left them at his honse, and he pressed the witness not to give any further information.

The witness who produced the paper, stated that the only object for which the dispatches were sent to him as he understood, was that they might be published in the *Daily News*.

There was no pecuniary inducement for the act, but it rather appeared that the prisoner bore some resentment to the Colonial Minister for the refusal of an appointment.

*Parry*, Serjeant, submitted there was an utter absence of any felonious intention on the part of the prisoner, and that it was clear that the only object he had in view was that the contents of the dispatches should be made public. He urged that there was no evidence to show that the prisoner intended permanently, to deprive the Colonial Office of the property in the dispatches, and cited *Regina* v. *Thornton*.

MARTIN, B. It is a question for the jury, with what intent the prisoner took the dispatches. The question you have to decide is, whether the prisoner, in taking these dispatches in the manner it appears to be admitted he did it, was guilty of the offense of larceny. The offense consists in the taking away the property of another without his consent, and with the intention at the time to convert that property to the use of the taker. Such documents as those are clearly the subject of larceny, and inasmuch as the stealing of the paper itself would have been a felony, the fact of the paper being printed on, makes no difference, and indeed this fact might in a great many instances materially increase the value. And the only question you have to decide is, whether the evidence establishes to your satisfaction, that at the time the prisoner took the documents away from the Colonial Office, he intended to deprive that office of all property in them, and to convert them to his own use.

*Verdict, not guilty.*

§ 501. —— **Intent Must Exist at Time of Taking.** — The intention to convert the property to the person's own use must exist at the time of the taking.[1]

[1] R. *v.* Hore, 3 F. & F. 315 (1862); R. *v.* Marsh, 3 F. & F. 523 (1862); R. *v.* Leppard, 4 F. & F. 51 (1864); State *v.* Stone, 68 Mo. 101 (1878); Wilson *v.* People, 39 N. Y. 459 (1868); Langley's Case, 4 City Hall Rec. 159 (1819); Spivey *v.* State, 26 Ala. 90 (1855); Fulton *v.*

Thus, where property was delivered to the prisoner under a contract of sale, part of the purchase-money to be paid on time, and the purchaser to retain and use the property meanwhile, and there was no pretense that at the time of the sale he had a felonious intent, he could not be held guilty of larceny from the fact that, after keeping and using the same for several months, under the contract, he carried it away without completing the payment.[1] So, where the prisoner received certain material to be made up into coats and return to the party furnishing it, and he made it up, but was afterwards persuaded to sell it to a peddler and absconded with the proceeds, he was held not guilty, if at the time he received the goods he did not intend to steal them.[2] So, one who, after selling and transferring a note and mortgage executed to him, and after notice of the transfer given to the mortgagor, receives the amount due on the mortgage, and converts it to his own use, is not guilty of stealing the money.[3] Where a cotton picker had the right to retain possession of what he picked until it was weighed at the close of the day, the mere fact that after picking it he secreted it, did not justify a finding that he had the intent to steal it at the time of picking it.[4]

A person hiring a horse from a livery stable and taking it away and afterwards selling it is not guilty of larceny, unless at the time he hired it he intended to steal it.[5] So where a person is overpaid money but does not discover it until subsequently when he converts it he is not guilty of larceny.[6] For a gamekeeper to take a gun from a poacher and afterwards to convert it to his own use is not larceny.[7] If a man takes a letter supposing it to be for him, and on finding it is not, appropriates property it contains, this does not make him guilty of larceny, there being no *animus furandi* when he first received the letter.[8]

In *R.* v. *Jones*,[9] the prisoner, who was not before in A.'s service, was employed by A. to drive six pigs from B. to C. On the way he left one at D.'s stating that it was tired, which he subsequently told A. A. then told the prisoner to go out and ask D. to keep the pig for him. A. went and sold the pig to D. This was held no larceny. So in *R.* v. *Evans*,[10] A. delivered a waistcoat to E. to take to R. to be washed. E. delivered it to R. as his own, and it having been washed and returned to E., he converted it to his own use. There being no intention on E.'s part to convert it when he obtained the possession from A., it was held no larceny.

In *R.* v. *Bank*,[11] the prisoner borrowed a horse under pretense of carrying a child to a neighboring surgeon. Whether he carried the child thither did not appear; but the day following after the purpose for which he borrowed the horse was over, he took the horse in a different direction and sold it. The prisoner did not offer the horse for sale, but was applied to to sell it, so that it was possible he might have had no felonious intention till that application was made.

State, 13 Ark. 168 (1852); People *v.* Stone, 16 Cal. 369 (1860); People *v.* Smith, 16 Cal. 280 (1863); People *v.* Jersey, 18 Cal. 337 (1861); Umphrey *v.* State, 63 Ind. 223 (1878); Snell *v.* State, 50 Ga. 220 (1873); Hart *v.* State, 57 Ind. 103 (1877); Beatty *v.* State, 61 Miss. 18 (1883); Wilson *v.* People, 1 Cow. Cr. Rep. 149 (1868).

[1] State *v.* Shermer, 55 Mo. 613 (1874); R. *v.* Threstle, 2 C. & K. 842 (1849). In this case A. delivered his watch to B., a watchmaker, to regulate. B. converted it to his own use. It was held not larceny.

[2] Abrams *v.* People, 6 Hun, 491 (1876).

[3] State *v.* McDougal, 20 Wis. 482 (1866).

[4] Lyon *v.* State, 61 Ala. 224 (1878).

[5] R. *v.* Cole, 2 Cox, 341 (1847).

[6] Bailey *v.* State, 58 Ala. 415 (1877).

[7] R. *v.* Halloway, 5 C. & P. 524 (1833).

[8] R. *v.* Mucklow, 1 Moo. 160 (1827).

[9] C. & M. 612 (1842).

[10] C. & M. 632 (1842).

[11] R. & R. 421 (1821).

The jury thought the prisoner had no felonious intention when he took the horse; but as it was borrowed for a special purpose, and that purpose was over when the prisoner took the horse to the place where he sold it, the learned judge thought it right upon the authority of 2 East's Pleas of the Crown,[1] and 2 Russell,[2] to submit to the consideration of the judges whether the subsequent disposing of the horse, when the purpose for which it was borrowed was no longer in view, did not include in it a felonious taking.

In Easter term, 1821, the judges were of opinion that the doctrine laid down on this subject in 2 East's Pleas of the Crown,[3] and 2 Russell,[4] was not correct. They held that if the prisoner had not a felonious intention when he originally took the horse, his subsequent withholding and disposing of it did not constitute a new felonious taking, or make him guilty of felony; consequently the conviction could not be supported.

In *Starck* v. *State*,[5] it appeared that a stray heifer came to the respondent's land and herded with his cattle; that at first he drove her off, but as she returned, he finally kept her. *Held*, that to constitute larceny, it must appear that the respondent intended to appropriate the heifer to his own use when he first took possession of her. *Held, also*, that a charge which only stated that if the respondent had such intent when the heifer first came upon his land, he was guilty of larceny, tended to mislead the jury, since it did not, of necessity, suggest the conclusion that if the intent was formed afterward, the conversion would not be larceny.

In *State* v. *Stone*,[6] the evidence showing that the defendant had borrowed a wagon and horses, and afterwards attempted to convert them to his own use, *held*, that no conviction could be sustained on the indictment, founded on section 25, page 456,[7] unless the State showed that the intent to steal existed when the property was taken; that no conviction could be had on this indictment, though the evidence might have warranted a conviction had there been a count in the indictment founded on section 37, page 459.[8]

In *Dow* v. *State*,[9] it was held that the intent at the time of taking was not proved. The indictment was for the theft of a horse. Henry Brown, for the State, testified in substance that he lived in Lampasas County; that he got acquainted with the defendant on the "trail;" that about January 1st, 1882, the defendant was living at witness' house, and had a horse in his lot which defendant intended riding to Belton, Bell County, to see his mother; that his horse got out of the lot, and the witness loaned the defendant his, the witness', horse to hunt for defendant's. The defendant searched for two days without success, and then importuned the defendant to lend him his horse to ride to Belton on a visit to his mother, promising to return in a week. The witness refused at first, but his wife interceding with him for the defendant, he finally consented, and directed the defendant to occupy two days in making the trip to Belton, as the distance was too great for a single day's ride. The witness heard nothing

1 pp. 690, 694.

2 pp. 1089, 1090. In 2 Russ. 1089 it is said that "in the case of a delivery of a horse upon hire or loan, if such a delivery were obtained *bona fide*, no subsequent wrongful conversion pending the contract will amount to felony; and so of other goods. But when the purpose of the hiring, or loan, for which the delivery was made, has been ended, felony may be committed by a conversion of the goods.

3 pp. 690, 695.

4 pp. 1089, 1090.

5 63 Ind. 285.

6 68 Mo. 101.

7 Wag. Stat.

8 Wag. Stat.

9 12 Tex. (App.) 344 (1882).

of the defendant or his horse for two or three weeks, and grew uneasy. He wrote to Belton several times but failed to get replies to his letters. He finally received a letter from R. D. Johnson, saying that his horse was sick, but he would return him as soon as he could travel to Lampasas. The witness afterwards got his horse from Mr. Markley.

A. Markley testified for the State that he bought the horse in question from the defendant. When he bought him he was so poor that he could scarcely stand on his feet. The witness had seen the defendant riding the horse for two or three weeks. The defendant claimed that the horse was his.

WHITE, P. J. It is well settled in this State that under an ordinary indictment for theft a conviction may be had on proof which shows that the taking, though with the owner's consent, was obtained by false pretense, or with intent to deprive the owner of the value of the property, and appropriate it to the use and benefit of the taker.[1]

But it is also equally as well settled that, in order to sustain a prosecution for theft when the taking was originally lawful, the proof must show that the taking was obtained by some false pretext, or with intent to deprive the owner of the value of the property and appropriate it to the use and benefit of the taker.[2] The intent is the gist of the offense, and such intent must exist at the time of the taking; for if the intent did not exist at the time of the taking, no subsequent felonious intention will render the previous taking felonious.[3]

Whilst there was no error in the portion of the charge of the court which is complained of, — the same being in harmony with the rules of law above enunciated, — we are of opininion that the facts shown in evidence do not establish a fraudulent intent at the time appellant obtained possession of the horse, nor do they establish the fact that the horse was obtained by means of a false pretext.

Because the evidence is insufficient to support the verdict and judgment, the judgment is reversed and the cause remanded.

*Reversed and remanded.*

§ 502. —— **Lost Goods — Finder not Guilty of Larceny.** — Stated broadly (the cases below illustrate the limits of the rule) a finder is not guilty of larceny.[4]

In *R.* v. *Martha Deaves*,[5] the child of the prisoner found six sovereigns in the street which she brought to the prisoner. The latter counted it, and told some bystanders that the child had found a sovereign, and offered to treat them.

1 Penal Code, art. 727; White *v.* State, 11 Tex. 769; Smith *v.* State, 35 Tex. 738; Maddox *v.* State, 41 Tex. 205; Reed *v.* State, 8 Tex. (App.) 40; Spinks *v.* State, 8 Tex. (App.) 125; Jones *v.* State, 8 Tex. (App.) 648; Hudson *v.* State, 10 Tex. (App.) 215.

2 Hornbeck *v.* State, 10 Tex. (App.) 408.

3 Billiard *v.* State, 30 Tex. 368; Johnson *v.* State, 1 Tex. (App.) 118.

4 R. *v.* Hutchinson, 1 Lewin, 195 (1828); R. *v.* Milburne, 1 Lewin, 251 (1829); R. *v.* Mole, 1 C. & K. 417 (1844); Brooks *v.* State, 35 Ohio St. 46 (1878); Ransom *v.* State, 22 Conn. 153 (1852); Lane *v.* People, 10 Ill. 305 (1848); Porter *v.* State, 1 Mart. & Yerg. 226 (1827); Com. *v.* Titus, 116 Mass. 42 (1874); State *v.* Conroy, 18 Mo. 321 (1853); Billard *v.* State, 30 Tex. 369 (1867); State *v.* Clifford, 14 Nev. 72 (1879); Hunt *v.* Com., 13 Gratt. 957 (1855); Tanner *v.* Com. 14 Gratt. 635 (1837); Bailey *v.* State, 52 Ind. 462 (1876); R. *v.* Scully, 1 Cox. 189 (1845); R *v.* Shea, 7 Cox, 148 (1856); R. *v.* Dixon, Dears. 580 (1855); R. *v.* Davies, Dears, 640 (1850); R. *v.* Thurborn, Temp. & M. 67 (1849); R. *v.* Christopher, Bell, C. C. 77 (1858); R. *v.* Preston, 1 Den. & P. 351 (1851); R. *v.* Knight, 12 Cox, 102 (1871); People *v.* Anderson, 14 Johns. 294 (1817); State *v.* Dean, 44 Ia. 73 (1867).

5 11 Cox, 227 (1869).

The prisoner and the child then went down the street to the place where the child had found the money, and found a half sovereign and a bag. Two hours afterwards the owner made hue and cry of his loss in the vicinity. On the same evening the prisoner was told that a woman had lost money; the prisoner told her informant to mind her own business, and gave her half a sovereign for herself. It was held that there was no larceny, as there was nothing to show that at the time of the finding the prisoner had reason to think that the owner could be found.

In *R.* v. *Matthews*,[1] the prisoner found two heifers which had strayed, and put them on his own marshes to graze. Soon afterwards he was informed by S. that they had been put on his, S.'s, marshes and had strayed, and a few days after that that they belonged to H. Prisoner left them on his marshes for a day or two, and then sent them a long distance away as his own property to be kept for him. He then told S. that he had lost them, and denied all knowledge of them. The jury found (1) that at the time the prisoner found the heifers he had reasonable expectation that the owner could be found, and that he did not believe that they had been abandoned by the owner; (2) that at the time of finding them he did not intend to steal them, but that the intention to steal came on him subsequently; (3) that the prisoner, when he sent them away, did so for the purpose and with the intention of depriving the owner of them and appropriating them to his own use. *Held*, that a conviction of larceny, or of larceny as bailee, could not be sustained under the above circumstances. BOVILL, C. J. "We have considered this case, and have come to the conclusion that the conviction must be quashed. The jury have found that at the time the prisoner found the heifers he had reasonable expectation that the owner could be found, and that he did not believe that they had been abandoned by the owner. But at the same time they have found that at the time of finding the heifers the prisoner did not intend to steal them, but that the intention to steal came on him subsequently to the first interview with Stiles. That being so, the case is undistinguishable from *Reg.* v. *Thurborn*,[2] and the cases which have followed that decision. Not having any intention to steal when he first found them, the presumption is that he took them for safe custody, and unless there was something equivalent to a bailment afterwards, he could not be convicted of larceny. On the whole, we think there was not sufficient to make this out to be a case of larceny by bailee.

"*Conviction quashed.*"

In *Tyler* v. *People*,[3] the Supreme Court of Illinois, in reversing a conviction of larceny say: "The whole of the evidence establishes clearly that the article of property for which he is charged with stealing was found in the highway and was a pair of saddle bags. It was further proven that there were no marks by which the owner could be distinguished. Larceny is defined by the books to be the felonious taking and carrying away of the personal goods of another. The original taking then in this case can not by any feasible construction that can be given it, be construed to be with a felonious intent."

In *People* v. *Cogdell*,[4] the prisoner had been convicted of stealing the pocket-book of John Warren, with six hundred dollars in bills therein contained. The book and contents having been lost in the highway, Cagdell found and at once concealed them. The other facts appear in the opinion of the court

1 12 Cox, 489.
2 3 Cox, C. C. 453.
3 Breese, 293 (1830).
4 1 Hill, 94; 37 Am. Dec. 297 (1841).

*By the court*, COWEN, J. There was abundant proof of the concealment and fraudulent conversion of the money after it had been found. This was undoubtedly under full consciousness in the prisoner that it was accidentally lost. It was immediately demanded of him by the owner, who suspected his having found it; but the prisoner denied the finding and concealed the bills. By the owner's good fortune, they were traced to the hands of the prisoner, and finally restored; but this was after a course of evasion and concealment, plainly indicating his fraudulent intent to keep the money if possible.

It did not appear in evidence that the pocket-book or money had any mark by which the prisoner could have discovered Warren to be the owner, though he must have been conscious that the owner, whoever he might be, would make an effort to find the money. He did make such effort, offering a reward to the prisoner personally. In short, the loss and finding were purely accidental. Everything after that done by the prisoner was characteristic of the thief; and if he can escape the legal consequences of the conviction of larceny, it must be solely because that crime is not predicable of a taking and conversion under the circumstances mentioned. Singular as it may seem to one reasoning upon principle, this appears to be the settled doctrine of the law, and was considered to be so by this court in *People* v. *Anderson.*[1] It is supposed, I perceive by the counsel for the State, that from what was said in *People* v. *McGarren,*[2] we may be considered as holding it a duty to disregard the adjudication in *People* v. *Anderson* which is not denied to be a point blank case against the prosecution. But neither the decision nor any *dictum* in *People* v. *McGarren*, nor the course of reasoning in that case, goes at all to countenance such an expectation. All we asserted there was that probably the rule must be confined to such a case as the present, where it does not appear that the prisoner knew or had the means of knowing the true owner; the cases were cited to that effect. One was where the pocket-book found was legibly marked with owner's name, the fluder being able to read. Such cases themselves imply, that if the owner has placed no mark about the property, and none exists by which the finder can discover him, the case must still be considered as it long has been, one of mere trover and conversion and not of larceny. The general remark in *People* v. *McGarren*, that a finder having the means of discovery, is an exception, must be taken with the limitation indicated by the authorities referred to. Every finder may be said to have the means of discovering the owner by the exercise of an honest diligence; and if when valuable property is lost, such means may be made a test the doctrine of *People* v. *Anderson* is indeed gone. Scarcely any finder could fail in his search; and this being generally obvious to a jury, they would hardly ever fail to convict for that reason. The rule would thus, in practice, be brought down to a very narrow exception.

It may be very difficult to perceive in sound morals why this should not be so; but that is no argument for disregarding a settled rule of law.

*New trial ordered.*

In *State* v. *Roper*,[3] the defendant had at an exhibition of wild animals picked up a shawl which had been lost by its owner, his attention having been called thereto by the exclamation of a bystander, "There is a shawl;" had shaken the dirt from it, placed it on the chain separating the spectators from the cages of the animals, and leaned his body over it. All this was done while the

1 14 Johns. 294; 7 Am. Dec. 462.
2 17 Wend. 460.
3 2 Dev. L. 473; 24 Am. Dec. 268 (1832).

ring was full of spectators. After a short lapse of time the defendant secreted the shawl upon his person, and taking it to where his horse was, hid it beneath the saddle. The defendant insisted: 1. That there could be no larceny here, because the shawl was lost and its owner unknown. 2. That he was entitled to an acquittal unless the jury thought that an intention to steal the shawl was formed the moment that it was picked up.

The jury was charged that whether the first taking was or was not with felonious intent, yet the defendant was guilty if when he took the shawl from the chain, he took it with intention to appropriate it, and with knowledge as to who was the owner, and even if he did not know the owner, yet he was guilty, if at the time he took the shawl the owner was within sound of his voice.

The defendant was convicted and appealed.

DANIEL, J. In a late work of great learning and research larceny is defined to be "the wrongful or fraudulent taking and carrying away by any person, of the mere personal goods of another, from any place, with a felonious intent to convert them to his (the taker's) own use, and make them his own property without the consent of the owner." [1] But there must be an actual taking or severance of the goods from the possession of the owner, on the ground that larceny includes a trespass; if, therefore, there be no trespass in taking the goods, there can be no felony in carrying them away.[2] It is a general maxim, that the ownership of goods draws after it the possession. But if the owner or person whose property is alleged to be stolen, be not actually or constructively in possession of it, the taking of it can not amount to larceny. Therefore, if goods were lost by the owner and found by another, and the taking was *bona fide* and under a mere pretense of finding, and the finder afterwards feloniously determines to appropriate them to his own use, it will not be larceny. But if the finder at the time of taking the goods knew who was the owner, the subsequent appropriation in a secret manner, or his denial of any knowledge of the goods, or any other acts showing a felonious intent, would be evidence to be left to the jury, from which they might infer that the original taking was with a felonious intent.[3] If money by mistake is sent with a bureau to be repaired, and it is taken with a felonious intent, it will be larceny because the money was not lost.[4] In the case before the court it appears that the shawl was lost, and that the defendant took it up after a bystander had said, "There is a shawl;" that he shook the dirt off it, and then laid it on the chain and leaned over it for a few moments and then secreted it in his bosom and left the ring. The shawl had not been placed by the owner where the defendant took it from, but it had accidentally fallen there and was lost; the defendant, when he took it up in a public manner was ignorant of the owner; he continued thus ignorant until some time after he had left the ring. The circumstance of his not calling out and proclaiming to the crowd that he had found a shawl, does not alter the case, neither does the circumstance of his laying the shawl on the chain and leaving it for a short space of time, and returning and then taking it from the chain and carrying it away with a felonious intent. The owner had lost it; she had not regained possession of it, nor did the defendant know the owner. The taking from that place (I mean the chain), was not a taking from the possession of the owner. I think

[1] 2 East's P. C., ch. 16, sec. 2, p. 553.

[2] 2 East's P. C. 554; 1 Hawk. P. C., ch. 33, sec. 1; 1 Russ. 95.

[3] East's P. C. 664; Lear's Case, 215 n.; 1 Hale, 506; *Id.* 507; R. *v.* Walters, 2 Burn's Justice, 180.

[4] Cartwright *v.* Green, 8 Ves. 405.

from the time the defendant took the shawl from the ground until he delivered it to the owner, it was in his possession. As the original taking of the lost goods was without a felonious intent, the subsequent felonious asportation will not make the defendant guilty of larceny. I think a new trial should be granted.

HENDERSON, C. J. This case does not present the question whether lost property is the object of larceny; for the original taking of the shawl from the ground was not attended by any circumstance from which a felonious intent could be inferred; it was not done *clam et secrete*, but openly and publicly. The secret conversion of it afterwards to the defendant's use could not impress a larcenous character on the original taking; at most it would only be evidence of the original intent, and the open and public manner in which the act was done precludes all idea of a larcenous intent and shows too plainly to be controverted that such intent if it ever existed, was an afterthought. So far therefore as the secret and fraudulent withdrawal of the shawl from the chair gave a larcenous character to the first taking, it is to be entirely discarded from the case, as even those that think that lost goods are the object of larceny, admit that the original taking must be with a larcenous intent — that no afterthought or after act can convert it into a felony. For my own part, thinking that there must be an unlawful taking from the possession of the owner to constitute a larceny, I am of opinion that lost goods are not the object of larceny. Some of my reasons, given in a much more forcible manner than I can give them, are to be found in Judge Spencer's opinion in the case of *People* v. *Anderson*.[1] Runaway slaves do not fall within the description of lost property, for from their nature, being intelligent beings, they are incapable of becoming astrays, in the legal or technical meaning of the word, which class of lost property they in their runaway state more closely resemble than any other. Possibly this exception to the general rule may be founded in policy, as no vigilance of the owner can prevent their absconding, and the law attaches some degree of negligence to the owner in losing his property and therefore does not protect it when lost by high penal sanctions. If the removal of the shawl from the chain was a continuous act of the possession acquired by the defendant when he took it from the ground, and not a distinct independent acquisition it was entirely immaterial whether he then knew who was the owner, or whether she was there within the ring, or within the sound of his voice; in neither case could it be a larceny. To constitute it a larceny there must have been an abandonment of the possession by the finder before it was taken from the chain. Whether there had been such abandonment should have been submitted to the jury. It is true it is a question of law, to be decided by the courts, but the facts upon which it arises are to be ascertained, either by the admission of the party upon record, or by the verdict of the jury.

The facts then are in no way ascertained, for abandonment is an intent of the mind, evidenced it is true by an overt act, from which as in the present case the jury alone is competent to make the inference. There is no fact stated upon the record from which the law can draw the inference. The *quo animo* with which the defendant placed the shawl on the chain, standing by or near to it, is for the jury and not for the court, and I would not add a single instance of an inference of fact to be drawn by the law; and very clearly this is not a case where any judge would do so. The act is too equivocal and subject to too

[1] 14 Johns. 294; 7 Am. Dec. 462.

many shades of difference, to infer from it any rule of intent applicable to all cases, and each case must be left to be decided according to its own particular and minute circumstances, that is, according to the actual intent in each particular case. I am of opinion therefore that the defendant is entitled to a new trial, because the intention with which he placed the shawl on the chair was not submitted to the jury, and without an abandonment of possession by him, no matter under what circumstances he afterwards withdrew it from the chain, no matter whether he knew who was the owner or not, or whether she was or was not within the sound of his voice; such withdrawal was not a larceny. Should the jury be of opinion that there had been an abandonment of the possession, I am not prepared to say that the article was then placed in a situation to be the object of larceny. Did such abandonment by hanging it on the chain, if it was an abandonment, restore the possession to the owner, without her knowledge. And did it merely cease to be lost property? Or did it only restore it to its situation when it was first discovered on the ground?

These are questions I leave to future discussion, if the occasion should require it, for as I said before, I am not prepared to decide them.

PER CURIAM. *Judgment reversed.*

§ 503. —— **Finder Keeping Article till Reward is Offered for Its Return.** — In *R.* v. *York*,[1] the prisoner was tried upon an indictment which in the first count charged him with feloniously stealing one silver watch, and in the second count with receiving the said watch, well knowing the same to have been stolen. The evidence against the prisoner seemed to prove that he had found the watch, and had subsequently appropriated it to his own use. It was therefore contended on the part of the prosecution, that if at the time the prisoner found the watch he took possession of it with a view of stealing it, or if he found the watch and intended to detain and keep it until a reward was paid for the same, he was guilty of larceny. The jury, after hearing counsel on behalf of the prisoner, retired to consider their verdict, and upon their return into court, delivered the following special verdict in writing, the words in italics having been subsequently added by the jury after explanation by the court with the jury.

"Not guilty of stealing the watch, but guilty of keeping possession of it in the hope of reward *f om the time he first had the watch.*"

The second count was abandoned by the counsel for the prosecution, and a verdict of "Not guilty" was entered thereon. The counsel for the prisoner then moved the court that the prisoner should be forthwith discharged, the special verdict being one which amounted in law to a verdict of acquittal.

The court, after argument, decided that the verdict amounted to a verdict in guilty, and the following entry was made in the record: "Guilty. Judgment to be reserved until the next Sessions, in the meantime a case to be submitted to the judges. The prisoner to be admitted to bail himself in £100 aud one surety in £50, conditioned for the appearance of the said George York to appear at the next Sessions, and abide the judgment of the court." The prisoner with a surety then in open court, forthwith entered into the required recognizances and was discharged, and the facts of the case were directed by the court to be laid before the judges to determine whether the opinion of the court upon the said finding of the jury was or was not correct.

[1] 2 C. & K., 841; 1 Den. 343 (1878).

This case was argued on the 9th of December, 1848, in the Exchequer Chamber, before POLLOCK, C. B., PARKE, B., PATTESON, J., CRESSWELL, J., E. V. WILLIAMS, J.

*Flood*, for the prisoner, was not called upon by the court.

*Macaulay* was heard in support of the conviction. He contended that the finding of the jury ought not to be regarded as a special verdict; it was in truth an irregular statement of the result of a desultory colloquy between the court and the jury; that the words not guilty of stealing the watch were mere surplusage, being inconsistent with that part of the finding which followed; that the finding, properly stated, would be this, that the prisoner from the first held it dishonestly, with the intention of getting something from the rightful owner; and not simply with a view of restoring it.

POLLOCK, C. B. It it submitted to us as the finding of the jury; if it is irregular this court can not amend it.

PARKE B. If a man finds a thing can he be guilty of larceny?

*Macaulay*. The jury do not say that he found it, and even if he had done so, the facts of the case seem to bring it within the qualification of the rule, that a finding is not such a taking as amounts to larceny. In *Merry* v. *Green*, Parke, B., said during the argument: "Suppose a person finds a check in the street, and in the first instance takes it up merely to see what it is; if afterwards he cashes it, and appropriates the money to his own use, that is a felony though he is a mere finder till he looks at it."

Here the words "from the time he first had the watch," merely show that the dishonest intent of appropriating the watch and holding it as his own till he could extort a reward from the rightful owner was the first idea that occurred to his mind after he took it up; it seems to come precisely within Baron Parke's *dictum*.

POLLOCK, C. B. We can not reason upon what the jury intended to find. Their verdict is "not guilty of stealing;" there is no statement that he feloniously took it. They have absolutely acquitted him.

PARKE, B. It seems clear, taking the finding in conjunction with the facts, that the prisoner can not be deemed to have committed the offense of larceny.

The rest of the court concurred; and it was therefore held that the prisoner ought not to have been convicted.

§ 504. —— **What Not Subjects of Larceny — Choses in Action.** — At common law choses in action were not the subjects of larceny.[2]

§ 505. —— **Bank Notes.** — It is not larceny at common law to steal a bank note.[3]

§ 506. —— **Railroad Ticket.** — And so a railroad ticket is not the subject of larceny, at common law.[4]

§ 507. —— **Bills of Exchange.** — County orders are not "bills of exchange" within a statute.[5]

[1] 7 M. & W. 629.

[2] Culp *v.* State, 1 Port. (Ala.) 33; 26 Am. Dec. 357 (1834); Warner *v.* Com., 1 Pa. St, 154; 44 Am. Dec. 114 (1845); R. *v.* Watts, Dears. 327 (1854).

[3] U. S. *v.* Bowen, 2 Cranch, C. C. 143; U. S. *v.* Carnot, 2 Cranch, C. C. 469.

[4] State *v.* Hill, 1 Houst. C. C. 420 (1874).

[5] Warner *v.* Com., 1 Pa. St. 154; 44 Am. Dec. 114 (1845).

§ 508. —— **Bills of Exchange — Orders for the Payment of Money — Property not in Prosecutor.** — In *R.* v. *Hart*,[1] the prisoner was indicted and acquitted of larceny under the facts as detailed in the opinions of the judges following: LITTLEDALE, J.: It appears to me that there is not enough in this case to make out a charge of felony; however, I do not say anything respecting any other prosecution that may be instituted. (His lordship stated the different counts of the indictment.) With respect to the first, second, and third counts I am of opinion, that, when these acceptances were taken from the prosecutor, they were neither bills of exchange, orders nor securities for money. It appears that Mr. Astley, in consequence of what he saw in a newspaper, wrote a letter, and that he afterwards had an interview with the prisoner, when the latter produced these stamps, upon which the prosecutor wrote the words, "Payable at Messrs. Preads, No. 189, Fleet Street, London," and as soon as that was done, the prisoner received them from Mr. Astley, and carried them away; and it seems that, singularly enough, little or nothing was said as to what was to be done with the papers. It then appears that it was found that Mr. Astley's name was not put upon them; and at another meeting, the prisoner again produced the stamps, and Mr. Astley wrote the words "Accepted" and "F. D. Astley," there being at that time on the papers neither the name of any drawee nor any sum or date; but it seems, that in the course of the discussion, it was stated that the stamps were to be used for bills of £500 each. The papers were again taken away by the prisoner; and it appears to me, that when they were so taken away, they were neither bills of exchange nor orders for the payment of money, but were only in an embryo state, there being the means of making them bills of exchange. The statute 7 and 8 George IV.,[2] enacts, that if any person shall steal any "bill, note, warrant, order, or other security whatsoever for money, or for payment of money, whether of this kingdom or any other State," the party is to be punished as he would be for stealing a chattel of like value. Now, how could this be said to be of any value? And of what value can it be said to be? If these papers had been stolen from a dwelling-house, could they be charged to be of the value of £500 each? There is no sum mentioned on them, and none drawn; and they being, as I before observed, but a kind of embryo security, I am of the opinion that the first three counts of this indictment are not proved. There is, however, a fourth count, which describes the papers as ten pieces of paper, each having a six shilling stamp; and upon this count the question is, whether the prisoner can be said to have stolen the property? As to the first three counts, I think the case turns upon a mere question of law, which is, I think, entirely for the court, as these papers do not come within the description contained in the statute 7 and 8 George IV.[3] The fourth count correctly describes them; but it seems to be that the circumstances under which they were obtained by the prisoner were not such as to make the prisoner liable for a felony. If a person by false representation obtains the possession of the property of another, intending to convert it to his own use, this is felony; but the property must have previously been in the possession of the person from whom it is charged to have been stolen. Now, I think that these papers, in the state in which they were, were the property of the prisoner. He took them from his pocket, and Mr. Astley never had them, except for the purpose of writing on them. They were not out of the prisoner's sight

1 6 C. & P. 107 (1833).
2 ch. 29, sec. 2.
3 ch. 29.

Mr. Astley writes on them, as was intended, and the prisoner immediately has them again. I think the prisoner can not be considered as having committed a trespass in the taking, as they never were out of his posession at all. The case cited was a case in trover; and to maintain trover, it is not necessaay that the party should have manual possession of the goods; if he has a right of possession that is sufficient. To support an indictment there must be such a possession as would enable the party to maintain trespass. It has been incidentally mentioned that these stamps might be charged in account to Mr. Astley; but that could only be if the transaction was completed. However, we must only take into consideration that which occurred ou the last occasion, when the words, "Accepted," and "F. D. Astley" were written. Indeed, it appears to me, that on neither of the occasions when these parties met, can the prosecutor be said to have either the property or the possession of these papers, so as to make the prisoner guilty of larceny in taking the papers out of the house. I do not say whether or not there is a fraud, but I am of opinion that this is not a case of felony.

BOLLAND, B. If I entertained any doubt in this case, I should certainly have requested my brother Littledale to have reserved it for the opinion of the judges. The first three counts are for stealing bills of exchange, securities for money, or orders for the payment of money. I will, to simplify the argument, put it as if one only of these papers was taken, instead of the ten. Is the paper a bill of exchange? No; it was at first a six-shilling stamp, with the words, "payable at Messrs. Pread & Co.'s, No. 189 Fleet Street, London," written upon it. In its then state, no piece of paper could be more useless. However, it is brought to Mr. Astley again, and the word "accepted" and his signatures are added; and it is in that state when it is charged to have been taken away. Can it, then, be called a bill of exchange? I should say, certainly not. In the next count it is called an order for payment of money; and that it clearly is not, as by it no money is directed to be paid; and it certainly can not be called a security, as no money is even mentioned in it. Then comes the fourth count, which states that there were papers bearing certain stamps, and that the prisoner stole the papers with the stamps upon them. This question then arises, — whether these papers were the property of Mr. Astley or of the prisoner. And on that point the case stands thus: The prisoner being solicited by the prosecutor to come into Hampshire, he does so; and the prisoner produces these stamps, and a negotiation takes place, in which it is ultimately arranged that the prisoner is to provide the prosecutor with money, at the exorbitant rate of £6 per cent. There is no agreement that Mr. Astley is to pay for the stamps.

BOSANQUET, J. I am of the same opinion; but after what has been said by my learned brothers, I shall not give my reasons at any great length. The question is not whether the prisoner is guilty of fraud, or whether he has acted improperly, but whether he has committed a felony. The thing stolen (for I will take it as if there were only one) is charged to be a bill of exchange, an order for the payment of money, and a security for the payment of money. I do not think that at the time it was taken it fell within either of these descriptions. There was no money mentioned in it, and no parties; and it seems to me quite impossible that the words written on it by Mr. Astley can bring it within the terms of either of the earlier counts of this indictment. The counsel for the prosecution feeling this, rely on a count which charges it to be a piece of paper with a stamp on it. It then becomes material to con-

sider whether the prisoner stole that from the prosecutor, as it is essential, to support that charge, that the thing taken was the property of the prosecutor, and stolen from him. Now we find that the paper itself was produced by the prisoner, and that the stamp on it was his. He had purchased it, and it does not appear that the prosecutor ever paid for it. The prisoner produces it when both parties are in the room together, the prosecutor writes some words on it, and the prisoner then takes it away. Is that a stealing from the prosecutor? It is in the possession of the prisoner before it is ever placed before the prosecutor; and even if we take it that it was ever in the possession of Mr. Astley at all, it is given by him again to the prisoner. But as it is produced by the prisoner, and he stays all the time Mr. Astley is writing, and when the writing is done he takes the paper up again, it seems to me that the stamp never was out of the possession of the prisoner. The case of Mr. Phipoe bears very strongly upon the present, only in that case the instrument was a complete promissory note; and there the judges were of opinion that, however atrocious the circumstances, and atrocious in that case they certainly were, it was not a case in which she could be convicted according to law; and nine of the judges held that the note was procured by duress and not by stealing. In that case, Mrs. Phipoe produced the stamp and made Mr. Courtry put his name upon it. I therefore concur with my learned brothers in thinking that the charge of taking can not be made out.

LITTLEDALE, J., decided on acquittal. *Verdict, not guilty,*

§ 509. —— **"Goods and Chattels."** — Bank-notes are not "goods and chattels;"[1] nor is money;[2] nor are bonds, bills and notes.[3]

§ 510. —— **"Lawful Money of the United States."** — Lawful money of the United States does not include national bank notes.[4]

§ 511. **"Money."** — Bank notes are not "money" within this word in a statute.[5]

§ 512. —— **"Money, Goods, Wares or Merchandise."** — A promissory note is not "money, goods, wares, or merchandise."[6]

§ 513. —— **"Order for the Payment of Money" — "Certificate for the Payment of Money" — "Public Security."** — A lottery ticket, before the drawing, is not within these phases.[7]

§ 514. —— **"Personal Goods."** — And choses in action are not "personal goods."[8]

§ 515. —— **"Promissory Notes."** — And a statute making promissory notes the subject of larceny will not include bank-notes.[9]

§ 516. —— **What is a "Direction in Writing as to the Application or Disposition of Moneys"** within the English statute.[10]

[1] R. *v.* Morris, 2 Leach, 527 (1787).
[2] R. *v.* Guy, 1 Leach, 277 (1782),
[3] U. S. *v.* Morgan, 1 Cranch, C. C. 278.
[4] Hamilton *v.* State, 60 Ind. 193 (1877).
[5] Johnson *v.* State, 11 Ohio St. 324 (1860).
[6] R. *v.* Major, 2 Leach, 894 (1796).
[7] Healey's Case, 4 City Hall Rec. 86 (1818).
[8] U. S. *v.* Davis, 5 Mass. 358 (1829).
[9] Culp *v.* State, 1 Port. 33; 28 Am. Dec. 357 (1834).
[10] See R. *v.* Brownlow, 14 Cox, 218 (1878).

§ 517. —— **Things Attached to or Savoring of Realty.** — So things attached to or savoring of realty are not the subjects of larceny — as cabbage in the ground[1] or copper pipes part of a machine in a manufactory.[2] It is not felony to take and carry away rails from a fence, if the severance and carrying away are one continuous act.[3]

§ 518. —— **Nuggets of Gold.** — So of a nugget of gold. In *State* v. *Burt*,[4] the court said: "Nuggets of gold are lumps of native metal and are often found separated from the original veins. When this separation is produced by natural causes, there is no severance from the realty, but such nuggets will pass under a conveyance, like ores and minerals which are embedded in the earth. When ores and minerals are taken out of mines, with expense, skill and labor, to be converted into metals, or used for the purposes of trade and commerce, they become personal property, and are under the protection of the criminal law.

"In England, ores, even before they are taken from the mines are protected by highly penal statutes.[5] Loose nuggets which are occasionally found in gullies and branches, and in woods and fields, are hardly considered by the law as the subjects of determinate property, until they are discovered and appropriated, and then they become personal goods, and are the subjects of larceny. In this respect they somewhat resemble trove, waifs, etc., in the criminal law of England.

"It is an ancient rule of the common law, that things which savor of, or adhere to realty, are not the subjects of larceny. In this respect the common law was very defective, and did not afford sufficient protection to many valuable articles of personal property which were constructively annexed to the realty. These defects have, in some degree, been remedied by a number of statutes in this country and in England.

"These beneficial changes were induced by the necessities of progressive civilization, which required many valuable species of personal property to be annexed to realty, to be used for the purposes of trade and manufacture, and in the arts; and which needed the constant protection of the criminal law.

"In a case like ours, there is no necessity for the court to depart from the ancient technical strictness of the common law, and there is no need of any additional legislation upon such a subject. In public estimation it has never been regarded as larceny for the fortunate finder of a nugget of gold, or a precious stone, to appropriate to his own use, although found upon the land of another person. Hundreds of instances of this kind have doubtless occurred, and yet no case can be found of a prosecution for larceny on this account, either in the courts of this country or of England. This fact sustains us in the opinion, that for cases like the one before us there is no necessity to depart from the ancient landmarks established by the fathers of our criminal jurisprudence. The nugget was found upon a loose pile of rocks by one of the defendants and the taking and carrying away was one continued act, and did not amount to larceny, but was only a civil trespass.[6]

[1] State *v.* Foy, 82 N. C. 679 (1880).

[2] State *v.* Hall, 5 Harr. 492 (1853).

[3] U. S. *v.* Wagner, 1 Cranch, C. C. 314; U. S. *v.* Smith, 1 Cranch, C. C. 475.

[4] 64 N. C. 619 (1870).

[5] Stats. 7 & 8 Geo. XIV, amended by 24 and 25 Vict.

[6] 1 Hale's P. C. 510; 2 East's P. C. 587; Roscoe Cr. Ev. 459; 2 Russ. on Cr. 136; 2 Bish. Cr. L., sec. 779.

"There was no error in the ruling of his honor, and the judgment must be affirmed.

"*Judgment affirmed.*"

§ 519. —— **Sea Weed.** — So drifted and ungathered sea weed cast on the shore is not the subject of larceny.[1]

§ 520. —— **"Personal Property."** — A growing crop of corn is not "personal property" within the Alabama statute.[2]

§ 521. —— **Things Savoring of Realty — Severance and Asportation must be Different Act.** — In *Bell* v. *State*,[3] the court said: "The plaintiff in error was convicted at the November term, 1874, of the Criminal Court of Montgomery County of petit larceny, for stealing, as charged, cabbage and sweet potatoes, the goods and chattels of G. B. White, the prosecutor, and sentenced to the penitentiary for one year. It is insisted that the charge of the judge was erroneous in its definition of the offense charged. In the beginning of his charge the judge gives a full and accurate definition of the offense, and correctly instructs the jury as to the difference between grand and petit larceny, and the punishment awarded to each. It is true, in a subsequent part of his instructions, as introductory to the definition of 'personal property,' he says: 'The jury will observe that larceny is the felonious taking away of personal property.' He then proceeds to state to the jury when vegetables, etc., growing in or upon the ground, may become 'personal property' and the subject of larceny, and uses this language: 'If defendant went into the garden of another, entering to steal, and dug a lot of sweet potatoes, laying them on the ground, or cut a lot of cabbage, severing them from the earth, and afterwards picked up the vegetables, put them in a bag, and carried them off, that would be larceny.'

"The latter part of the charge is not strictly accurate, according to the rule of the common law. In 3 Greenleaf on Evidence,[4] it is said: If the severance and asportation were one continued act of the prisoner, it is only a trespass; but if the severance were the 'act of another person, or if, after the severance by the prisoner, any interval of time elapsed, after which he returned and took the article away, the severance and asportation being two distinct acts, it is larceny.'[5]

"And in Archbold's Criminal Practice and Pleading,[6] it is said: 'Things though they savor of the realty, may become the subject of larceny by being severed from the freehold; thus, if stones be dug out of a quarry, wood be cut, fruit be gathered, larceny may be committed of them. And this will be the case, not only where they have been severed by the owner, but also by the thief himself, if there be an interval between his severing and taking them away, so that it can not be considered as one continued act. If, therefore, the thief sever them at one time, whereby the trespass is completed, and they are converted into personal chattels, in the constructive possession of him upon whose soil they are left or laid, and come again another time, when they are so turned into personalty, and take them away it is larceny,' 'If a thief severs a copper, and instantly carries it off, it is no felony, yet, if he lets it remain after it is

[1] R. *v.* Clinton, Ir. Rep. 4 C. L. 6 (1869).
[2] McCall *v.* State, 69 Ala. 227 (1881).
[3] 4 Baxt. 429 (1874).
[4] sec. 163.
[5] Citing 1 E. Hale's P. C. 510; 2 East's P. C. 587.
[6] p. 378.

severed any time, and comes back and takes it, then the removal of it becomes a felony; and so of a tree that has been severed.'

"The principle is, that where the severance and asportation constitute one continuous act, then it is a trespass only, but if the severance is a distinct act, and not immediately connected with or followed by the asportation it is a larceny.

"To dig potatoes, whereby they are cast upon the surface of the earth, and immediately to pick them up, and put them in a bag and carry them away, would be one continuous act, although the picking up, necessarily, was after the digging, and after they had lain upon the ground. The act would be continuous, without cessation, until the asportation, as well as the severance was completed, and thus a trespass only. And, so, also, of cutting a 'lot of cabbages,' 'severing them from the earth,' the 'severing' necessarily precedes the taking away, yet, when the taking away immediately follows, it is a 'continuous act,' and is trespass only.

"It is argued by the attorney-general, that the taking of vegetables s vered from the ground, and the carrying of stolen goods into another county, seem to stand upon the same footing, although it is considered that the authorities hold, as to the first mentioned, that the possession is not in the owner as personalty, and in the latter, that the legal possession still remains in him. The trespasser holds the severed property, as personalty, but he can not be convicted of larceny, for he did not obtain that possession feloniously. No felony was committed in the taking and carrying away from the owner, but a trespass only. In the case of an original felonious taking and carrying away, every moment's continuance of the trespass and felony amounts to a new caption and asportation,[1] and the offense is considered as commited in every county or jurisdiction into which the thief carries the goods.[2] It is difficult to see any difference in the moral guilt of one who takes and carries away immediately upon the severance from the freehold and one who severs at one time and takes away at another, but the Legislature has not altered the distinction made by the common law, and it is still in force in Tennessee.

"*The judgment of the Criminal Court will be reversed.*"

§ 522. —— **Animals Not Subject of Larceny — Ferrets.** — At common law, animals are not the subject of larceny.[3] Ferrets though tame and salable, are not the subject of larceny, nor rabbits.[4]

§ 523. —— **"Cow, Sheep, Hog, or Other Animal."** — This phrase in the Alabama statute, means the live animal and not its carcass.[5]

§ 524. —— **Doves.** — So doves are *feræ naturæ* and not the subject of larceny.— In *Commonwealth* v. *Chase*,[6] PARKER, C. J., said: "It is held in all the authorities, that doves are *feræ naturæ*, and as such are not subjects of larceny, except when in a dove-cot or pigeon-house, or when in the nest before they are able to fly. If, when thus under the care of the owner they are taken furtively, it is larceny. The reason of this principle is, that it is difficult to

[1] 2 Arch. Cr. Pr. & Pl. 343, note 1.

[2] *Ibid.*

[3] R. *v.* Searing, R. & R. 350 (1818.)

[4] R. *v.* Townley, 12 Cox, 59 (1871); R. *v.* Petch, 14 Cox, 116 (1871.)

[5] Hunt *v.* State, 55 Ala. 138 (1876).

[6] 9 Pick. 15 (1829); was of martins in trap. Norton *v.* Ladd, 5 N. H. 203 (1830).

distinguish them from other fowl of the same species, they often take a flight and mix in large flocks with the doves of other persons, and are free tenants of the air, except when impelled by hunger or habit, or the production or preservation of their young, they seek the shelter prepared for them by the owner. Perhaps, when feeding on the grounds of the proprietor or resting on his barn or other buildings, if killed by a stranger, the owner may have trespass, and if the purpose be to consume them as food, and they are killed or caught, or carried away from the enclosure of the owner, the act would be larceny. But in this case there is no evidence of the situation they were in when killed, whether on the flight, a mile from the ground of the owner, or mingled with the doves of other persons, enjoying their natural liberty. Without such evidence, the act of killing them, though for the purpose of using them as food, is not felonious. Therefore, a new trial is granted."

§ 525. —— **Dogs.** — So dogs are not the subject of larceny at common law.[1]

§ 526. —— **"Personal Goods."** — Nor are dogs "personal goods,"[2] within a statute.

§ 527. —— **Horse — Filly.** — One who steals a horse is not indictable for stealing a "filly."[3]

§ 528. —— **Oysters.** — So larceny can not be committed of oysters in the sea.[4]

§ 529. —— **Other Fish.** — And so of other kinds of fish not confined or dead.[5]

§ 530. —— **Sheep.** — One who steals a lamb under a year old is not indictable for stealing a sheep.[6]

§ 531. —— **Prosecutor Must Have Property in Goods.** — The prosecutor must have property in the things stolen.[7]

§ 532. —— **They Must Have Some Value.** — So taking a letter which has no intrinsic value is not larceny.[8] One indicted for stealing a bank-note, must be acquitted if the note is not proved to be genuine.[9]

Where a debtor procured his creditor to sign a receipt for his debt, under pretense that he was going to pay him, and then took it from him with a criminal intent and without paying him this was held not larceny,[10] — the paper not being an instrument of any legal obligation.

§ 533. —— **Opening Letter Addressed to Another.** — Opening a letter addressed to another is not larceny even though the object be to prevent it from reaching its destination. In *R.* v. *Godfrey*,[11] the indictment charged the

1 Ward *v.* State, 48 Ala. 161 (1872); State *v.* Holder, 81 N. C. 527 (1879); State *v.* Lymus, 26 Ohio St. 400; R. *v.* Roberson, Bell, C. C. 34 (1859).

2 State *v.* Doe, 79 Ind. 9; 41 Am. Rep. 599 (1881).

3 Lunsford *v.* State, 1 Tex. (App.) 449 (1876).

4 R. *v.* Walford, Esp. 562 (1803).

5 State *v.* Krider, 78 N. C. 481 (1878).

6 R. *v.* Birket, 4 C. & P. 216 (1830).

7 R. *v.* Smith, 1 Den. & P. 44 (1852); McNair *v.* State, 14 Tex. (App.) 78 (1883).

8 Payne *v.* People, 6 Johns. 103 (1810).

9 State *v.* Dobson, 3 Harr. 573 (1843).

10 People *v.* Loomis, 4 Denio, 380 (1847).

11 8 C. & P. 563 (1835).

prisoner with having stolen six sheets of paper of the value of three pence, and a paper parcel containing two letters of the value of three pence of the goods and chattels of William Brinton.

It was opened by *W. J. Alexander*, for the prosecution, that Mr. Brinton was a solicitor at Kidderminster, and that the prisoner, Mr. Godfrey, was an inn-keeper and stage coach proprietor at that place; and that on Saturday, the 29th of July, 1837, Mr. Brinton, being at Brierly Hill, engaged in the South Staffordshire election, he had occasion to send two letters to Kidderminster, these letters being inclosed in a parcel addressed, "Mrs. W. Brinton, Kidderminster. Immediate." The parcel was sent by a coach of which the prisoner was the proprietor. However, on Mr. Brinton's arriving at home on the next day, he discovered that the parcel had not arrived; and on a note being sent to Mr. Godfrey respecting it, he returned a written answer, stating that no parcel had arrived directed to W. Brinton, Esq.; and, in answer to another note, he replied that no parcel had arrived for Mrs. Brinton. It would, however, be proved that the parcel did arrive, and that Mr. Godfrey himself received and opened it; and finding it to contain letters, he broke the seals and read them, and then disposed of them in such manner as he thought proper.

LORD ABINGER, C. B. The facts you have opened are rather a trespass than a felony. Opening a letter from idle curiosity would not be a felony.

*W. J. Alexander.* I should submit that when the act was done with the intent to injure another, that would be sufficient.

LORD ABINGER, C. B. The term *lucri causa* infers that it should be to gain some advantage to the party committing the offense. A malicious injury to the property of another is not enough.

*W. J. Alexander.* In *Cabbage's Case*, it was held that a taking with intent to destroy is a stealing, if it be done to effect an object of supposed advantage to the party committing the offense, or to a third person. There a person took a horse and backed it into a coal pit and killed it, his object being that the horse might not contribute evidence against another person who was charged with stealing it, and that was held to be larceny, six judges against five, holding it not to be essential that the taking should be *lucri causa;* but thinking that a taking fraudulenter, with intent wholly to deprive the owner of the property, was sufficient.

LORD ABINGER, C. B. I can not accede to that. If a person, from idle, impertinent curiosity, either personal or political, opens another person's letter, that is not felony. *Mr. Alexander*, has opened an action for not safely delivering a parcel, in which a jury might give considerable damages. I can not see any excuse for the conduct of the defendant, if it was as stated. Still, assuming that statement to be correct, it is no felony. It was evidently done to gratify some idle curiosity, or perhaps to prevent the letters from arriving. It is a trespass and a breach of contract, but no felony.

His lordship directed an acquittal.

*Verdict, not guilty.*

§ 534. —— **"Writing Containing Evidence of Any Existing Debt" — Value of Newspaper List of Subscribers.** — In *State* v. *James*,[1] it was held that a printed list of subscribers to a newspaper, with dates, in the possession of the proprietor was not within this phrase. "The questions reserved were," said

[1] 58 N. H. 67 (1877).

Bingham, J., "whether the list was a writing containing evidence of an existing debt, within section 3;[1] whether if it was not such a writing, it was a chattel within said section; and if such a chattel, whether evidence was admissible to prove it worth to the owner twenty dollars, although to others it was of no value. The statute of December 1812, so far as material, was the same as section 3.[2] In *Blanchard* v. *Fisk*,[3] it was held, in construing the act of 1812, that, to make the taking of a file of bills larceny, it must contain evidence of unsatisfied debts, or subsisting contracts, covenants or promises, or of the discharge, payment or satisfaction of such debts.

"Was the list a writing containing evidence of an existing debt, within said section 3? It contains no evidence of a contract, promise or covenant subscribed. If evidence, it must be as a book of accounts; but, as a book of accounts, it is wanting in nearly all the elements required by the rule to make it evidence.[4]

"Its value as a statutory subject of larceny is its market value; and evidence that it is worth twenty dollars to its owner, and worth nothing to anybody else, does not show its market value to be twenty dollars. To be of the market value of twenty dollars, it must be capable of being sold for that sum at a fairly conducted sale, at a sale conducted with reasonable care and diligence in respect to time, place, and circumstances, for the purpose of obtaining the highest price.[5]

"*Case discharged.*"

§ 535. —— **Lucri Causa Essential.** — The taking must be of some value to the prisoner.[6] In *State* v. *Hawkins*,[7] it was held that taking a slave from his master with the intention of enabling him to obtain his freedom by sending him to a free State would not support an indictment for the larceny of the slave.

In *R.* v. *Smith*,[8] it was considered that a servant who stole his master's corn for the purpose of feeding it to his master's horses was not guilty of larceny

§ 536. —— **No Larceny of One's Own Property — The Goods Must be the "Goods of Another."** — Therefore where A. delivered his cart to B. to repair and A. took the cart away without paying B.'s charges, A. was not guilty of larceny.[9]

So where the defendant M. was indicted for larceny in converting to his own use, while bailee, a quit-claim deed from one A. to himself the court said: "The deed having been made and executed as alleged in the indictment by A. to M. was the property of the latter and could not be stolen by him.[10]

§ 537. —— **Tenant in Common or Joint Owner.** — A tenant in common or joint owner of property can not be guilty of its larceny at common law.[11]

1 ch. 260, Gen. Stats.

2 ch. 260, Gen. Stats.

3 2 N. H. 398, 400.

4 Cummings *v.* Nichols, 13 N. H. 420; Swain *v.* Choney, 41 N. H. 235.

5 Locke *v.* State, 32 N. H. 106; State *v.* Ladd *Id.* 110; State *v.* Goodrich, 46 N. H. 186; Cocheco *v.* Strafford, 51 N. H. 481.

6 People *v.* Woodward, 31 Hun. 57 (1883).

7 8 Port. 461; 33 Am. Dec. 294 (1839).

8 1 Cox, 10 (1843).

9 Com. *v.* Tobin, 2 Brewst. 570 (1868).

10 People *v.* Mackinley, 9 Cal. 250 (1858).

11 Holcombe *v.* State, 69 Ala. 218 (1881); McCall *v.* State, 69 Ala. 227 (1881); Bell *v.* State, 7 Tex. (App.) 25 (1879).

§ 538. —— **Person Having Lawful Possession of Property.** — Where the prisoner has the lawful possession of property it is not larceny to appropriate it to his own use.[1]

In *R.* v. *Mattheson & Potts*,[2] the prisoners were tenants and occupiers of a house in which were certain gas fittings belonging to a gas company. It became necessary that a gas meter should be changed, and the old one was taken down and left in the custody of the prisoners till called for by the company's servant. In the meantime they converted it to their own use and tried to sell it. It was held they were not guilty of larceny. "The possession of the meter," said the court, "was lawful on their part."

§ 539. —— **Bailee.** — Therefore a bailee of property appropriating it to his own use is not guilty of larceny at common law.[3] So one is not guilty of larceny as a bailee who refused to deliver back a watch loaned to him.[4] Nor is pawning a ring loaned larceny at common law.[5] Where one lost a carpet bag on the highway and sent the person to get it for him, which he did as his bailee, but concealed it and denied having found it, he was not guilty of larceny.[6]

In *R.* v. *Saward*,[7] it appeared that the prisoner was employed by the prosecutor, who was a tarpauling manufacturer, to make up for him canvas bags. The canvas was cut out by the prisoner, at the prosecutor's shop, and taken away by him; and it was his duty to make it up at his own house, and bring back the bags complete. A portion of a large quantity of material received by him was worked up and brought back to the prosecutor; the remainder he pawned, and appropriated the money to his use. The Recorder (after consulting Mr. Justice CRESSWELL). An extremely nice point of law arises in this case. If, under ordinary circumstances, a servant has possession of his master's goods, the possession of the servant is the possession of master, and if he makes away with the property, he is guilty of larceny. But a very refined distinction has been taken between the case of a servant having goods of his master's upon his master's premises, and having them to work up upon his own. He is, in the latter case, considered not in the light of a servant, but in that of a bailee. If he then makes away with the property, he is guilty of a fraud, but not of larceny. If on the other hand a servant so entrusted were to separate a portion of the goods, and dispose of them to his owu use, then the very act of separating them would determine the bailment. He would no longer be in lawful possession of those he had so separated with a fraudulent intent, and would therefore be guilty of larceny in converting them. Here it appears the prisoner had separated and made up a portion of the materials, which would be a lawful act; his pawning the rest, therefore, would not render him guilty of larceny. I have consulted Mr. Justice CRESSWELL on the subject, who, after some hesitation, thinks that the jury should be directed to acquit the prisoner.

*Verdict, not guilty.*

In *R.* v. *Rielly*,[8] the prisoner was indicted for stealing a sheep, the property of George Guest and was found guilty under the following circumstances: "Mr.

[1] State *v.* Copeland, 86 N. C. 691 (1882); Ex parte Kenyon, 5 Dill. 389; R. *v.* Pratt, Dears. 360 (1854).

[2] 5 Cox, 276 (1850).

[3] R. *v.* Hey, 2 C. & K. 982 (1849); State *v.* Fann, 65 N. C. 317 (1871); Zschocke *v.* People, 62 Ill. 127 (1871).

[4] Com. *v.* Frantz, 8 Phila. 612 (1872).

[5] Com. *v.* Perry, 8 Phila. 616 (1872).

[6] State *v.* England, 8 Jones (L.), 399 (1861).

[7] 5 Cox, 295 (1851).

[8] Jebb, 51 (1826) the statement is from the report of the trial judge to the judges.

Guest, who resided in Liverpool, stated, in substance, that he bought upon Thursday the 30th of June last, a lot of thirty sheep, in Smithfield market; that he had them directly after the sale branded upon the back with his own brand, and arranged through persons of the name of Wilson & Graham, that they should be driven on the same day to the water's edge, for the purpose of exportation to Liverpool. That he set off himself immediately for that town, but that after his arrival there, he received only twenty-nine sheep, instead of the thirty. That he thereupon returned to Dublin, and that on the 6th of July, being the Wednesday next after the purchase, he saw the missing sheep in a field near Dublin; Samuel Fisher, the next witness, being examined, swore that on the same Thursday mentioned by Mr. Guest, as the day of the purchase, the prisoner and another man were driving a lot of sheep down Great Brunswick Street (which appeared to have been the route to the Pigeon House); that he was standing at the time in his timber yard, which opens upon the street, when the two drivers solicited permission to leave one of the sheep, which they represented to have tired, for some time in his yard; that he in consequence took from them a sheep (which was proved to be the one identified by Mr. Guest upon his return to Dublin, as the missing sheep), and that the drivers thereupon proceeded forward in the same direction as before. That, however, suspecting a fraud, he took measures with the police, by means of which the prisoner, who called the next morning for the sheep, was apprehended. The peace officer who made the arrest was examined and proved declarations of prisoner, as to the property of the sheep, which I do not consider it for the purposes of this case necessary, to detail. I should have observed that Mr. Guest did not accompany the drivers.

"Neither of the persons (Wilson & Graham), alluded to by Mr. Guest, was examined, and the case in some respects came imperfectly before the court; however, it was to be collected from all the circumstances, and such was the opinion of the jury, that the prisoner and his companions were of the class of persons who drive for hire, from Smithfield market, cattle which may happen to be purchased there, to such places as the purchasers or those acting for them may direct. The prisoner was not defended and produced no witnesses.

"It did not appear to me that there was any reasonable ground for presuming that the sheep were taken by the drivers originally (I mean upon the delivery for the purpose of being driven), with any felonious intent, and I did not, therefore, in terms present that consideration of the case to the jury. I thought, however, that the case might be reasonably assimilated to the familiar one in the books of a carrier separating part of what he is intrusted to carry from the residue, and embezzling such part; and I directed the jury, if they were satisfied that the lot of sheep the prisoner and his companions were driving, was the one purchased by Mr. Guest, and that whilst driving them upon the occasion stated they singled out and took from the lot at large the sheep in question with the intention of fraudulently converting it to their own use, to find in such event the prisoner guilty. He was found guilty accordingly.

I determined to reserve the question as to the propriety of my direction for future consideration. I have accordingly reflected upon it a good deal, and adverting to some modern determinations in England, but particularly the case of *Rex* v. *Madox*,[1] I apprehend that my direction to the jury was erroneous, and

[1] Russ. & Ry. Cr. C. 92.

that I should in the circumstances and event supposed in that part of my charge, have directed an acquittal. I think it right, however, to submit the case to the consideration and decision of the judges."

The judges were unanimously of the opinion that the conviction was wrong; that the prisoner was not a servant but a special bailee, and that according to the adjudged cases there was not such a severance of the sheep as to put an end to the bailment. They also held that the *animus furandi* should have been left to the jury.

§ 540. —— **Bailee Failing to Account.** — So one is not liable for larceny as a bailee who having agreed to conduct a business, pay expenses and divide the net profit with the prosecutor, fails to account.[1]

§ 541. —— **Larceny by a Bailee — Meaning of Bailment.** — The bailment intended by the English statute punishing larceny by a "bailee" is a deposit of something to be returned in specie. Therefore, one with whom money has been deposited and who is under an obligation to return the amount, but not the identical coin deposited is not a "bailee" of the money within the statute.[2]

In *R.* v. *Jackson*,[3] the prisoner was indicted for the larceny of a coat of which he was bailee. From the evidence it appeared that the prisoner lodged with the prosecutor, and on the 3d of January borrowed a coat from the prosecutor for the day, and returned it. On the 10th of January he took the coat without the prosecutor's permission. He was seen wearing it by the prosecutor, who again gave him permission to wear it for the day. Some few days afterwards, he left the town and was found wearing the coat on his back on board a ship bound for Australia. MARTIN, B., stopped the case, stating that in his opinion, there was no evidence of a conversion sufficient to satisfy the statute. There are many instances of conversion sufficient to maintain an action of trover, which would not be sufficient to support a conviction under this statute; the determination of the bailment must be something analogous to larceny, and some act must be done inconsistent with the purposes of the bailment. As, for instance, in the case of bailment of an article of silver for use, melting it would be evidence of a conversion. So, when money or a negotiable security is bailed to a person for safe keeping, if he spend the money or convert the security, he is guilty of a conversion within this statute; the prosecution ought to find some definite time at which the offense was committed; the taking the coat on board ship was subsequent to prisoner's going on board himself.

*Edlin*, for the prosecution, contended that there was evidence of a conversion sufficient to satisfy the statute; that the fact that the prisoner was taking the coat with him on a voyage to Australia, was inconsistent with the bailment, which was a bailment to wear the coat for a limited period.

MARTIN, B., said that the case did not disclose a crime contemplated by the statute and refused the application of the prosecution to grant a case.

In *R.* v. *Loose*,[4] the prisoner who was a trustee of a friendly society, was appointed by a resolution of the society to receive money from the treasurer and carry it to the bank. He received the money from the treasurer's clerk, but instead of taking it to the bank he applied it to his own purposes. He was in-

[1] Com. *v.* Supt. Phila. Prison, 9 Phila. 551 (1872).

[2] R. *v.* Hassall, L. & C. 58 (1861).

[3] 9 Cox, 505 (1864).

[4] Bell. C. C. 259 (1860).

dicted for stealing as bailee of the money of the treasurer and also for a common-law larceny, the money being described as that of the treasurer. The statute concerning friendly societies vests their property in trustees and directs that in all indictments the property shall be laid in their names. It was held that he could not be convicted, either as a bailee or of a common-law larceny.

§ 542. —— **Common Carrier.**— Therefore it is not larceny for a carrier to appropriate goods in his possession unless he breaks the bulk.[1]

§ 543. —— **Carrier of Goods for Hire.** — One employed to carry goods for hire who appropriates them to his own use without breaking bulk is not guilty of larceny, although he is not a common carrier.[2]

§ 544. —— **Servant.** — And so a person having possession of property as a servant is not guilty of larceny at common law in converting it.[3]

In *R.* v. *Butler*,[4] a servant received money from his master to pay wages, and in the book in which he kept his accounts, entries were found charging the master with more money than he had disbursed, but there was no proof that he ever delivered this account to his master. This was held not larceny. "The question here is," said WIGHTMAN, J., "did the prisoner in fact deliver this account to his employers. True it is that there are certain entries made by the prisoner which are incorrect; but they are entries which perhaps he never intended to deliver, or if he did deliver them to deliver them with explanations. But this was not accounting; and there must in this case have been an accounting, in order to fix the prisoner with the larceny."

In *R.* v. *Betts*,[5] the prisoner was a miller's foreman and in making a sale of flour and giving a receipt made no entry of the sale in the books but appropriated the money. It was held that he was not guilty of stealing the goods. "In this case," said POLLOCK, C. B., "the prisoner instead of being indicted for embezzling the money received by him for the goods delivered to a customer, upon that customer's orders, was indicted for stealing the goods. He neglected to make the entries of the sale in the books, which it was his duty to make, and, by omitting to give his master credit for the proceeds of the sale, he concealed the sale from his master. The court are of opinion that as the goods were actually sold, though the prisoner appropriated the money which he received for them, he could not be indicted for stealing the goods. As between the buyer and the prisoner's master there was an actual sale; and what the prisoner did which was objectionable was, not the selling the goods, but appropriating the money instead of making the proper entries and handing it over to his master; and the court are of opinion that in so doing he was not guilty of stealing the goods; although he was no doubt guilty of embezzling the price.

"*Conviction quashed.*"

In *R.* v. *Glass*,[6] the prisoner was a letter carrier appointed by the Postmaster-General. His duty was to carry letters from Westbury every morning, and de-

---

1 R. *v* Madox, R. & R. 92 (1805); R. *v.* Cornish, Dears. 425 (1854); R. *v.* Gibbs, Dears. 448 (1855); R. *v.* Pratley, 5 C. & P. 533 (1833).

2 R. *v.* Fletcher, 4 C. & P. 545 (1831).

3 R. *v.* Glass, 2 C. & K. 375 (1847. See R. *v.* Barnes, 10 Cox, 255 (1866); R. *v.* Green, Dears. 323 (1854); R. *v.* Thompson, L. & C. 233 (1862).

4 2 C. & K. 340 (1846).

5 Bell, C. C. 90 (1859).

6 1 Den. 216 (1847).

liver them at Great Chevril to the parties to whom they were addressed. There was a post-office at Chevril for receiving letters which the prisoner carried every evening to Westbury and delivered at the post-office there, and he also on the road from Great Chevril to Westbury received letters at a village called Bratton, which were in like manner delivered at the post-office at Westbury. The Great Chevril and Bratton letters, were at the respective receiving houses, put in bags which were tied up, but not locked or sealed, and those bags he carried in a leather pouch which was supplied by the Postmaster-General. (At Bratton it was his duty to open the Great Chevril bag in order that the Bratton postmaster might mark on the time bill the time of his arrival.

The postmaster at Great Chevril had no power to issue money orders and the nearest post-office at which they could be obtained was Westbury. It was no part of the duty of the postmaster at Great Chevril to procure money orders from Westbury, or to forward instructions to the postmistress at Westbury respecting them.

Mark Sawyer residing at Great Chevril, and wishing to remit £5 to Henry Osman, of Meeksham, and the like sum to James Rawlings, of Trowbridge, on the 14th September, directed an envelope to each, which he sent together with two £5 notes to the postmaster at Great Chevril, with a written request that he would send them by Glass, and desire the postmasters at Westbury to make out two money orders for £5 each, and forward them in the envelopes which he had sent. When the prisoner called at the Great Chevril post-office in the afternoon for the letters, the wife of the postmaster told him that Mr. Sawyer had sent two envelopes and two £5 notes, and some written instructions to be taken to Westbury, and asked whether he would put them in his pocket, or have them put in the bag with the letters. He requested her to put them in the bag which she accordingly did, and tied the bag as usual. The prisoner put the bag in his pouch. On his arrival at Westbury, he pretended that he had lost the Great Chevril bag; went away as if to look for it, returned, and then produced the bag untied, with all the letters that had been placed in it, and the two envelopes, but not the £5 notes. The jury found the prisoner guilty, but added that he had no intention to steal the notes when they were given to him by the wife of the postmaster at Great Chevril. Entertaining some doubt, whether the taking of the notes by the prisoner, under the circumstances above mentioned, amounted to larceny, the learned judge respited judgment, and requested the advice of the judges on the point.

On April 24th, 1847, Lord DENMAN, WILDE, C. J., POLLOCK, C. B., PARKE, B., PATTESON, J., ROLFE, B., CRESSWELL, J., WIGHTMAN, J., EARLE, J. and PLATT, B., were unanimously of opinion that the conviction was wrong.

The driver of a coach hired for the day is not the "servant" of the party hiring it.[1]

§ 545. —— **Stealing — "In a Building."** — It is not enough to constitute "larceny in a building," that the property was in the building; it must be shown that it was under the protection of the building, and not under the eye or care of some one therein. Therefore, where the owner of goods in a shop placed two watches in the prisoner's hands for inspection, who ran off with them while the owner's back was momentarily turned, this was not "larceny in a building." [2]

[1] R. v. Hayden, 7 C. & P. 445 (1836).

[2] Com. v. Lester, 129 Mass. 101 (1880).

§ 546. —— **Stealing From a "Dwelling-house."** — To steal from a "dwelling-house," the goods must be deposited in the house; to take them from the person of an inmate, or from outside it is not within the statute.[1]

§ 547. —— **"In a Dwelling-house."** — Stealing clothes from the railing or banisters of a piazza, attatched to a dwelling-house, is not larceny "in a dwelling-house."[2]

§ 548. —— **"Dwelling-house."** — A bed-room over a stable, not under the same roof, nor connected with the house, is not a "dwelling-house" within the English statute.[3]

§ 549. —— **"Ground Adjoining a Dwelling-house."** — This phrase imports actual contact; and therefore grounds separated from a house by a narrow walk and paling with a gate in it are not within the words.[4]

§ 550. **Larceny from a House.** — Stealing property hanging at and outside a door is not "larceny from a house."[5] So of goods outside a wash-house.[6]

§ 551. —— **Shop.** — A "shop" is a place for the sale not the deposit of goods.[7]

§ 552. —— **"Warehouse" — "Granary."** — A building of twenty-one feet by fifteen feet placed on a market garden and used for storing the tools and agricultural implements used there, such seeds as are sown and manure employed, is not a "warehouse" or a "granary" within the statute of New Hampshire.[8]

§ 553. —— **Stealing from the Person — Property must be Completely Removed.** — In *R.* v. *Thompson*,[9] the prisoner was indicted for stealing from the person of John Hillman, a pocket-book and four promissory notes of £1 each.

The evidence of the prosecutor was this: "I was at a fair at East Grimstead; I felt a pressure of two persons, one on each side of me; I had secured my book in an inside front pocket of my coat; I felt a hand between my coat and waistcoat; I could feel the motion of the knuckles; I was satisfied the prisoner was attempting to get my book out. The other person had hold of my right arm and I forced it from him, and thrust it down to my book, in doing which I just brushed the prisoner's hand and arm; the book was just lifted out of my pocket; it returned into my pocket; it was out; how far I can not tell; I saw a slight glance of a man's hand down from my breast. I secured the prisoner after a severe struggle, and a desperate attempt at escape, in which he was assisted by twenty or thirty persons." Upon cross-examination the witness said: "My coat was open, the pocket not above a quarter of an inch deeper than the book; I am satisfied the book was drawn from my pocket; it was an inch above the top of the pocket."

[1] R. *v.* Campbell, 2 Leach, 642 (1792); R. *v.* Owen, 2 Leach, 652 (1792); Martinez *v.* State, 41 Tex. 126; Middleton *v.* State, 53 Ga. 248.

[2] Henry *v.* State, 39 Ala. 679 (1866).

[3] R. *v.* Turner, 6 C. & P. 407 (1834); and see R. *v.* Flanagan, R. & R. 186 (1810).

[4] R. *v.* Hodges, M. & M. 341 (1829).

[5] Martinez *v.* State, 41 Tex. 126.

[6] Middleton *v.* State, 53 Ga. 248.

[7] R. *v.* Stone, 1 Leach, 376 (1784).

[8] State *v.* Wilson, 47 N. H. 101 (1866).

[9] 1 Moody, 78 (1835).

Upon the evidence it was insisted for the prisoner that this did not amount to a taking from the person.

The learned judge recommended it to the jury if they were satisfied that the prisoner removed the book with intent to steal it, to find him guilty. The jury found the prisoner guilty, but the learned judge respited the execution of the sentence until the opinion of the judges could be taken on the point.

In Hilary Term, 1825, the judges (BEST, L. C. J., and ALEXANDER, L. C. B., being absent) met and heard this case argued by *Law* for the prisoner, when ABBOTT, L. C. J., BAYLEY, J., PARK, J., HOLROYD, J., BURROUGH, J., and LITTLEDALE, J., thought that the prisoner was not rightly convicted of stealing from the person, because from first to last the book remained about the person of the prosecutor. GRAHAM, B., GARROW, B., HULLOCK, B., and GASSELEE, J., were of the contrary opinion; but the judges were unanimous that the simple larceny was complete; and sentence of transportation for life having been passed, a pardon, on condition of transportation for seven years, was recommended.[1]

§ 554. —— **Stealing "Privately from the Person."**— To steal from one who has rendered himself insensible by intoxication is not a "privately stealing from the person" within the English statute.[2]

In *R.* v. *Scribble*,[3] the prisoner was indicted for having stolen a watch from Thomas Sheridan, privately from his person and without his knowledge.

The prosecutor had been drinking at a public house with the prisoner, and being both of them much intoxicated, they went together to the prisoner' lodging, where the prosecutor fell asleep; and while he was asleep the prisoner stole his watch.

The court ruled this not to be such a stealing privately as would oust the offender from the benefit of clergy, within the meaning of the legislature; and mentioned the following case as having been decided by the judges: a person who had become intoxicated at Vauxhall Gardens fell fast asleep on his way home, in one of tho watch-houses or niches on Westminster Bridge. A waiter, also from Vauxhall, passing that way stole the buckles out of his shoes without waking him, and the judges were of opinion, that the statute was intended to protect the property which persons by proper vigilance and caution should not be enabled to secure; but that it did not extend to persons who by intoxication had exposed themselves to the dangers of depredation, by destroying those faculties of the mind by the exertion of which the larceny might probably be prevented.

The jury found the prisoner guilty of stealing, but not privately from the person.

§ 555. —— **Receiving Stolen Goods.** — Receiving stolen goods is not larceny.[4]

§ 556. —— **Possession of Recently Stolen Property.**— Convictions are sometimes had on the fact alone that the prisoner has in his possession the stolen property; that the possession is recent and he gives no reasonable explanation of the possession. But in a number of cases it is laid down that a conviction

[1] *Vide* 2 East's P. C. 555, 556, 557.

[2] R. *v.* Kennedy, 2 Leach, 914 (1797); R. *v.* Morris, *Id.* 915 (1797); R. *v.* Duff, *Id.* 915 (1796).

[3] 1 Leach, 275 (1782).

[4] People *v.* Maxwell, 24 Cal. 15 (1864).

can not rest on recent possession alone.[1] For the rules of law and the presumptions as to this proof, see my book on "Presumptive Evidence."[2]

§ 557. —— **Possession of Recently Stolen Property — Erroneous Charge. — Tucker v. State.** — In *Tucker* v. *State*,[3] the defendant was indicted and convicted of stealing a horse from one Carr; the evidence being as follows: Carr's horse was stolen, in Erath County, about the 26th of October, 1882. About a month before the horse was stolen, appellant was seen in the neighborhood. The last of October or first of November, 1882, appellant came to the house of S. B. Walker, in Mason County, one hundred and fifty miles from Erath County, and was riding a horse in every way filling the description of Carr's stolen horse, and defendant "said he was just back from Mexico." This was, in brief, all the evidence. Upon the subject of recent possession, the court charged the jury "that the possession alone of property shown to have been recently stolen is not in law sufficient to warrant the conviction of one charged with theft. Such possession, if proven, is only a circumstance for the jury to weigh and consider in connection with other established facts in determining whether the accused is guilty of the offense charged or not. If, therefore, the alleged horse was stolen as charged, and if the said horse has been traced to the possession of the defendant, such possession, if unsupported by other evidence, will not warrant the defendant's conviction; and if such be the case, you will acquit the defendant. If, however, you find that such possession, if shown, is corroborated by other evidence, than to warrant the defendant's conviction all the evidence taken and considered together, including the fact of possession, if it exists, should be sufficient to exclude from your minds every reasonable theory consistent with defendant's innocence." On appeal this was held error,—

WHITE, P. J., saying: This objection was objected to, and is complained of and assigned as error. However comprehensive the charge may appear to the legal mind, we fear it was calculated, and did mislead the jury by impressing them with the idea that if the mere fact of "possession" was "corroborated" that would be sufficient to establish guilt. There was no question about "possession" and "recent possession." The evidence, if it established anything, established "recent possession," and that fact needed no "corroboration." What the jury should have been told was, in effect, though recent possession be established, still unless the other evidence in the case tended to connect defendant with the fraudulent taking of the animal, he would be entitled to an acquittal; in other words, that there must be other evidence of guilt besides the recent possession, and that these evidences, together with the recent possession, must be sufficient to establish in the minds of the jury defendant's guilt to a moral certainty, beyond a reasonable doubt. Because the charge was calculated to, and perhaps did, mislead the jury, and because the evidence is insufficient to support the verdict and judgment, the judgment is reversed and the cause remanded.

*Reversed and remanded.*

1 State *v.* Graves, 72 N. C. 482; State *v.* Walker, 41 Iowa, 217; Yates *v.* State, 37 Tex. 202; People *v.* Noregea, 48 Cal. 123; Galloway *v.* State, 41 Tex. 289; R. *v.* ——, 2 C. & P. 459 (1826); R. *v.* Adams, 3 C. & P. 600 (1829); State *v.* Carter, 72 N. C. 444; State *v.* Graves, 72 N. C. 482; State *v.* Walker, 41 Iowa, 217 Gablick *v.* People, 40 Mich. 292.

2 Lawson on Presumptive Evidence, Rule 109.

3 16 Tex. (App.) 471 (1884).

§ 558. —— **"Voluntary Return" of Stolen Property.** — In Texas the penalty for theft is mitigated where the property is voluntarily returned within a "reasonable time." The evening of the day on which it was taken is "reasonable time."[1] The return of stolen property may be voluntary within this statute, although it is caused by fear of detection and punishment, as well as by repentance.[2]

§ 559. —— **Evidence held Insufficient on which to Convict.** — In a large number of cases in the appellate courts the evidence below has been held insufficient on which to convict.[3] The most important of these cases in the Court of Appeals of Texas are given in full in the succeeding sections.

§ 560. **Evidence Insufficient to Convict — Casas v. State.** — In *Casas* v. *State*,[4] the indictment charged the prisoner and one Gomez, jointly, with the theft from the shop of one Fierling of dress goods to the value of $20. The prisoner was convicted.

Andreas Fierling was the first witness introduced by the State. He testified that, at the time of the theft, about the first day of June, 1881, he was the proprietor of a tailor shop, situated in front of the steamboat office in the city of Brownsville, Texas. Everything of value which was stored in the shop was taken on the occasion referred to. The articles mentioned in the indictment being read over to the witness he identified the following: One black cap, one black vest, two grey vests, one pair of soldier's pants, two pair of black pants, one coat and pair of pants, one cassimere coat, one black coat, one cassimere vest without a back, trimmings, and one pocket knife. He gave the value of each article, and testified that their aggregate value was $35. The witness recovered the articles named through Mr. Storms, a justice of the peace. They were stolen in the morning between three and four o'clock. The witness had suffered with toothache up to three o'clock, and between .ur and five

[1] Ingle *v.* State, 1 Tex. (App.) 307 (1876).

[2] Allen *v.* State, 12 Tex. (App.) 190 (1882). And see Bird *v.* State, 16 Tex. (App.) 528.

[3] State *v.* Rice, 83 N. C. 661 (1880); State *v.* Wilkerson, 72 N. C. 378 (1875); State *v.* Deal, 64 N. C. 270 (1870); Green *v.* State, 12 Tex. (App.) 51 (1882); Casas *v.* State, 12 Tex. (App.) 59 (1882); Pettigrew *v.* State, 12 Tex. (App.) 225 (1882); Hardemann *v.* State, 12 Tex. (App.) 350 (1882); Johnson *v.* State, 12 Tex. (App.) 385 (1882); Seymore *v.* State, 12 Tex. (App.) 391 (1882); Taylor *v.* State, 12 Tex. (App.) 489 (1882); Shelton *v.* State, 12 Tex. (App.) 513 (1882); Santello *v.* State, 16 Tex. (App.) 249 (1884); Harrison *v.* State, 16 Tex. (App.) 326 (1884); Madison *v.* State, 16 Tex. (App.) 435 (1884); Tucker *v.* State, 16 Tex. (App.) 471 (1884); Fletcher *v.* State, 16 Tex. (App.) 635 (1884); Evans *v.* State, 15 Tex. (App.) 31 (1883); Willis *v.* State, 15 Tex. (App.) 118 (1883); Clayton *v.* State, 15 Tex. (App.) 221 (1884); Taylor *v.* State, 15 Tex. (App.) 357 (1884); Prator *v.* State, 15 Tex. (App.) 363 (1884); Schindler *v.* State, 15 Tex. (App.) 394 (1884); Harris *v.* State, 15 Tex. (App.) 411 (1884); Powell *v.* State, 15 Tex. (App.) 441 (1884); Buntain *v.* State, 15 Tex. (App.) 490 (1884); Castellow *v.* State, 15 Tex. (App.) 551 (1884); McNair *v.* State, 14 Tex. (App.) 78 (1883); Cook *v.* State, 14 Tex. (App.) 96 (1883); Mapes *v.* State, 14 Tex. (App.) 129 (1883); Dresch *v.* State, 14 Tex. (App.) 175 (1883); Wolf *v.* State, 14 Tex. (App.) 210 (1883); Hammel *v.* State, 14 Tex. (App.) 326 (1883); Knutson *v.* State, 14 Tex. (App.) 570 (1883); Deering *v.* State, 14 Tex. (App.) 599 (1883); Hart *v.* State, 14 Tex. (App.) 657 (1883); Hunter *v.* State, 13 Tex. (App.) 16 (1882); Voight *v.* State, 13 Tex. (App.) 21 (1882); Harris *v.* State, 13 Tex. (App.) 309 (1882); Johnson *v.* State, 13 Tex. (App.) 379 (1883); Irvine *v.* State, 13 Tex. (App.) 499 (1883); Landin *v.* State, 10 Tex. (App.) 63 (1881); McPhail *v.* State, 10 Tex. (App.) 128 (1881); Baker *v.* State, 11 Tex. (App.) 262 (1881); Merritt *v.* State, 2 Tex. (App.) 177 (1877); Smith *v.* State, 2 Tex. (App.) 477 (1877); Dixon *v.* State, 15 Tex. (App.) 480 (1884).

[4] 12 Tex. (App.) 59 (1882).

o'clock he heard a noise in the shop; and, proceeding to investigate it, he discovered that the establishment had been "cleaned out." The goods were taken in June or July of 1881, and the taking was without the consent of the witness. The witness gave Mr. Pecina a sample of the goods lost, and recovered goods corresponding with the samples. On his cross-examination the witness stated that the man whom he thought took the goods was a man who stayed about the steamboat office, until about a month after the robbery. The witness did not know the man's name, but considered him a very good friend until he began to miss articles every day, after this man's visits to his shop. The witness missed articles invariably after this man's visits to his shop, which was the reason of his suspicion. The loss of the knife and a pocket handkerchief, on two separate occasions following the visits of this man, was particularly spoken of by the witness. The man was a Mexican and disappeared soon after the discovery of the stolen goods. Some of the stolen goods fitted the man exactly, and these the witness had never recovered. The defendant resembled the man spoken of, but the witness could not possibly identify him as the same. If the defendant was not the man, then defendant was never about the shop — or if so, the witness did not know it. On redirect examination the witness said the man he spoke of was about the height and strength of the defendant, and the clothes referred to would fit the defendant. He proved the venue and want of consent.

D. Buterera testified, for the State, that he was a police officer at the time of the robbery, and as such executed the search warrant under which the goods were recovered at the house of Pedro Alvarez. The articles there found were those described in the indictment. He found at Pedro Alvarez's house, when he executed the search warrant, Pedro, his wife, three daughters, and this defendant. The latter, when found, was asleep in a little room. None of the articles removed were found in the large family room, but for the most part were found in a box under a bed, in a small room occupied by the defendant. The witness found some of the articles under a mattress in a large room, and some in a trunk in the same room. The witness had never seen the defendant before that day. Over the objection of defendant, the witness testified that he found other stolen property in the house beside that named in the indictment. A saddle was found in the defendant's room, which was turned over to the owner, Faustino Villareal. A pair of saddle bags containing a pair of spurs and ordinary toilet articles were found in defendant's room, which were claimed by and turned over to him. Cross-examined, the witness stated that he did say on the trial of Alvarez, the day before this trial, that, when he searched the house under the warrant, he heard a stamping like some one leaving the house. He said nothing about this on his direct examination on this trial, because he was not asked about it. Pecino was about the premises and saw the shadow of some one running off. The witness saw a bed just outside the door, which had the appearance of being recently occupied, but the witness saw no shoes near or under it. On his return to the house, the next day, the witness was told that Gomez fled on his approach the day before. The house is an ordinary grass covered jacal, divided very nearly in the middle; one division being subdivided, forming the small room and kitchen. The witness found Pedro Alvarez, his wife and three daughters in the large room, and read the warrant to them, about one o'clock. There was an open space or hole for a door leading into the room where the defendant was. The defendant heard the warrant read, and got up, but made no effort to escape. The witness first searched the

trunks. In one he found the soldier's pants and some ladies' wearing apparel; in another a lot of trimming and a gray waistcoat in which there was no back. He next found, under the mattress, a black coat and pair of pants, and next went into the small room, where the defendant still was, and there he examined the saddle-bags first. He then looked under the bed and discovered the box in which the missing goods were found. The house was the property of Alvarez. Upon finding the goods the witness arrested the defendant and Alvarez, and took them and the goods found to the justice of the peace. He shortly returned with another search warrant, and then arrested the wife of Alvarez.

Faustino Villareal recognized the saddle recovered from the Alvarez house, as the one stolen from him the night before the arrest of the defendant and Alvarez. It was found in the room in which the defendant was arrested. The witness had never seen the defendant before his arrest.

Louis Kowalski testified for the defence, that as a business man and politician he knew nearly every man in Brownsville. He was custom-house officer in Brownsville. He knew the defendant. In the beginning of the year 1881, the defendant worked for the witness' mother. He afterwards disappeared, and the witness heard nothing more of him until his arrest. The defendant has two sisters, one living in Matamoras, and one living with the witness. The defendant was in Brownsville during the first part of the year of 1881. The witness knew nothing personally of his going away.

Elisha Campbell, for the defence, testified that he was acquainted with Pedro Alvarez, who owned the house in which the stolen goods were found. The witness was present when the arrests were made. Alvarez, wife, daughters and defendant were in the house and Refugio Gomez was in the kitchen. Gomez heard the order or search warrant read, and ran out and attempted to mount the witness' horse. He did not succeed, but ran on down the street and escaped. This witness had heard a conversation between Gomez and defendant, in which Gomez, speaking of having rented a small room, said he had to pay Alvarez one dollar for it. He had several times seen Gomez at Alvarez's house, previous to the arrest. Gomez left his shoes when he ran away. The defendant made no effort to escape.

Juana Casas, defendant's sister, testified that for eight or nine years past the defendant had resided at Corpus Christi, having left the neighborhood of Brownsville and Matamoras when he was ten or twelve years of age. He had been back but twice since; the last time he returned was about fifteen days before his arrest.

Buterera, for the defence, testified that when he arrested the defendant he told him the reason of his arrest. The defendant immediately denied any knowledge or participation in the theft, and declared that he had been in Brownsville but two or three days, and was from Corpus Christi.

Silvario Maza testified, for the defence, that he knew Gomez before arrest of defendant, but did not know where Gomez went to. When in Brownsville, Gomez stayed at Alvarez's house. Guadalupe, the man referred to by Fierling as the man who worked in the steamboat office, was when the trial was had, on the Mexican side of the Rio Grande, but was in Brownsville when these parties were arrested, and for six weeks after.

Campbell, in rebuttal, testified that he saw the defendant at the Alvarez house on four different days, before his arrest; the first time as many as seventeen days before the arrest.

HURT, J. On the 1st day of June, 1881, the shop of one Andreas Fierling was rifled of its contents, consisting of goods, such as are ordinarily kept in a village tailor shop. A search warrant was issued, and by a policeman of the town of Brownsville the house of Pedro Alvarez was searched and the goods found therein. Pedro Alvarez, Margarita Molano and defendant, Angel Casas, were arrested. Pedro and Margarita were jointly indicted and tried. Pedro was convicted and Margarita acquitted.

One Refugio Gomez and appellant were jointly indicted for the same theft. Gomez, when the search was being made, fled, and has not been captured. Appellant was tried and convicted; the jury assessing his punishment at confinement in the penitentiary for the term of two years.

The defendant, when the house was searched, was found in sleep on a bed in a small room of the house of Alvarez. When arrested, on being informed of the charge, he denied having any knowledge of the matter. His saddle-bags being examined, no fruits of the crime were discovered. Under the bed, however, in a box was found some of the stolen property. With this box it was not shown that defendant had any connection whatever; nor is it shown that defendant had control of the room in which he was sleeping. On the other hand, the evidence tends to prove that Refugio was the occupant of the room,—he who broke and made good his escape, when he learned the business of the officer. The only fact tending to implicate defendant is "that some of the goods were found in this box." Under the circumstances of this case, we are of the opinion that this is not sufficient.

The court should have granted the defendant a new trial. The judgment is reversed and the cause remanded, with a new trial awarded.

*Reversed and remanded.*

§ 561. **Evidence Held Insufficient — Cook v. State.** — In *Cook* v. *State*,[1] the indictment charged the appellant with the theft of two horses, the property of John Collier, in Dallas County, on the fourth day of March, 1882. He was convicted, and was awarded a term of seven years in the penitentiary.

John Collier was the first witness, for the State. He testified that he worked his certain sorrel horse the whole of the day on the last Monday in March, 1882, and at night he turned the animal into his lot, from which he was missing next morning. He next saw the animal, eight or nine days later, in Eastland, Eastland County, in possession of the sheriff, who also had George Cook, John Broach and Joe McGee in custody, charged with the theft of this animal. Each of these three parties denied all claim to the animal. On Tuesday, the day after the horse was lost, the witness learned, upon inquiry, that the defendant and Joe McGee had left his neighborhood and gone west, bound for Eastland; and he immediately left in pursuit. At Arlington, a point eighteen miles west of his house, the witness heard of his horse from a party of travelers. Following on that road in the direction of Fort Worth, beyond Arlington, the witness overtook Riley Pemberton, a neighbor, who had lost a horse on the same night that the witness lost his. When the witness heard of his and Pemberton's horses, at Arlington, they were reported to be in the possession of two men of whom witness could get no description. Witness and Pemberton next heard of their horses when they had reached a point beyond Fort Worth. Along this route beyond Fort Worth the witness and Pemberton

[1] 14 Tex. (App.) 96 (1883).

traced the track of a wagon drawn by a yoke of bulls, and within a day or two came upon a camp near a small creek, which camp had been occupied by four men, having in their possession horses answering the description of those stolen, and a wagon drawn by a yoke of bulls. Reaching a point eight miles distant from Eastland the roads forked, and the witness took and followed one and Pemberton the other. When the witness reached Eastland, he found Pemberton already arrived. The witness' horse was there in possession of the sheriff. George Cook, John Broach and Joe McGee were there in the custody of the sheriff. The defendant was not there, but, knowing that he had a brother-in-law living a few miles out from Eastland, witness, with a party, went there, found and arrested him. George Cook, a brother of the defendant, escaped from the officers at Eastland, and has not since been seen. Joe McGee lived in the witness' neighborhood, and owned the yoke of oxen, and was seen in company with the defendant a few days before the theft of the animals. He has been sent to the penitentiary for the theft of these animals. John Broach is under indictment for this theft, and is out on bond. Witness could not say that these parties were familiar with the stock of the country, but knows that they had seen his horse often enough to know it. Witness never saw the defendant in possession of his horse which was stolen on the night of March 27, 1882, and which was taken without the consent of the witness. An indictment for horse theft is now pending against the witness in the District Court of Dallas County, but witness asks no more than a trial as fair as he thinks defendant will get in this case.

Riley Pemberton was the next witness for the State. He testified that he lost a horse from his place near Collier's place, in Dallas County, on the same night that Collier lost his. He saw the defendant and Joe McGee together near his farm on the Sunday before, and on the following Tuesday learned that they had gone west with a horse owned by defendant, and a yoke of bulls, which were worked as steers, owned by McGee. Witness started in pursuit, and near Arlington, in Tarrant County, met up with John Collier, on the same pursuit, and the two traveled on together. At Arlington they heard of their horses for the first time, but could get no description of the parties who had them in possession, nor of the exact time they passed through Arlington. Beyond Fort Worth witness and Collier got on the trail of the bulls, wagon and two persons. A day or two thereafter, and some distance beyond Fort Worth, they again heard of the horses, bulls and wagon, in possession of four persons who had camped one night on a small creek. Collier and witness separated at the forks of the road, eight or nine miles from Eastland, each taking one of the forks. After riding along his route a short distance, the witness saw parties ahead, and leaving the road and riding around them, the witness reached a point near the road ahead of them, and secreted himself so that he could see them as they passed. As they passed witness recognized the defendant and Joe McGee in the wagon driving Collier's horse and another horse which the witness did not know. George Cook and John Broach came on behind the wagon and were driving the bulls. They were riding horses which the witness did not know. The witness' horse was not in their possession. When the party had passed the witness, he again took to the brush, passed them, rode rapidly into Eastland and notified the officers.

George Cook soon came into Eastland, and was arrested. Witness and the officers then went in quest of the other parties and the wagon and stock.

They found Joe McGee and John Broach with the wagon, camped a hundred or two yards off the road, and arrested the two men. Collier's horse, another one, the wagon and the bulls were in their possession. Neither McGee nor Broach claimed the Collier horse. Witness and the officers returned to Eastland with McGee and Broach, and found Collier, who had then reached town. George Cook escaped from the officers in Eastland and has not been seen since. John Broach was released by the officers, over the protest of the witness, but has since been indicted in Dallas County and is now under bond. Collier and the officers went out and arrested the defendant somewhere in the country. McGee and the defendant were brought to Dallas, and were indicted for this theft. McGee has been convicted and is now in the penitentiary.

Dave McGee testified, for the State, that he was a brother of Joe McGee, heretofore convicted and now serving a term in the penitentiary for this offense. At the time of this offense Joe McGee lived with his mother, in the neighborhood of the witnesses Collier and Pemberton. On the Saturday before this theft, the defendant came to the McGee house, and said that he had come for Joe to go west with him to Eastland County. They left for Eastland that morning, Joe taking with him, at defendant's request, a yoke of bulls he owned. Defendant had a gray horse with him when he came to the house. When the two left, they took with them Joe's bulls and the defendant's horse. Defendant said at the time that he had sent his brother, George Cook, to get a wagon in which he intended to work the bulls. Joe McGee owned a horse at that time, but it was lost. Witness saw no more of them until after their arrest and return to Dallas County.

J. W. Vincent was the first witness for the defence. He testified that some time in March, on Tuesday, he saw the defendant and a young man whom, from description, he supposes to have been John Broach, in camp on Sycamore Creek. They had a yoke of cattle standing near a wagon. Defendant said they had no horses, but that his partners behind, who were going with him to a hog ranch in Eastland County, would bring along two or three. The witness saw the same parties that night at a dance at the house of Mrs. Dietz, who lives in the suburbs of Fort Worth.

Mrs. E. Deitz testified for the defendant that she lived in the suburbs of Fort Worth; that on Tuesday, March 28th, she saw the defendant and John Broach at her house; that they returned that night as attendants upon a dance which occurred there at that time. Witness had known defendant seven or eight years.

Carrie Samuels, who attended the dance at Mrs. Dietz's corroborated that witness.

Motion for new trial assailed the sufficiency of the evidence, and was overruled.

White, P. J. (after ruling on an instruction as to principal and accessory). In the case before us, whilst in a legal point of view the charge of the court, as we have shown, was a correct enunciation of the law upon this point, we are of opinion that the evidence was not sufficient to support the verdict and judgment upon the ground of defendant's guilty complicity as a principal offender. The evidence before us lacks that probative force which carries with it the conviction that it is incapable of explanation upon any hypothesis other than that of the defendant's guilt.

Again, the evidence, so far as defendant's guilt is sought to be established, is wholly circumstantial. Such being the case, under repeated decisions it has

been held error for the court to refuse, fail or omit to instruct the jury as to the law with reference to that character of the testimony.

Because the evidence was insufficient, and because the charge of the court did not submit the law essential to the evidence, the judgment is reversed and the cause remanded

*Reversed and remanded.*

562. **Evidence held Insufficient — Crockett v. State.** — In *Crockett* v. *State*,[1] the indictment charged the appellant with the theft of a boar hog of the value of twenty-five dollars, the property of George Brown. The theft was alleged to have been committed on the seventeenth day of January, 1883. The punishment assessed against the appellant, by a verdict of conviction, was a term of two years in the penitentiary.

George Brown testified, for the State, that the defendant lived about three-quarters of a mile distaut from his house, and about three hundred yards from Tate's. In January, 1883, the witness had a very fine black and white spotted boar hog, which he valued at twenty-five dollars. When turned out, the hog would customarily remain away from the house three or four days, and then return. The hog had been missing longer than his usual time when, on January 17, witness went to look for him. In that search he got information from Tate which caused him to give up the search. The hog was marked and the left ear was scarred by dogs or worms. Witness gave no one his consent to take the hog. Witness has not seen his hog since he missed him on the occasion named.

Henry Tate testified, for the State, that on the morning of January 17, he and his wife passed the defendant's house, and saw a large fine black and spotted boar hog lying at the defendant's hog pen. On their return that night, they learned that the defendant had killed a hog that evening, and as the witness had recently missed a hog, he went over to see the defendant next morning. Witness found blood about the hog pen, and called the defendant out and asked him if he had not killed witness' hog, which the defendant denied. Witness then went off and got Jim Battle, aud returned and asked the same question of defendant. Defendant replied that witness should know he had not killed witness' hog; that the hog he killed was much larger than that of witness. He showed the witness the head of a large hog, off which the hair had been scraped and the ears cut close. He then asked witness if he had ever noticed a large black and spotted boar hog running about the neighborhood. Witness replied that he had, and defendant said that that was the hog he had killed. That hog, according to the witness, was worth twenty-five dollars.

Jim Battle, for the State, corroborated the witness Tate. He stated, further, that he identified the head shown by defendant by the scarred appearance of the left ear. It was the head of a large black and spotted boar hog which had been running in the neighborhood for some days.

Flora Crockett, wife of the defendant, testified that she was at home on the January evening when her husband, the defendant, killed a large black and spotted boar hog. That hog was one of four the defendant bought from Hayden Smith, about two weeks before, for thirty dollars. When Tate and Battle came to the house next morning, witness was in the house singeing the ears of the slaughtered hog.

[1] 14 Tex. (App.) 226 (1883).

Amy Howard testified, for the defence, that she was living with defendant when he killed a hog on January 17, 1883. She testified exactly as Flora Crockett did, except that she was positive that she was boiling the ears for breakfast on the morning after the hog was killed, and while Tate and Battle were at the house. She also testified that the hog was castrated.

Fannie Smith testified, for the defence, that her husband, Hayden Smith, bought some hogs about the first of January, from a man on Summer's place, and among them a large black and spotted boar. These hogs, four in number, including the boar, he shortly sold to the defendant for eighteen dollars. Her husband raised none of these hogs.

Hayden Smith testified, for the defence, that in January he sold defendant four hogs for twenty-eight dollars. One of these was a large black and white spotted boar, which witness had raised from a pig. The others witness bought on the Summer's place. This witness denied that he had told George Brown that the hog he sold the defendant was a small hog, and on this point Brown, in rebuttal, contradicted him.

The motion for new trial set up newly discovered evidence among other grounds. It was supported by the affidavits of three parties. That of Tom Reed set up, in substance, that late in February, 1883, he saw a large black and spotted boar hog on Bennett's place, about two and a half miles from George Brown's place. The affidavit of John Shaw set up that at the time of this trial, or a few days before, there was running at large on the Bennett place, a little more than a mile distant from George Brown's, a large black and white spotted boar hog. Witness did not know who owned the hog. Oliver Jackson's affidavit set up the same facts as that of Shaw, except that he added that the hog referred to as now at large was marked with an underbit in the right ear. The left ear appeared somewhat lacerated.

WHITE, P. J. The hog killed by defendant is not identified positively as the hog of the prosecuting witness, George Brown. A strong case of circumstantial evidence is made by the testimony of the State's witnesses, and, if no doubt had been thrown upon it, it would unquestionably have been sufficient to support the verdict and judgment. It is also true that the defendant's witnesses contradicted each other in several particulars. We concede, as stated, that the case made by the State was strong and only lacked a positive identification of the hog to make it conclusive. On his motion for a new trial defendant produced the affidavits of three witnesses to facts which if true were, in connection with defendant's evidence, almost if not quite as strong as the case made by the State, to prove that Brown's hog had not been killed by defendant at all, but was alive on the Bennett farm within a few miles of Brown's home some time after defendant killed the hog for which he was tried, and up to within a very few days of the trial.

We are of opinion the court, under the circumstances of the case, should have granted the new trial.

*Reversed and remanded.*

§ 563. **Evidence Held Insufficient — Deering v. State.** — In *Deering* v. *State*,[1] the indictment charged the defendant with the theft of eighteen head of sheep, the property of Bart. Burkett. The offense was alleged to have been committed in Gonzales County, on the fifteenth day of November, 1881. The

[1] 14 Tex. (App.) 599 (1883).

trial was had at the July term, 1883, of the District Court, and resulted in the conviction of the appellant. His penalty was affixed at confinement in the penitentiary for a term of two years.

Bart. Burkett was the first witness for the State. He testified that he lived in Gonzales County, Texas. He knew and identified Hill Deering as the prisoner at the bar. During the spring of 1881, the witness from time to time lost sheep from his pens, aggregating perhaps a hundred head. About the time mentioned, the witness found eighteen head of his sheep in a drove in DeWitt County, about one mile from the Gonzales County line. They were then about three miles distant from the witness' house, and about seven miles distant from the defendant's house. The drove was then under the charge of John G. Hester and the defendant's brother, Tobe Deering. The defendant was not present. The sheep were being driven along the public road in the direction of Hoheim. Hester told the witness that he had purchased the sheep from the defendant. The witness stopped the sheep, which were driven into his pen, and Hester sent for the defendant. When the defendant arrived, Hester claimed, in the presence of witness, defendant and others, that he had bought the sheep from the defendant, and the defendant said he had sold them to Hester. The sheep were wrath three dollars per head. No one had the witness' consent to take the sheep.

The witness' brand was X on the side of the face, one prong of the cross extending from the left corner of the eye to the corner of the mouth, and the other extending across the bridge of the nose. This brand was on these sheep, with the addition of a small mark across one bar of the cross. This mark had been added and "haired over." The sheep were still in the witness' mark. When the defendant first came up to where the witness Hester and Tobe Deering had the sheep, he said they were his sheep. Afterwards, and during the same conversation, he said they were honest sheep which he had sold for his little brothers. He said they had raised some and bought some of them. The witness took his sheep from the bunch, one by one and examined them carefully. There were present at this time the witness, J. L. Crawford, Rufus Hale, Willis Arrington, John Hester and the defendant. Subsequently, and in the presence of the parties named, the defendant and the witness entered into the following agreement: The witness was to allow Hester to go on with the sheep, and the defendant was to bring a suit against the witness for the sheep, and Willis Arrington was to become surety for the forthcoming of the sheep. Hester was to hold the sheep as the property of the witness until their *status* was decided by law. The defendant never brought the suit agreed upon.

Some time after the agreement was entered into, the witness found his sheep in the flock of Lee Floyd, on the west side of Guadalupe River. He and Floyd tested ownership by arbitration, and the sheep were awarded to the witness, whereupon Floyd paid the witness for them. This arbitration was had in Gonzales County, in March, 1882. The witness had never seen his brand on other sheep than he owned, except those he sold, which were put in the mark of the purchasers. When the witness found these sheep in the flock in the possession of Tobe Deering and John G. Hester, the letter V had been (since they were taken) branded on the side of the face opposite the witness' brand.

Rufe Hale was the next witness for the State. He testified that some time in 1881, at the request of Burkett, he went to Burkett's house to look at eighteen head of sheep which were said to have been stolen from Burkett. When the witness saw them, the sheep were near Burkett's house, in Burkett's posses-

sion, and had Burkett's mark and brand on them. A slight addition had been made to Burkett's brand. These eighteen head of sheep were in a brand different from that on the other sheep of the flock. When the defendant came up to the party, he said that he had sold those sheep to John G. Hester. He claimed that the sheep had been raised by his family. Respecting the conversation between Burkett and the defendant, the witness testified substantially as Burkett did. He corroborated Burkett as to the arrangement for the proposed litigation over the ownership of the animals.

J. L. Crawford testified, for the State, that he was present when Burkett separated eighteen head of sheep from a flock of sixty or seventy, and saw Burkett examine them one by one. Seventeen of them had Burkett's brand, with a slight addition, on them. They were also branded with a V on the opposite jaw. This V and the addition to Burkett's brand were fresher than the original brand. Two of the sheep Burkett recognized from the outside of the pen, and independent of the marks and brands — one by a peculiarly broken horn, and the other by a distinct and different brand. The defendant said that these eighteen sheep were, or had been, his and his little brother's, but that he had sold them to John Hester. Burkett returned the sheep to Hester upon the agreement of the defendant to sue for them; and Arrington became surety to Burkett for the sheep. The witness afterward saw some of the sheep in Floyd's flock, in Gonzales County. He had never seen any of them in the possession of the defendant.

J. L. Floyd testified, for the State, that Bart. Burkett came to his house early in the spring of 1882, and examined his, witness', flock of sheep, from which he picked out eighteen head which he claimed as his own. The question of ownership was arbitrated by the witness and Burkett, and, the award being in Burkett's favor, the witness paid him for them. C. J. O'Neil, the witness' partner, brought the sheep to the witness' place, and had a bill of sale for them from John G. Hester. This was the first time the witness ever saw them. The brands and marks showed then that they were original marks and brands changed. The brand showed that it had recently been changed from the brand claimed by Burkett. The letter V was also branded on the cheek opposite the changed brands, and was fresher than the former. One of the eighteen head identified by Burkett had a broken horn, and another the letter B branded on one jaw.

J. A. Deering, for the defence, testified that the defendant was his son, and that if the defendant ever owned any sheep, he, the witness, did not know it. The witness' family had owned a small flock of sheep since 1875, which was started from a pet lamb presented to some one of them by Captain Gus. Jones. Two or three other sheep were afterwards obtained from Sam. Moore, and as many from Dave Williamson. In 1880, the witness' family exchanged a buck and some mutton with George Johnson for six ewes, and in the fall of the same year got five or six more from George Johnson. The witness' children sold a flock of about sixty head of sheep to John Hester, and he, Hester and Tobe Deering drove them off. The defendant had no interest in those sheep. There were several marks among the sheep, but they were all in the same brand, which was the letter H and the figure four connected. That was of record. The witness had nothing to do with the sheep, and knew but little about them.

On his cross-examination the witness described the marks and brands on the sheep belonging to his family, but none of them corresponded with the Burkett mark and brand. These sheep, when driven from the house, were started in

Gonzales County, about eight miles from where they were stopped by Burkett. Except five or six of the flock, which belonged to one Spaulding and were unbranded, they were branded in the H4 connected brand.

The defendant's brother-in-law, J. L. Johnson, testified that in 1879, 1880 and 1881, he lived with the defendant's father. The Deering family owned a small flock of sheep, in which the defendant neither had nor claimed an interest. In 1878 the witness got four or five motherless lambs from Sam. Moore, and in 1879 five or six more from Will Jones, which he gave to old Mrs. Deering. In 1881 the Deering family traded a buck to George Johnson for five or six head "His" (Johnson's?) brand was the letter H with the cross-bar elongated, and when the Deerings got these last sheep they put all the rest in that brand. The mark was a smooth crop off each ear. The witness here corrected himself, and said that it was in 1882 they got the sheep from Johnson. The Deerings impressed the letter V on the jaw of the sheep. Old man Deering made the trade with Hester, in the presence of all his family except the defendant.

S. S. Gary testified, for the defence, that five years ago the Deerings owned a small flock of sheep. The witness understood them to belong to Mrs. Deering and the little children, and that the defendant had no interest in them.

Leon Kendall testified, for the defence, that he had seen a few sheep running around the Deering place, which he understood to belong to the old lady and the boys.

A. H. Jones testified that the young Deering children claimed some sheep, but he had never known the defendant to claim any. They got a few lambs from the witness' father in 1874, and traded a buck to George Johnson for five or six ewes.

The motion for new trial, which included the questions involved in the opinion, was overruled.

Hurt, J. Bart. Burkett lived in Gonzales County; and in the spring of 1881 lost about one hundred head of sheep. On or about the fifteenth day of November, same year, John J. Hester and Tobe Deering were found in the possession of eighteen head of Burkett's sheep, Hester stating that he had purchased them from defendant, Hill Deering, who was not present. Burkett stopped the sheep, putting them in his pen, and Hester sent for defendant. When the defendant arrived he stated that he had sold the sheep to Hester. When the defendant first arrived he said the sheep were his, but afterwards said in same conversation that they were honest property, and that he had sold them for his little brothers. An agreement was made, the terms of which were that Burkett was to "let Hester go on with the sheep, and defendant was to bring suit against Burkett for them, Willis Arrington standing security to Burkett for the same." Defendant did not sue Burkett. Hester sold the sheep to Lee Floyd, and Floyd and Burkett arbitrated the matter, Burkett gaining the sheep, and Floyd paid him for them.

Viewing this evidence in its strongest light against defendant, what does it prove? First. That defendant sold the sheep to Hester, as his own property, or as the property of his little brother. Second. That he agreed to bring suit against Burkett for the sheep, but failed to do so. A most thorough scrutiny of all the evidence in the record will not show at any time defendant in possession of these sheep. On the other hand, when we take in consideration the testimony for the defence, without conflict on material points, the confession of defendant "that he sold the sheep to Hester" will be reconciled with his perfect innocence.

Be this as it may, theft is the fraudulent taking of property, etc. The taking by defendant must be proved by the State such taking as would constitute him a principal. Does the fact that he sold the sheep, some six months after they were taken, to Hester, constitute proof of such taking? It may be urged by the State that there is other evidence tending to prove the taking. What is it? The altering the brands and marks? Who altered the marks and brands? Did the defendant? There is not only no evidence to support this theory, but, on the contrary, the evidence of the witnesses who speak to this point, or facts bearing upon this point, most clearly negatives such theory. (The Reporter will give the evidence in full.) But, suppose the brands and marks to have been altered by defendant, will this alone support the charge of theft? We think not; for, if so, defendant could be convicted of two felonies upon precisely the same proof. We are of the opinion that the evidence does not support the verdict.

The seventh paragraph of the charge is, we think, justly complained of by the defendant. This is the objectionable part of that paragraph: "If the jury have a reasonable doubt as to whether the defendant honestly and in good faith, believing he had a legal right so to dispose of said sheep to Hester, * * * then they should give him the benefit of such doubt and acquit him." But suppose the jury should believe from the evidence that the defendant did not honestly and in good faith believe that he had the legal right so to dispose of the sheep, then and in that event what should they do? Convict, of course. The palpable error in this charge consists in leading the minds of the jurors from the issue made and tendered by the indictment, to wit: did defendant fraudulently take the sheep from the possession of Burkett? This was the issue, and the only issue which could be determined by the jury under the indictment. Other inferior issues may be determined in order to a decision of this main issue, but for no other purpose. From this charge the jury would be justified in concluding that it was the offense of theft to sell the sheep of Burkett to Hester, unless in good faith the defendant believed that he had the legal right to do so; and defendant's honesty in his belief in regard to his legal right to sell is made the issue by this part of the charge. This, as we have said, is error — the issue being that defendant fraudulently took the sheep. This was affirmed by the State and denied by the defendant. This must be proved by the State to sustain a conviction on this indictment. For no subsequent felonious or fraudulent connection with the sheep, whatever it may be, will justify a conviction for theft. Possession of property recently after the theft, unexplained, is used for the purpose of proving that the party so in possession was the fraudulent taker. A party being so in possession is not punished for being in possession; but from this possession it may be presumed that he was the party who fraudulently took the property. We are not passing upon the weight to be given to recent possession of stolen property, for the purpose for which it can be used.

For the error in the charge, and because the verdict is not supported by the evidence, the judgment is reversed and the cause remanded.

*Reversed and remanded.*

§ 564. **Evidence Held Insufficient — Dresch v. State.** — In *Dresch* v. *State*,[1] the indictment charged the appellant with the theft of seven goats, of the value

[1] 14 Tex. (App.) 175 (1883).

of one dollar per head, the property of Frank Gaines, in Maverick County, Texas, on the twenty-fifth day of September, 1881. The punishment assessed against him by a verdict of guilty was a fine of twenty-five dollars and confinement in the county jail for one day.

The substance of the testimony of Frank Gaines, the first witness for the State, was that on or about the twenty-fifth day of September, 1881, he lost seven head of goats from his herd. He found his animals in a herd of goats reputed to be the property of the mother of the defendant, and which at that time was under the charge of the defendant. These animals, which the witness lost and afterwards found in Mrs. Dresch's flock, included six "nannies" and one "billy," worth in the aggregate at least seven dollars. He recognized them by their flesh mark, and the "billy" as well by his ear mark, notwithstanding it had been changed. He demanded his property, and the defendant said that he would first speak to his mother and then deliver the goats to the witness. These and other goats of the witness were under the charge of the witness' son as herder. Witness did not give his consent to any one to take these goats, nor did he authorize his son to consent to such taking. He recovered these goats next day under a writ of sequestration.

Cross-examined, the witness stated that the six "nannies" taken under the writ of sequestration were his. They were all white. There were a great many white goats of the size and age of these six in Mrs. Dresch's herd when these were taken, but nevertheless the witness knew that these six were his. He knew the "billy" goat was his, and he was mad because his mark had been changed. All of Mrs. Dresch's goats had been freshly marked. Witness did not see the defendant mark them. The goats were returned to the defendant subsequent to their seizure under the writ of sequestration. The writ of sequestration was issued in a suit instituted by the witness against the defendant. Witness was mad, and did not wait to hear what Mrs. Dresch had to say about his demand for the goats. The written testimony of the witness on the examining trial was read, and diclosed a conflict with his present testimony as to the time he lost his goats, and as to the total number lost.

J. W. Yates, deputy sheriff, testified that in September, 1881, he seized seven goats from the herd of the defendant under a writ of sequestration issued by Judge Terry, a justice of the peace, in a suit instituted by Frank Gaines against the defendant. These goats were pointed out to the witness by Gaines. Witness kept them a long time under the writ of sequestration, and finally returned them to the defendant under an order of court.

Miguel Leal testified, for the State, that he sold Frank Gaines a "billy" goat a long time before this trial. The goat was then in the witness' mark. Witness subsequently saw the same goat in possession of the sheriff. He was then in a different mark. The witness did not know the mark of either Gaines or Mrs. Dresch, and knew nothing of this alleged theft.

The substance of the testimony of Mrs. Gaines was that seven head of goats belonging to herself and Frank Gaines were lost about the time alleged, and were subsequently found in the defendant's herd. She identified those lost and those found, as described, as the same identical goats.

Mrs. V. Dresch was the first witness for the defence. She testified that the defendant was her son. She owned a herd of goats in September, 1881. Victoriano Aleman had cared for them on the shares for three years previously, and had returned them to her about the last of August, 1881. For two days thereafter they were in charge of the defendant as agent for the witness, and subse-

quent to that time they were in charge of one Antonio as herder. In September, 1881. Mr. Dell came to the witness and told her that her goats and his had got mixed, and that, because or the similarity of marks, he found great difficulty in separating them, and he asked the witness to have the marks on her goats changed. The witness directed the defendant to change the marks, and he accordingly did so. Late in the same month Frank Gaines told the witness that he had lost some goats and believed that they were in witness' herd. He described them at the request of the witness, and the witness said to him: "Frank, you have lost some goats, and as you can not find them, you want to make your number good out of my herd." Gaines laughed, said "yes," and went off.

On the next morning Gaines came with the sheriff to the witness' herd and took seven of her goats. These included six small nannie goats, the offspring of mother goats which belonged to the witness. These mother goats cried for the "nannies" long after they were taken, and tried to follow them. The "nannies" taken by the sheriff belonged to the witness, as did the whole herd. Frank Gaines owned no interest in the goats taken — they were wholly and absolutely the property of the witness.

F. C. Dell testified, for the defence, that he knew Mrs. Dresch's herd of goats well. They became mixed with his herd on three separate occasions which the witness mentioned, and their separation involved a great deal of trouble on account of the similarity of marks. The defendant did not know his mother's goats from those of the witness when they were mixed, and the latter had to point out to him the ones to take. Witness demanded that the defendant change the marks on his mother's goats. One day Frank Gaines' goats got mixed with the witness' herd, and they had a great deal of trouble separating them, as both herds were large. About the time that he and Gaines got their herds separated, Mrs. Dresch's herd ran into the witness' herd, and were again separated with great trouble. This was the third and last mixture. Witness got mad and sent Mrs. Dresch word that he insisted on her having the marks changed so that their respective marks could be readily distinguished. The witness knew nothing of the defendant marking any of Gaines' goats.

Edwardo Jiminez testified, for the defence, that he was present when the sheriff took the six small "nanny" goats from Dresch's herd, and he knew that the mothers of the "nannies" were left in the herd. They cried for the young "nannies" when they were taken, and tried to follow, and were still crying for them two days later, when witness and others drove the herd across the river. Witness helped defendant to mark part of his mother's goats one afternoon. He knew nothing of Gaines' "billy" goat being in Mrs. Dresch's herd at that time.

WILLSON, J. * * * There are other errors apparent from the record which, in our opinion, would demand a reversal of the judgment. It appears from the evidence that the goats which were alleged to have been stolen by the defendant were, at the time of the taking thereof, in the possession and under the care, management and control of the alleged owner's son, and yet there is no evidence that the goats were taken without this son's consent. Such evidence we think was necessary.[1] We think, furthermore, that the evidence is insufficient to support this conviction. It fails to show with any degree of certainty a fraudulent intent in taking the goats, conceding that defendant did take them. But one of the goats, the old "billy," was certainly identified as the

1 Wilson v. State, 12 Tex. (App.) 481.

property of Frank Gaines, the alleged owner, except by the testimony of Frank Gaines and his wife, who, it is true, stated that the "nanny" goats belonged to them, but failed to identify them by any particular marks. Under the circumstances of this case this evidence of ownership, to say the best of it, should be considered cautiously, and not received with implicit confidence. While, however, it may be admitted that the goats were the property of Frank Gaines, as charged, still we think there is a total want of evidence proving or even tending to prove that the defendant took them with the fraudulent intent to deprive the owner of the value thereof, and to appropriate the same to his own use. We think the evidence reasonably shows the contrary, that the goats in question got into the flock which defendant had charge of, without his knowledge or consent, and that whatever ownership he exercised over them was under the *bona fide* belief that they belonged to the flock of goats of which he at the time had charge, The judgment is reversed and the caused is remanded.

*Reversed and remanded.*

§ 565. **Evidence Insufficient to Convict — Green v. State.** — In *Green* v. *State*,[1] the indictment charged the appellant with theft of a saddle, bridle, and halter, worth $26, the property of T. J. Fields. By the verdict of conviction the punishment was assessed at a term of two years in the penitentiary.

T. J. Fields, for the State, testified that about the 1st of August, 1881, at night, he went to a church at Blooming Grove, in Navarro County, on horseback, and was riding a full-rigged, red leather, oil-tanned saddle, worth $22 or $23. He hitched his horse to a fence, about two hundred yards from the church. Defendant was at the church that night, and for a while was sitting in a wagon in front of the church, along with witness and others. Witness went down to his horse, and while there saw the defendant approaching. Defendant, as soon as he saw the witness, stopped, and witness went up to him, and they returned together to the church door, where witness stopped. The last he saw of the defendant that night, the latter left the church door and went out in front, in the direction of witness's horse. When witness started home, his horse and accoutrements were gone. Witness had tied him securely, and did not think he got loose. He recovered the horse the next day, but did not find his saddle until some three weeks afterwards, when he found it in the possession of a young man named Brown, in Limestone County, about two miles north of Groesbeck. It did not have the stirrups to it. Part of witness' bridle and halter were also in Brown's possession. The stirrups and the rest of the bridle witness found at Simmons' livery stable in Mexia, and the rest of the halter in possession of another person near Mexia. The defendant knew or might have known witness' horse and saddle. On cross-examination the witness said he had known the defendant seven years, and lived four or five miles from him. Witness saw other persons besides the defendant walking around among the horses near the church. So far as witness could say, the defendant knew no more about the horse and saddle than any other young men in the neighborhood. There were other saddles of the same sort in the vicinity. Witness did not know whether the defendant had left the church when witness missed his horse and saddle. The fence was the only hitching place near the church, and there were many horses hitched to it and between witness' horse and the

[1] 12 Tex. (App.) 51 (1882).

church. If defendant had a horse there, he must have hitched it beyond witness' from the church.

Willie Brown, for the State, testified that in August, 1881, the defendant came to the house of witness' father, two miles north of Groesbeck, on the road to Mexia. He came about half past eleven in the forenoon and asked for dinner and to have his horse fed. His horse was fed, but he did not get dinner, there being sickness in the family. He said he was going to Hill County. He was riding a sorrel mare, and proposed to trade saddles with witness. They swapped saddles, and witness also traded part of his bridle and halter for par- of defendant's. When the defendant left he inquired, and witness told him the way to Mr. Winston's, and he started in that direction, which was also the direction of Mexia. The saddle witness got from the defendant, was a full-rigged, red leather, oil-tanned saddle, worth twenty dollars, and the bridle and halter were worth two dollars. The saddle the defendant got from witness was worth fourteen or fifteen dollars.

On cross-examination, the witness stated that defendant said he wanted to swap saddles, because his mare's back was sore, and he wanted a lighter saddle. The mare's back was sore, and defendant's saddle was a heavier one than the saddle witness traded him. Mr. Winston lives in the neihgborhood, and is a well known man.

W. Jordon, for the State, testified that he lived about two miles south of Groesbeck. A short time before the defendant was arrested, he came by witness' house, and, as witness thought, stayed all night. He said he lived in Hill County, and was on his way to Austin to see his sister. To come by witness' house in traveling from Hill County to Austin, would be a long distance out of the way. (To this evidence the defence objected on the ground of irrelevancy, but the objection was overruled, and the defence excepted.) Defendant said his saddle cost him twenty-five dollars. When he left witness' house he started towards Groesbeck, which was not the way to Austin. This was some time in August, 1881.

Tom Whatley, for the State, testified that he lived about a mile south of Groesbeck, and thought he had met the defendant between home and Groesbeck after the latter had left the public road and taken a wood-road. Witness told the defendant he could not get through that way, and defendant replied that he thought he would save distance by taking that route. To this evidence the defence objected that it was irrelevant and calculated to mislead the jury, and the objections being overruled, the defence reserved exceptions.

J. W. Simmons for the State, testified that he kept a livery stable in Mexia. Some time in August, 1881, the defendant came to the stable, riding a black swalm-tree saddle, which had stirrups that did not correspond with the saddle. Defendant told witness he had traded saddles the preceding day. The stirrups had red leather housings. Afterwards a young man named A. J. Fields, came with a saddle which corresponded with the stirrups on the Swaim-tree saddle ridden by the defendant. The saddle ridden by Fields was a red leather, oil-tanned saddle, worth about twenty-five dollars. Fields also brought with him a part of a bridle which corresponded with portions of a bridle left at the stable by the defendant. The defendant said he had made a crop about twelve miles southwest of Mexia.

For the defence the first witness introduced, was Jesse Green, a brother of the defendant, who stated that he remembered when Mr. Fields is said to have lost his saddle, and was at the church the night it was reported to have been lost.

Dave Peveyhouse, Frank Simpson, the defendant and the witness went to the church together ou horseback. Before they started to church, their horses were hitched to trees in the yard, and a little before sunset a man rode up to the gate on a sorrel mare and leading a gray horse. He inquired where he could get water for his animals, and was directed by the defendant to an old well about three hundred yards distant. The man inquired if any of those present had any trading stock, and said his mare's back was sore, and he wanted to trade her off; to which the defendant replied that he had a horse he would trade. The man said he would camp at the well, and told the defendant to bring his horse there the next morning. Witness and the defendant, with their companions, then went to the church. Mr. Fields was there, and witness saw him at one time in a wagon with others, and afterwards saw him at the door of the church. Defendant and his party remained until the services were over, and then returned home together. Before leaving the ground, but after the services had closed, the witness heard some one say that Mr. Field's horse had got loose with the saddle on him. About sunrise the next morning, the defendant took his bay horse, and accompanied by witness and Frank Simpson, went down to the well and traded his horse to the man for the sorrel mare, the bridle, halter, blanket and saddle, giving thirty dollars in money to boot. The saddle was a full-rigged, red-leather, oil-tanned saddle. The mare's back was a little sore. The man gave his name as Southerland; he was about five feet ten inches high, dark complexion, had a mustache, and, witness thought, a little chin whiskers. For some time previous, the defendant had been talking about leaving home and he had fixed to start on the day he traded with Southerland. Defendant sometimes sports, and was going off to see if he could find a game of cards. He had taken such trips once or twice before. After breakfast on the day he made the trade, he left on the mare and saddle he got from Southerland, and said he was going to Waco and probably to Mexia. On cross-examination, the witness said he saw Southerlaod when he first rode up, had never seen him before, did not know where he lived, nor hear him say where he was going. Witness did not know Mr. Field's saddle, and thought his brother, the defendant did not.

Frank Simpson, for the defence, testified that he knew Mr. Fields, and remembered the night, about August 1, 1881, on which the latter's horse and saddle were said to have been taken from the church. In the evening of that day the witness, who lived near Blooming Grove, was at the house of the defendant's mother. About half an hour before sunset a man rode up to the gate and inquired for stock water. Some of the boys directed him to go to an old well two or three hundred yards off. Witness and the other young men were ready to go to church, and had their horses hitched to trees in the yard. The man who came up to the gate was riding a sorrel mare and leading a gray horse. He said his mare's back was sore, and inquired if any of those present had a horse to trade. The defendant told him he had a horse he would trade, and the man told him to bring the horse down the next morning. Shortly afterward, the winess, with Dave Peveyhouse, Jesse Green and the defendant went to the church, hitched their horses to the fence, remained until the services were over, and then returned together to the house of defendant's mother, and witness stayed there all night. The next morning witness and the others went down to the well where the man was camped. The defendant took with him a bay horse-pony he had. The man was of a dark complexion, above medium

height, had a black mustache, and said his name was Southerland. Defendant traded his bay pony to the man for the sorrel mare, the bridle, halter, blanket, and a red leather, oil-tanned, full-rigged saddle, paying the man thirty dollars in money to boot. After breakfast, the defendant left, riding the mare and saddle he had traded for; he said he was going to Waco, and probably to Mexia. Cross-examined, the witness stated that he was sitting on the porch at defendant's mother's when the man rode up to the gate, which was twenty or thirty steps distant from the porch. He could see the man plainly, but did not notice how many saddles he had. The county attorney asked the witness if he and defendant's brother Jesse had not made up this story for the purpose of acquitting the defendant; to which the witness replied that they had done no such thing.

The defence proposed to prove that several neighbors of Frank Simpson and and Jesse Green were present in court, and that two of them had been brought there by the prosecution, — the object being to show that the State had the means of assailing the reputation of Simpson and Jesse Green in the regular way. The court, on objection of the State's counsel, excluded the proof, and the defence excepted, but reserved no separate bill of exceptions. The defence also proposed, but was not allowed, to prove that the defendant was an expert at cards; and excepted in like manner.

C. B. Pearre, Esq., was introduced by the defence, and stated that he lived at Waco, and had heard the description given of the man Southerland by the witnesses Simpson and Jesse Green. Witness had known a man named Southerland in McLennan County, who was above medium height, had a dark complexion, a black mustache, and some chin whiskers. Southerland had left McLennan for Navarro County over a year before the trial. On cross-examination the witness stated that he heard Simpson and Jesse Green state the name and description of the man Southerland, before he, the witness, made known that he knew such a man. Southerland had a wife and children.

White, P. J. Because of the insufficiency of the evidence, the judgment is reversed and the cause remanded.

§ 566. **Evidence Insufficient to Convict — Hammell v. State.** — In *Hammell v. State*,[1] the indictment charged the appellant with the theft of thirty-four dollars from the person of W. W. Glover, in the county of Falls, on the eighth day of March, 1883. The penalty imposed by a verdict of guilty was a term of two years in the penitentiary.

Jay Gammel, city marshal of Marlin, was the first witness for the State. He testified that he saw the defendant on the streets of Marlin, Texas, two or three times prior to the eighth day of March, 1883. Witness knew W. W. Glover at that time. Glover is now dead. On the Monday morning of the week of Glover's death, the witness arrested him, Glover, for drunkenness. Before confining him in the calaboose the witness took from his person one much-worn and somewhat mutilated ten-dollar United States currency bill, one new twenty-dollar United States silver certificate bill, four silver dollars, and forty cents in small silver change. One corner of the ten dollar bill was somewhat torn. Glover was then very drunk. When he sobered up that evening between three and four o'clock, the witness took him before the mayor for trial.

[1] 14 Tex. (App.) 326 (1883).

The trial was postponed, and Glover gave bond for his appearance and was released, whereupon the witness, in the presence of Mayor Shelton, returned the money described, which Glover put in a small tobacco sack. The witness next saw Glover very drunk in Lew. Stewart's saloon. This was about eight or nine o'clock that night. He claimed then to have lost his money, and requested the witness to make search for it. This part of the testimony of the witness was admitted over the defendant's objection. The witness next saw him about midnight lying in the street very drunk, arrested him again and put him in the calaboose. The next day Mr. Glover was fined for drunkenness, and, as he had no money with which to pay the fine, the witness went with him to borrow the amount. On the day after Glover claimed to have lost his money, the witness arrested the defendant and found on his person four or five dollars in silver.

Mayor Shelton testified, for the State, that the alleged injured person, W. W. Glover, died in Marlin Falls County, Texas, on or about the eighth day of March, 1883. A few days prior to his death the deceased, W. W. Glover, was in the town of Marlin, drinking, and was brought before the witness' court, and released on bond to answer a charge of drunkenness. Marshal Gammel, who had taken the money described in the indictment from Glover, before putting him in the calaboose, returned to him, Glover, the money described, and Glover placed that money in a small cloth tobacco sack. This took place in the presence of the witness, and the witness gave the same description of the money as that given by Gammel. The next day Glover was before the witness' court again on a charge of drunkenness. He pleaded guilty, but said that he had lost his money, and thought that perhpps some of his friends had taken it. He was permitted to go to see his friends, but shortly returned and said that he could not find his money. He thought, however, that he could borrow the amount, and left the court room in charge of the officer for that purpose. He shortly returned, paid his fine, and was discharged. This was on the day after Gammel had returned him his money. The witness next saw Glover on the day following in Rinkelman's saloon, dead. Witness had his body searched, and found about a dollar and a half on his person.

Lew Stewart testified, for the State, that he knew the deceased Glover well in his lifetime, and also knew Anderson, who died a few days after Glover did, and for a few days prior to Glover's death had seen the defendant about the streets of Marlin. On Tuesday evening before Glover's death, at about seven o'clock, Glover, Anderson, and the defendant stepped into the witness' saloon, and the defendant called for drinks. Glover and Anderson were very drunk, but the defendant, who was by far the most sober of the three, knew very well what he was doing. The defendant had that day "beaten" the witness out of a drink, claiming that he had no money, and the witness said he must know who proposed to pay for the drinks before he served them. The defendant thereupon asked Glover if he would not pay, and Glover replying that he would, the witness served them. After drinking, Glover poured some silver money out of a small cloth tobacco sack on the counter, and the defendant pushed a half dollar piece to the witness. Witness gave the change, and suggested to Mr. Glover, who was helplessly drunk, that he had better go and sit down. The three, Glover, Anderson, and the defendant, then went back to the stove, and sat down, Mr. Glover having Anderson and defendant on either side. Mr. Glover becoming still more helplessly drunk during the next half hour, Tom

Elsbury, the witness' colored porter, removed him to the rear of the billiard room. Witness then went to supper and returned at about eight o'clock, when Mr. Glover came up to the bar and asked of him the loan of five dollars.

Edward Parish testified, for the State, that he saw the defendant about Marlin for a day or two prior to the death of Mr. W. W. Glover. About dark, on Tuesday evening of the week of Glover's death, the witness stepped into Lew Stuart's saloon, and saw the defendant, Glover, and a man named Anderson, since dead, sitting near the stove. Anderson and Glover were very drunk. The defendant was somewhat in liquor, but not drunk. Glover was in a drunken stupor, leaning over in the chair. As he would sway over in the chair, the defendant would push him and say: "It is time to take another drink." The witness watched them awhile, and then left the saloon. Other men were about the saloon at the time, but no one was near the parties. The witness saw Mr. Glover next morning under arrest for failing to pay a fine. He was then trying to borrow money for that purpose, and did, in the presence of the witness, obtain from Mr. Rinkelman ten dollars to be applied to the payment of the fine.

James E. King testified, for the State, that he knew the defendant, who was a stranger in Marlin. On the night of Tuesday before the death of Mr. Glover, about ten o'clock, the defendant and a tailor named Wilson entered the witness' saloon, and the defendant called for a pint of whisky. The witness gave it to him, and the defendant handed him, in payment, a worn, mutilated ten dollar United States currency bill, one corner of which was torn off. The witness gave him change, but before he left the defendant requested witness to return him the ten dollar bill and other change for a new twenty dollar silver certificate bill, which he then handed the witness. The witness complied with this request, and the defendant and Wilson then left. Both defendant and Wilson were somewhat in liquor. Mr. Marlowe was in the saloon at the time.

James V. Marlowe, for the State, corroborated the witness James E. King.

Henry A. Barber testified that he saw the defendant with five or six dollars in silver on the morning of his arrest.

Captain G. A. King testified, for the defence, that on the Monday of the week of Glover's death the defendant registered at his hotel and paid for his breakfast and lodging. He exhibited then four five dollars in silver. The witness did not see him with any kind of paper money.

The motion for new trial complained of the charge of the court and the rulings upon the evidence, and the sufficiency of the evidence to support the conviction.

WHITE, J. (after rulings on other questions). We are further of opinion that, besides this erroneous ruling of the court, the other evidence, as shown in the statement of facts, is not sufficient to support the conviction, and the judgment is reversed and the cause remanded.

*Reversed and remanded.*

**§ 567. Evidence Insufficient to Convict — Hardeman v. State.** — In *Hardeman* v. *State*,[1] the indictment charged the appellant with the theft of an estray horse, whose owner was unknown. His trial resulted in conviction, and he was adjudged a term of five years in the penitentiary. Ira Harris testified for the

[1] 12 Tex. (App.) 350 (1882.)

State that he knew the horse alleged to have been stolen by the defendant. He was a dun horse and ranged about about the Chandler water-hole in Williamson County. He had been known for several years as an estray. In the spring of 1878 the witness penned the animal and cut a small piece off one ear.

Mr. Hodges, for the State, testified that he knew the animal, and had known it as an estray for six or seven years. He had no mark when the witness first saw him, but afterwards had a small piece cut from one ear. Mr. Dick Tisdale estrayed the horse in 1877. The animal was then very wild and unbroken.

Ed. Lewis testified for the State that he had known the horse for several years as an estray. He last saw the horse in the spring of 1880. Lewis Owens was then riding him. The witness had a conversation with the defendant while working on the road in March or April, 1880, about a week before he saw Owens riding the horse. They talked about estray horses, and the witness spoke of the estray dun horse with the cropped ear. The defendant said the horse was "Old Magruder," a horse that got away from him some time before, and that he belonged to his cousin, Sam Hardeman. The witness spoke of the horse as an estray and described him before the defendant inquired about, or claimed him.

Lewis Owens testified for the State that the defendant hired him to ride a dun horse with a cropped ear in the spring of 1880. The defendant told the witness that he got the horse off the range, and that he had lost him some time before.

John Parnell testified for the defence that in the spring of 1876 Mat Cain was living on the witness' place in Travis County. During that spring the defendant stayed two or three weeks with Cain, and with Cain was engaged in assisting drovers to put their herds across the river, and in gathering stock dropped on the trail. He and Cain each had a dun horse which they said were owned by some parties who had gone on the trail. He and Cain left the witness' house together, saying they were going to take the horses to their owners. The witness did not notice that either of the dun horses had a cropped ear.

John Hughes testified for the defense, that in the spring of 1880 he and George Clark were on the range looking for horses. They met the defendant, who told the witness that he was looking for a dun horse, and described him. They separated, the witness agreeing to drive up the horse if he saw him, and the defendant agreed to drive up that of the witness, should he find him. The witness found the crop-eared dun horse, drove him up and delivered him to the defendant. The defendant claimed the horse openly, and said that he bought him, and had lost him on the trail several years before.

Further testimony for the defence was to the effect that the defendant claimed the horse openly and publicly.

White, P. J. The facts proven upon the trial do not, in our opinion, tend to establish defendant's guilt of the theft charged with that degree of conclusiveness or certainty as that we are willing to let the conviction stand as a precedent for adjudications in criminal cases. Defendant may be guilty, but his guilt should be established beyond mere suspicion or even strong probability. In the view we take of the statement of fact there appears to be no other evidence which, if accessible, may on another trial tend to throw more light upon the question of guilt or innocence. As presented in this record, because the evidence is insufficient to support the verdict, the judgment is reversed and the cause remanded for a new trial.

*Reversed and remanded.*

§ 568. **Evidence Insufficient to Convict — Harrison v. State.** — In *Harrison v. State*,[1] the conviction was for the theft of seventy dollars in money, the property of J. W. Tabor, in Brazos County, Texas, on the tenth day of August, 1881. A term of three years in the penitentiary was the punishment imposed.

The first witness for the State was J. W. Tabor. He testified, in substance, that one night, about the time mentioned in the indictment, he went to bed on his gallery, hanging his pants, which contained his pocket-book and money, at the head of his bed. The defendant lived in a house about two hundred yards to the side, and a little in the rear of witness' house. The defendant customarily left his house early in the morning, but did not do so on the morning after the night spoken of, as the witness, when he first got up, and before he missed his money, saw him standing on the gallery of his house. Some time after he dressed, the witness missed his pocket-book and money, the money being fives, tens and twenty dollar United States currency bills, aggregating seventy dollars, but whether treasury or bank bills the witness did not know. Upon examination he found foot prints on the ground near the head of the bed, and in his yard, and followed them to his yard fence. The track indicated that the upper leather of a shoe had been torn from the sole, and that, when the wearer walked, the upper part would lap over the sole and make an impression on the ground on both sides of the foot. The witness and the defendant started to town from their homes on that morning at the same time, and met in the road. Witness then noticed that the uppers of a shoe worn by defendant were loose from the sole, and that they made a track similar in every respect to the tracks discovered in his, witness', yard. Afterward, on the same morning, witness saw the defendant on the streets of Bryan, and had him make a track in the sand. That and the track in the witness' yard were in every particular similar. In having him make the track in the sand, the witness used no more compulsory force than a peremptory order. The defendant hesitated, and made the track unwillingly. Previous to that witness had the defendant to make a track at his, witness', store, but did not remember who was present. The witness had never consented to the taking of his money by any one. Cross-examined, the witness stated the defendant was a negro. Neither he nor his wife had ever been in his, witness', employ, and neither had ever been on his premises that he was aware of. Witness did not remember whether or not he had any negro employed at his stable at that time. He did not know the number of the shoe worn by the defendant at the time, nor the number of shoe that made the tracks in the yard. Defendant has a good-sized foot. The uppers of the shoe making the tracks described did not extend over the end of the foot and make impressions on the ground, but did on the sides. Uppers cut loose from the soles of a shoe will always make marks on impressionable ground. The person who made the tracks in the yard walked tip-toed until the fence was crossed. The track from the fence went in the direction of the defendant's house.

George R. Tabor, son of the prosecuting witness, testified, in substance, that he reached his father's house from his sleeping room in town about seven o'clock on the morning of the theft of the money, and then first heard of it. He examined the tracks in the yard, and described their peculiarity as the first witness did, except that he stated the loose upper made an impression only on one side of the foot, and the sole left an impression of pegs. He followed this

[1] 16 Tex. (App.) 326 (1884).

track to the defendant's gate, where the defendant met him and asked him if he had lost any money, to which witness answered no, that he was hunting a place to dig a well. When defendant came out to meet witness he seemed to put his whole foot down in walking. Witness did not notice his foot, but noticed the track he made, which was similar in appearance to those discovered in Tabor's yard. The track led from Tabor's yard fence to defendant's gate, as though to go in; it did not pass the gate or go away. Witness did not go into the defendant's yard or house. His gate opened on a public road. The cross-examination resulted in no material change of this witness' testimony. Freedmantown was some three or four hundred yards distant from Tabor's house. One of the only two roads leading from the oil mills to Freedmantown passed directly in front of defendant's gate. This, however, was not the usual route traveled. Many negroes lived back of Tabor's house toward the oil mills, and could have access to Tabor's house by going through the field. Very few people were in the habit of passing Tabor's house. The oil mill and lower Freedmantown route, leading by Tabor's house, was the nearest, but not the only route.

Robert Tabor testified that he heard of the loss of the money about nine o'clock a. m. He went horseback to defendant's house, but did not find him at home. He went to defendant's brother's house, about a mile from town, and found defendant. He first refused to come out, but being called a second time, he came out with a hatchet in his hand, and finally went to town with witness. Witness saw the tracks at his father's house, and the one at his father's store. They were alike. He did not notice the track made by defendant on his way to town. The State closed.

Sallie Archie, the first witness for the defence, testified that she was living with the defendant at the time of the alleged theft; was at home all that night; had a light all night, nursing a sick child. She knew that the defendant was in his room the whole of that night, and did not get up, or go out, at any time during the night. Pin Adams' son Clement came to the house about twelve o'clock that night, and called to defendant to get a gun, but the defendant refused to get up. A great many people were in the habit of passing along the lane which ran in front of defendant's gate. Witness was the wife of John Archie. She had not known Clement Adams very long at that time, but sufficiently long to recognize his voice when he called for the gun. Clement was now living in Galveston. Witness was morally certain that defendant did not leave the house that night. She did not see him with any money, and got none from him subsequent to that night.

The questions discussed in the opinion were presented by the motion for a new trial.

Willson, J. (after passing on other points). As to the inculpatory facts proven against the defendant, they are very few and of a very uncertain and unsatisfactory character. Tracks similar to his were discovered at the place where the money was lost, and these tracks were followed to his gate. These tracks, in connection with the witness Tabor's suspicions and conclusions, constitute the case of the State. No other facts, except as to the tracks, were proved by the State, which are entitled to be regarded as inculpatory, and the the proof as to the identity of the tracks found with those made by the defendant is by no means certain. In our opinion, the evidence, even when supplemented with the witness Tabor's suspicions and opinions, is insufficient to exclude every other reasonable hypothesis than that of defendant's guilt.

We think the court erred in not granting the defendant a new trial, and for this error the judgment is reversed and the cause is remanded.

*Reversed and remanded.*

§ 569. **Evidence Insufficient to Convict — Johnson v. State.**— In *Johnson* v. *State*,[1] the indictment charged the defendant with the theft of a mare, the property of some person unknown to the grand jury. The trial resulted in conviction, with a five years' term in the penitentiary assessed as punishment.

J. R. Jackson testified for the State that he knew the defendant and the mare mentioned in the indictment. She was a black mare about five years old, and had no brands on her that the witness had ever discovered. About the last of July or the first of August, 1877, the mare came to the witness' place in Coleman County, Texas, being at the time a yearling colt. She was not branded at that time. She continued to range and stay around the witness' place, with his stock, from that time until the fall before this trial. The witness regarded this animal as an estray, and she was so known and recognized in the neighborhood where she ranged. The witness did not then, nor does he yet know who was the owner of the animal. In looking after his own stock the witness made inquiry of stock men concerning this mare, but failed to find out who owned her. The defendant, in November, 1880, lived about two or three miles from the residence of the witness. In that month the witness saw this mare tied out back of a field, some two hundred or two hundred and fifty yards from the defendant's house. The witness went from Mr. Spalding's molasses mill to the house of a Mr. Savage, to get a barrel, and on his return to Spalding's he passed near the defendant's house, and saw the mare tied out behind the field. She then had a colt. The witness recognized this animal as the same black mare which had been running with his stock for several years. When the witness got back to Spalding's mill he found the defendant there, and told him that he had seen the mare tied out behind the field. He asked the defendant if he knew who took the mare up, and the defendant answered that he did. The witness then told him that the mare was an estray and had been running with his horses for several years. The defendant replied that he had purchased her from Sam Harrell. The witness did not remember whether or not he said anything to the defendant in that conversation about the colt that was with the mare. Subsequently the defendant asked the witness if the colt belonged to the mare. This all occurred in Coleman County, Texas, after Sam Harrell had moved from the county. On cross-examination the witness stated that he had never seen the detendant in possession of the animal. The defendant told the witness that he had purchased the mare from Sam Harrell, and had a bill of sale for her. The colt that was with the mare when the witness saw her tied up behind the field was about a year old. He had seen the mare on the range once or twice since, and once at the lick-log near his house, with his horses. He had not seen the colt since it was at his house with the mare.

Moses Jackson testified, for the State, that he knew a black mare without brands, which at one time ran with J. R. Jackson's horses in Coleman County. He did not know who owned her. She was recognized in the neighborhood as an estray. The witness saw this mare on the range some time during the year 1880. She had with her at that time a six month's old colt. He had never seen the mare in the possession of the defendant.

[1] 12 Tex. (App.) 385 (1882).

Taylor Smith testified that he saw the defendant with a black mare in his possession several times during the fall and winter preceding this trial. She was not then branded, so far as the witness could see. He saw the mare frequently about the defendant's place in Coleman County, Texas, and the witness thought that he had seen the defendant working her. The defendant had but one black mare during the period mentioned, that the witness knew anything about. On cross-examination the witness stated that he did not, of his own knowledge, know that the mare for the theft of which the defendant was being prosecuted, was the same animal which he saw in the defendant's possession during the last winter, but, after he had seen the mare in his possession, defendant's brother, James Johnson, told the witness that she was the animal about which the fuss was being made. James Johnson was riding the mare when this conversation occurred. The witness was tolerably well acquainted with the range about J. R. Jackson's, and had been through it several times. He did not remember that he had ever seen this mare upon that range. He may or may not have seen her.

Will Faris testified that about four years before this trial he saw an unbranded black yearling colt with his horses on the range in Coleman County. This was the first time he saw her. The next time the witness saw her, as well as he could remember, she was running with J. R. Jackson's horses, and was still unbranded. She then had a colt about four months old. The witness did not remember having seen the mare but twice. He did not know to whom she belonged. He regarded her as an astray. Cross-examined, the witness stated that he had never seen the animal in the possession of the defendant. He did not remember when it was that he last saw the animal, but it was some time during the year 1880.

Frank Rucker testified that, in the spring of 1880, he saw a black mare and colt with Mr. Faris' horses on the range in Coleman County, Texas. The mare was unbranded. The witness did not know to whom she belonged. He regarded her as an estray, but did not know that she was. During the fall of 1880, the witness saw an unbranded black mare in the defendant's pasture. He saw no colt with her at that time. The witness did not know that the black mare he saw in the defendant's possession was the same animal he saw with the colt on the range during the preceding spring.

The State next introduced the defendant's application for a continuance. The application was based upon the absence of J. B. Hooten, of Coleman County, by whom the defendant proposed, if he was granted a continuance or postponement, to prove the handwriting of Sam Harrell to an unacknowledged bill of sale conveying to him the mare in question.

J. R. Kuling was the first witness introduced by the defendant. During the the month of November, 1880, the witness was at the molasses mill of R. L. Spalding, in Coleman County, Texas, and while there he heard J. R. Jackson ask the defendant about a black mare which was then staked out between the mill and the house of a Mr. Savage. The defendant told Mr. Jackson that he had taken the mare up, that he had purchased her from Sam Harrell, and that he had Harrell's bill of sale conveying the mare to him. The witness was of opinion that Mr. Jackson, in that conversation, said something about the mare having a colt. The witness had never, to his recollection, seen the mare in question. This witness stated on his cross-examination that Jackson told the defendant where he had seen the mare staked out, back of the field; where-

upon the defendant told Jackson that he had taken her up, that he had purchased her from Sam Harrell and that he had Harrell's bill of sale conveying the animal to him. This was some time after Harrell had moved out of the settlement. The recollection of the witness was that in this conversation with the defendant, Jackson told him that the colt was with the mare.

R. L. Spalding testified, for the defence, that in November, 1880, he and the defendant lived about one-half a mile apart in Coleman County, Texas. The road leading from the witness' house to the house of Mr. Savage runs within about two hundred yards of the defendant's house. The witness heard nothing of the conversation between J. R. Jackson and the defendant about the mare, which is said to have occurred at the molasses mill on the witness' place, in November, 1880.

B. F. Rose testified, for the defence, that some time during the spring of 1881, he saw and examined a black mare in the defendant's possession. She was a young animal, and in the opinion of the witness had never given birth to a colt. He did not remember whether or not the animal was then branded, nor does he know that she was the same animal for the theft of which the defendant was now on trial. The witness would not state positively that the mare he saw in the possession of the defendant had never had a colt. It was his opinion that she had not, but he might have been mistaken.

Hurt, J. The appellant was convicted of the theft of a mare. He moved for a continuance of the case; which motion was overruled. In his motion for a new trial this ruling of the court was made a ground for a new trial. We are of the opinion that a new trial should have been granted.

The only criminative fact against defendant was recent possession of the mare, an estray. This was explained by defendant, he stating that he had purchased the mare from one Sam Harrell. The State proved that there was such a man as Sam Harrell, and that he had lived in that county, but had moved off. That this explanation was reasonable can not be questioned. This being the case, to convict, the State (relying upon recent possession alone) must prove this explanation false; to do this there was no attempt made whatever.[1] The verdict of the jury was not supported by the evidence and upon this ground also a new trial should have been granted. The judgment is reversed and the cause remanded.

§ 570. **Evidence Held Insufficient — Johnson v. State.** — In *Johnson v. State*,[2] the indictment charged that the appellant on the twenty-first day of August, 1876, did not steal a certain gelding, the property of one Amanda Brown. The trial was had at the March term, 1884, of the District Court, when the appellant was convicted, and his punishment was assessed at a term of five years in the penitentiary.

Mrs. Amanda Walker was the first witness for the State. She testified that her name in August, 1876, was Amanda Brown. She was well acquainted with the defendant, and pointed him out in the court. The witness first saw the defendant in the early part of the year 1876, when he came to witness' house, and contracted with her then husband, Mr. Brown, to make a crop on the place. The defendant remained at the house of the witness and Brown until

1 Perry *v.* State, 41 Tex. 483; Thompson *v.* State, 43 Tex. 260; McCoy *v* State, 44 Tex. 616; Hannah *v.* State, 1 Tex. (App.) 578; Garcia *v.* State, 26 Tex. 209.

2 16 Tex. (App.) 402 (1884).

some time in July, 1876, when he left and went to Mrs. Bruce's to live, having previously sold his crop. Since some time in 1876, until his trial, the witness has not seen the defendant. The defendant was fleshier at the time of his trial than he was in 1877, and wears a somewhat heavier beard. In 1876, the defendant passed under the name of Jim Johnson.

On the night of the twenty-first day of August, 1876, the witness lost a cream colored horse, in Houston County, Texas. The defendant was at the house of the witness and Brown on that night about nine o'clock. He passed though the room in which the witness was sitting at the time, but said nothing to the witness. The witness' horse at that time was staked out in the field. She saw the horse in question late on that evening, and missed him about sunrise, or a little later, the next morning. The witness' former husband, Mr. Brown, died in July, 1876, and the horse was the property of his estate, and was not the separate property of the witness. The witness administered on the estate of her deceased husband, but did not now remember when she qualified as administratrix — whether before or after the theft of the horse. She had the absolute control and possession of the horse, and he was taken from that control and possession without the knowledge or consent of the witness. Mrs. Bruce, the lady previously spoken of, lived a short distance from the house of the witness, and the defendant lived at Mrs. Bruce's from the time he left the witness' house in July, 1876, until the horse was missed. At the same time that the horse disappeared the defendant disappeared. His saddle and his saddle bags disappeared at the same time. He had no horse. The defendant was married to Mrs. Bruce's daughter, and lived at Mrs. Bruce's house after his marriage until he disappeared. On cross-examination by the defence, the witness stated that she did not see the defendant take her horse, and never saw him in possession of the horse after the animal disappeared. On the same night that the defendant stole witness' horse, a man named Parker stole the defendant's wife.

Robert Hale was the second witness introduced and sworn by the State. He testified that he lived in Houston County, Texas, near the residence of Mrs. Amanda Walker, formerly Mrs. Amanda Brown. He knew the defendant and he knew the horse that the defendant is charged to have stolen from Mrs. Brown. At this point the witness was directed by counsel for the State to point the defendant out in court. He pointed out a man who sat some three or four feet from the defendant. He was again directed to point out the defendant, and he again pointed out the man who sat some three or four feet distant from the defendant. The counsel for the State then pointed to the defendant and asked the witness if he was not the man Johnson, and the witness answered that he was. Mrs. Walker, then Mrs. Brown, he stated, lost a clay bank horse some time during the month of August, 1876. The next day after the horse was taken the witness went to where, on the night before, he was staked in the field, and tracked him out at the back of the field, up to Mrs. Bruce's house, and thence to the town of Palestine, in Anderson County, where the witness lost the track. A part of one of the hoofs of the horse was so broken off that his foot made a very peculiar and a very easily followed track. The witness was of opinion that the defendant owned no horse at the time of the theft of Mrs. Brown's horse. He had, a short time before this, contracted with a party to do some clearing, for which he had been given a horse, but he failed to perform his part of the contract, and the party with whom he contracted took the animal back. The witness first saw the defendant in 1876, when he

engaged to make a crop on Mrs. Brown's place. After that the witness saw the defendant occasionally until he disappeared in the same year, since when the witness had not seen him until on this trial. The woman that Parker is supposed and said to have taken off lived at Mrs. Bruce's. Cross-examined by the defence, the witness said that he never saw the defendant in the possession of the missing horse, and did not know that the defendant took that horse.

Wyatt Lane was the next witness sworn for the State. He testified that he lived in Houston County, Texas, in 1876, about three miles from the house of the prosecuting witness, Mrs. Walker, then Mrs. Brown. One night in the month of August of that year, 1876, while the witness and his wife were occupying a bed on the gallery of their house, some one on horseback passed the house. The witness recognized the horse as Brown's old saddle horse, and remarked to his wife: "Frank Brown is worse, and yonder is some one going for the doctor." Witness said nothing to the party riding the horse. No one was with the man on the horse. Witness did not recognize the man. The witness could not say what time of night it was, though guessing it was about twelve o'clock. He had been asleep and was awakened by the barking of his dog. The road was about fifteen steps from the gallery where the witness and his wife were lying. The defendant is the man who worked at Mrs. Brown's in 1876. The witness only knew him by sight, and saw him only occasionally. Cross-examined by the defence, the witness stated that he never saw the defendant in possession of the horse, and did not know of his own knowledge who took the animal.

F. B. Bayne was the next witness introduced on behalf of the State. He testified that he was the sheriff of Houston County, Texas. The State's counsel asked the witness if he had ever had a *capias* for the arrest of the defendant, and whether or not he had ever made search for the defendant and failed to find him, and directed the witness to state when and where and under what circumstances the defendant was arrested. To these questions the counsel for defence interposed strenuous objections, which being overruled, the witness stated in reply that *capias* for the arrest of the defendant was placed in his hands, and as sheriff he made diligent search for the defendant and failed to find him in Houston County. He then transmitted the *capias* to the sheriff of Freestone County, who arrested the defendant and lodged him in the Houston County jail. The defendant was afterwards released on bail, and in November, 1883, was re-arrested by the sheriff of Freestone County and relodged in the Houston County jail. The witness did not know that the defendant was avoiding arrest.

Mr. Childs was the next witness introduced and examined by the State. He testified that he was sheriff of Freestone County, Texas. He knew the defendant. The defendant was first arrested in Navarro County. He was arrested the last time in Montague County. The defendant's father resided in Freestone County, and offered a reward of one hundred dollars for the re-arrest of defendant after he was released on bond on his first arrest. Defendant was a married man and had two children. Over the objection of the defence the witness was permitted to testify that he received a *capias* for the arrest of the defendant from Houston County, but failed, after search, to find him in Freestone County.

The State then introduced in evidence the judgment *nisi* of September, 1883, forfeiting the defendant's appearance bond. The State closed.

Colonel John B. Paine was the first witness for the defence. He testified that he resided in Navarro County, Texas, in 1876. He knew the defendant's father, who lived some eight or nine miles distant from the witness' house. He also knew the defendant, and had known him for many years. It had long been the custom of the witness to hire the hands he worked about the last of January or the first of February of each year, and to employ them for five or six months. The witness was afflicted with a bad and uncertain memory, and could not say positively, but believed that it was in the year 1876, and that he had had the defendant employed. He employed him in January or February, and he stayed with witness until the following July. The defendant's reputation for honesty was good in the community in which he was reared.

A. M. Carter was the next witness introduced and sworn for the defence. He testified that he lived in Freestone County, and lived there in 1876. He knew the defendant's father, from whom he lived about eight miles distant. He had known the defendant pretty much all his life, say about twenty-five years. About the last of July or the 1st of August, either in 1875 or 1876 (the latter year, the witness believed), he hired the defendant to help him run a thresher, and from that time until the last of August the defendant worked at the thresher for him. The witness ran a thresher but one season, and that was the same year that J. A. Bounds purchased a thresher and commenced operating it, and that year was either the year 1875 or the year 1876, which the witness could not now be certain, but he was of impression that it was the latter year. At all events he had run a thresher but one year since the war, and that was the year that Bounds purchased his, and the same year that defendant worked for him. Witness met the defendant in the town of Wortham, Freestone County, Texas in the month of July before the August in which the defendant entered his service. The defendant's character for honesty up to the time this charge was preferred against him was perfectly good. Witness had never heard his honesty impeached before.

J. A. Bounds was the defendant's next witness. He testified that he lived in Freestone County, and lived in that county during the year 1876. Witness purchased a thresher in 1876, and ran it that year and for several succeeding years. The witness at that time lived about thirteen miles distant from the house of the previous witness Carter. Carter operated a thresher the same year that witness purchased and commenced the operation of his, which was the year 1876. Witness remembers this, because he started to make a drive in Carter's neighborhood, when he found that Carter had purchased and was operating a thresher. He then turned his thresher into another course. The witness did not know that Carter ever run his thresher before this year, but was of impression, that he, Carter, run it after 1876. Such at least, was the understanding of the witness. The witness had known the defendant for some fifteen or sixteen years. Until the defendant was charged with the theft of the horse in this case, his reputation for honesty was as good as that of any person known to the witness.

Mrs. Johnson, the mother of the defendant, testified, in his behalf, that she still lived in Freestone County, on the same place she lived in 1876. The witness did not know of her own knowledge where the defendant worked or stayed all of the time during the year 1876, but was under the impression that he worked for Col. John B. Payne. He and Colonel Payne's son frequently came to the witness' house together during the summer of 1876. Some time during

that year the defendant helped Mr. Carter run a threshing machine. About the last of August or first of September of that year, the defendant left the witness' house to go out West. It was the recollection of the witness that the defendant worked at Mr. Longbotham's during the year 1875. In May, June and July, 1877, he worked on the witness' place. He married in the fall of 1877. The witness had never heard of the defendant being or living in Houston County, until he was arrested under the charge on which he is now tried.

Jasper Steadman was the last witness examined in the case. He testified on behalf of the defendant, that he had known the defendant for twelve years, and knew that his reputation for honesty, until arrested on this charge, was perfectly good. The witness lived in Freestone County. About the last of August or first of September, 1876, the witness met the defendant in Navarro County, Texas, about twenty miles from defendant's father's house, going out West. He had no horse, and was traveling on foot.

WHITE, P. J. (after passing on other points). On the sufficiency of the evidence, in addition to that fact that defendant raised a serious question as to his personal identity, it is made to appear that on the night the horse was stolen, one "Mr. Parker stole defendant's wife," or the wife of the man defendant was supposed to be. And whilst defendant disappeared himself that night, and his saddle bags and saddle also disappeared, it is not improbable, and not altogether unreasonable in the absence of proof, that Mr. Parker wanted a horse to carry the woman off on, and, being so wholly regardless of defendant's domestic rights, he might have concluded further not to respect his property rights in the saddle and saddle bags, which articles he could perhaps utilize to advantage with the horse in his purposes and intent to rob the man of his wife.

We would not do intentional injustice to Mr. Parker, but these suggestions are thrown out because the disappearance of the saddle and saddle bags on the night the horse and woman were stolen are the principal inculpatory facts in the record against defendant, and whilst they may be pertinent and strong circumstances if his identity be established, they do not of themselves exclude every other reasonable hypothesis, but that of his guilt, as we have endeavored to show.

The judgment is reversed aed the cause remanded.

*Reversed and remanded.*

§ 571. Evidence Held Insufficient — Knutson v. State. — In *Knutson v. State*,[1] the indictment charged the appellant with the theft of a horse, the property of W. H. Martin, in Henderson County, on the first day of September, 1882. The verdict of guilty assessed his punishment at confinement in the penitentiary for a term of five years.

W. H. Martin was the first witness introduced by the State. He testified that he had known the defendant for several years. In the winter of 1881, the defendant, who was then in jail, sent for the witness and requested witness to bail him out. This the witness refused to do, and the defendant then said that he desired to employ the witness to defend him in the case then pending against him. The witness agreed, and the defendant gave him a clay bank horse as his fee. Witness got the horse and kept him a while, during which time he was ridden by witness' boys after cattle. He was then turned on the range four or five miles from the witness' residence. Shortly after the defendant employed

[1] 14 Tex. (App.) 570 (1883).

the witness, he secured bail and was released from jail. The witness afterwards saw the horse in the possession of the defendant. He told the defendant that he must quit riding that horse, and the defendant promised that he would. The witness at no time consented to the taking or using of this horse by the defendant or other person. He represented and acquitted the defendant in the case for which as a fee this horse was given him.

W. W. Robertson testified, for the State, that in the summer of 1882 he saw the horse once owned by the defendant, and which was said to have been transferred by him to the witness Martin. The horse at that time was necked to another, and was turned into the witness' pasture by the defendant and one Chancey. He remained in the pasture for several days. This pasture was seven or eight miles from Martin's. The defendant and Chancey left the witness' house with the horses still necked. They were driving a small herd of cattle at the time. The witness did not know where they went, but Chancey usually drove his cattle to Corsicana. Cross-examined, the witness stated tha he had heard but did not know of his own knowledge that the defendant had ever transferred the horse to Martin. The defendant was in the employ of Chancey, who was a cattle buyer. Chancey had bought a great many cattle in the witness' neighborhood during the preceding three or four years, and was in the habit of penning them in the witness' pasture. This pasture is about three quarters of a mile from the little town of Malikoff. The witness had never seen the defendant using the horse in question. The horse was in the witness' pasture for three or four days, during the most of which time the defendant and Chancey were out after cattle. This pasture was in or near the horse's range, and about two miles from the house of Martin. They left the witness' house in the day time, going in the direction of Malikoff, which is on the road from the witness' house to Corsicana, to which town Chancey generally drove his cattle. The witness did not know to whom the horse belonged which was necked to the horse in question. He did not hear Chancey or the defendant claim either of the horses. He had never seen the clay bank horse since.

A. S. Tanner testified that he lived in the town of Malikoff, which is near the Navarro County line. He had known the defendant for three or four years, and knew the horse he was said to have transferred to Martin. During the summer of 1882 the defendant passed through Malikoff with Mr. Chancey, going towards Corsicana. They were driving a herd of cattle, and also this horse necked to another. Cross-examined, he stated that Chancey was a cattle buyer, who lived in Corsicana. He had bought a great many cattle in the Malikoff neighborhood, and usually penned them at Robertson's. The witness supposed that this herd was his. The defendant, who lived in that neighborhood, was in the employ of Chancey. The horse ranged in that neighborhood. These parties passed through Malikoff in the morning about nine o'clock.

The defence first introduced W. H. Martin, and asked him in substance if he did not, shortly after the defendant's release from jail, meet John Clay in the public road, at a certain place, and ask the said Clay how his (Martin's) "claybank horse" was getting along; how he liked the range, and if he was not a "wild, fool kind of a horse;" and did not Clay answer that he was such a horse; and did not he (Martin) there and then say to John Clay: "You, Tom Knutson and the other boys may take up that horse and use him until I call for him." To these questions the witness answered: "No, I don't think I ever had such a conversation. If so, I have no recollection of it. I never gave anybody my consent to ride my horse."

John Clay was the second witness introduced by the defence. He testified that he knew the horse the defendant let Martin have. When the defendant gave bond and was released from jail, about January 1, 1882, which was after he had employed Martin, the witness took the defendant this same horse, and the defendant rode him home. The witness had seen him ride this horse several times since then, and had seen him ride the horse since the disposition of the case against him, for services in which he gave Martin the horse. Some time in the spring of 1882, and after the disposition of that case, the witness in passing Martin's house saw that gentleman. Martin on that occasion asked the witness about the horse. He asked if he was not a wild, fool kind of a horse. The witness told him that he was, and that he would pitch. Martin then said: "You, and Tom Knutson and the other boys can ride and use him until I call for him." Cross-examined, the witness said that he did not tell the defendant about Martin's saying that he could use the horse, until the defendant came to him and asked him about it after his arrest. The witness did not remember to whom he told this. The defendant must have derived his information from some of the neighbors. The witness, when he was asked by defendant, told him what Martin said, and he thereupon had the witness subpœnaed. The witness, who lived in the same neighborhood in which the defendant lived, and in which the horse ran, often saw the defendant riding the horse during the spring of 1882. After he was indicted, the defendant told the witness that he took the horse to Corsicana and left him at Chancey's.

Tom Chancey was the next witness for the defence. He testified that he lived in Corsicana, and for several years had been engaged in buying cattle in Henderson and adjoining counties, and of using the pasture of W. W. Robinson to pen them. He had bought at least four hundred head of cattle in Henderson County. The witness had known the defendant since December, 1881, about which time he employed him to assist in driving cattle. He understood then that there was a case pending against the defendant in the District Court, and that he was out on bond. The defendant was using a yellow horse at that time, which he always said was the property of W. H. Martin. He at no time pretended that he had a claim to him, but repeatedly refused to trade him because he was the property of W. H. Martin. In May, 1882, the witness made other purchases of cattle in Henderson and Anderson Counties, and again employed the defendant. The case against the defendant had then been disposed of. The defendant again took up the same yellow horse, asserting that the horse belonged to W. H. Martin, and denying any claim himself. *En route* to Corsicana with fifty or sixty head of cattle, after having remained at Robinson's pasture four or five days, the witness and the defendant passed through the town of Malikoff, and he thinks that he saw A. S. Tanner on that occasion. The defendant was riding the yellow horse when they passed through Malikoff. He remained with the witness a few days at his house in Corsicana, when the witness purchased his saddle, bridle and blanket. He then left on the train, saying that he was going to Madison County. He requested the witness to take the yellow horse back to Martin when he returned to Malikoff. This the witness promised him that he would do. The horse remained in the witness' pasture about two weeks, when he and a black mare broke out and ran away. The witness found them after a search of six or eight days, and returned them to the pasture. Two weeks thereafter the witness and Charley Pickle rode the yellow horse and black mare around the neighborhood, and finally turned them out on the prairie near the witness' house. Since that time the witness has

seen neither of them, though he hunted several days for them. This was about July, 1882. The defendant left for Madison County about the first of June, and returned about the first of August, which was about four weeks after the two horses ran away. The witness again employed him. Cross-examined, the witness stated that a short time after the defendant left for Madison County, and while the horse was in his pasture, he made a trip to Henderson County to purchase cattle, and while there sent W. H. Martin word that his horse was in his, witness', pasture. He could not say that Martin ever received the word. The witness made one or two trips to Henderson County while the horse was in his pasture. He felt quite certain that the defendant was riding the yellow horse when he and the witness passed through Malikoff *en route* to Corsicana, because the horse would not drive. Two days were consumed in going from Robinson's pasture to Corsicana. It was the practice of the witness to take several horses with him on these trips as reliefs. He did not remember how many he had on this trip. His contract with the defendant was to furnish him riding stock. The backs of all his horses were then sore; so was that of the yellow horse, but it was not in as bad a condition as the witness' horses. The witness felt quite certain that the defendant rode the Martin horse through the town of Malikoff on that trip, because, as stated, he would not drive. The witness repeated and emphasized this statement.

The following entry appears in the statement of facts: "The State's attorney, after many other questions, asked Chancey: 'Do you know who got that horse?' The witness gave no positive answer, but said: 'I suppose the horse ran away.' The same question was propounded again and again, when the witness turned his head and declined to answer. The defendant's counsel recalled this witness the next morning, and asked him if he knew who got the horse. He replied that he did not."

The next witness for the defence was Charley Pickle. He testified that he was employed by Chancey to help him drive some cattle from Anderson County about December, 1881. The defendant was with Chancey about that time, and was riding a yellow horse. The witness proposed to trade for him. The defendant refused, saying that the horse belonged to Mr. W. H. Martin, and that he could not trade him. Some time in June, 1882, the witness saw the same horse at Chancey's, in Navarro County. Chancey rode that horse about the neighborhood with the witness. That night he turned the horse out on the prairie, and the witness had not seen him since.

Cross-examined, the witness stated that he saw four or five horses at Chancey's on the occasion last referred to. All save a sorrel had sore backs. The yellow Martin horse's back was sore as any of them. Witness knew nothing about the present whereabouts of the horse.

The motion for a new trial assailed the sufficiency of the evidence to sustain the verdict.

Willson, J. To constitute theft the taking of the property must be fraudulent, with the intent on the part of the taker to deprive the owner of the value thereof, and to appropriate the same to the use or benefit of the taker.[1] It devolves upon the prosecution to prove beyond a reasonable doubt, that the property was taken with the intent above stated, and that such intent existed at the time of the taking.[2]

[1] Penal Code, art. 724; Camplin v. State, 1 Tex. (App.) 108; Dunham v. State, 3 Tex. (App.) 465.

[2] Reed v. State, 8 Tex. (App.) 40.

In this case, we regard the evidence as wholly insufficient to establish a fraudulent intent on the part of the defendant in taking the horse. On the contrary, we think the evidence shows, at most, a mere trespass; a taking of the horse for temporary use only, with no intention to deprive the owner of the value thereof, or to appropriate the same absolutely to his own use or benefit. In our opinion the conviction is without sufficient evidence to support it, and the judgment is reversed and cause remanded.

*Reversed and remanded.*

§ 572. **Evidence Insufficient to Convict — Madison v. State.** — In *Madison* v. *State*,[1] the conviction was for the theft of twenty hogs, the property of R. H. Cabiness, of the aggregate value of forty dollars, in Walker County, on the tenth day of March, 1883. A term of two years in the penitentiary was the punishment awarded.

R. H. Cabiness was the first witness for the State. He testified that, early in March, 1883, he left his home to look after his stock. The creek running near his house was so swollen that he left his horse and crossed over on a foot log, and went into the field in which the residence of Mr. Grooms was situated. He found Mr. Grooms penning some hogs in a close pen that he had recently made. Witness asked Grooms about the hogs that he was then penning, and ascertained from him that he had purchased them from the defendant. Witness informed Grooms that those hogs were his. The bunch included seventeen shoats and three sows. Grooms had butchered one of the sows, and was on the eve of marking the shoats, which at that time were unmarked. The animals described were perfectly gentle, and would readily answer to call. Witness had the defendant sent for, and he came to Grooms' place. Witness asked the defendant why he had traded his hogs to Grooms. The defendant replied that they looked like his hogs — a bunch that he had purchased from Mr. Roberts, and that he took them to be that same bunch. Some one asked the defendant what he proposed to do about the hog Grooms had killed — if he was going to pay for it. He answered that that was Mr. Grooms' business, or that Grooms would attend to that, as it was Grooms that killed the animal. The witness remarked, in reply, that he did not want pay for the hog, as he intended to prosecute the defendant for taking the animals.

Cross-examined, the witness stated that his mark was a swallowfork in one ear and a split in the other. He found his hogs as stated, and sent for the defendant on or about the tenth day of March, 1883. He took his hogs home on the same day, and on the same evening went to Huntsville and lodged complaint against the defendant, charging him with the theft of the hogs, twenty in number. He made this complaint before a justice of the peace. The complaint, bearing date March 10, 1883, was here exhibited. On the Monday following the Saturday on which the hogs were recovered and the complaint filed, the defendant came to the witness' house, having a hog in his wagon which he offered the witness in the place of the one Grooms had killed. The witness hesitated about accepting the hog, but finally told the defendant that he would accept the hog in payment for the one killed by Grooms. He directed the defendant to put the hog in his, witness' lot, which he did. Witness thereupon turned the hog over to a colored man. He did not, on that occasion, tell the defendant that he had been to Huntsville and filed a complaint against him for stealing the hogs.

[1] 16 Tex. (App.) 435 (1884).

The defendant did not, at the time that he made restitution for the hog killed by Grooms, know that the complaint for theft had been filed. Witness was of the impression that the defendant knew his, witness' mark, as two years before he, the defendant, had attended to and milked some of witness' cows in that mark. When the defendant milked the cows spoken of he lived about nine miles from the place where he lived when he sold the hogs to Grooms. Witness owned three sows in the lot the defendant sold to Grooms, one a black sow, one a brown or sandy sow with spots about on her body, and the other a spotted sow. Grooms' place was about two and a half miles from witness' residence. The witness identified the defendant, and stated that the hogs were owned by him, witness, and were taken without his consent, in Walker County, Texas, on or about March 10, 1883.

The witness Grooms testified, for the State, that he traded for a bunch of hogs with the defendant; that at the time he made the trade the hogs were running in his, witness', field; that he informed the defendant that the hogs were in the field, and the defendant said that he thought they were his, the defendant's, hogs, as he had hogs running in the same range with the Cabiness' hogs. Witness made the trade with the defendant for the hogs on Thursday. On Saturday following, while he, witness, was putting the hogs in a small pen for the purpose of marking the shoats, Cabiness came up and claimed the hogs as his. The defendant was then sent for, and came to the hog-pen. Cabiness told the defendant that the hogs belonged to him, Cabiness. Defendant replied that the hogs looked like his, and he thought that they were his when he traded them to the witness. The hogs, except one open sow, which the witness had killed, were taken away by Cabiness. Cross-examined, the witness stated that the defendant owned a bunch of hogs that ran on the same range with the Cabiness' hogs. About eight days after the hogs traded for were identified as Cabiness' hogs, the defendant found his hogs, and turned them over to the witness for the same consideration that had been paid on the trade for the Cabiness' hogs. The defendant had a fine lot of hogs, numbering about thirty head of shoats, and four or five sows. Of the Cabiness hogs described, the witness bought of defendant eleven shoats and three sows. One of the sows was black in color, another was a sandy animal with some white spots about the body, and the other was spotted. The sows witness last bought of the defendant were marked with a crop and split in one ear, and a crop and upper half-crop and underbit in the other. The defendant had a very poor faculty for distinguishing ear-marks, and could not now, if required to do so, go out into the court house yard, examine the mark of a hog and return and describe it correctly. Before he traded for the hogs that proved to belong to Cabiness, the witness knew that the defendant owned hogs running on the same range with the Cabiness' hogs, not far from where he, witness lived. He knew that the defendant had not seen his hogs oftener than twice since Christmas, 1882. There were two different ear-marks in the second lot of hogs that the witness got from the defendant, one of which was the defendant's mark and the other the Roberts' mark. Neither of these marks resembled the Cabiness' mark. When the witness bought the Cabiness hogs from the defendant, he and the defendant called the hogs right up to them. They were quite gentle. Witness went to defendant's house after Cabiness claimed the hogs, when, it is the impression of the witness, the defendant, upon being asked about the mark, said: "That is the old Cabiness mark." The Cabiness and Roberts' mark, except that both had a split in one ear, were totally unlike. The State closed.

Jimmie Smith was the first witness for the defence. He testified that he was present at the Grooms' house on the Saturday that Cabiness sent for the defendant to go to Grooms' house. When Cabiness told the defendant that the hogs he had sold to Grooms were his, Cabiness', hogs, the defendant said that they looked like his own hogs, and that at the time he traded them to Grooms he thought they were his. The witness knew that the defendant owned hogs running in the same range with the Cabiness' hogs when he made the trade with Grooms. He owned a "likely" or good bunch, numbering four or five sows and some thirty pigs, or shoats. The witness owned these hogs originally, but sold them to Roberts, who subsequently sold them to the defendant. Witness heard of this latter sale through both Roberts and the defendant. These hogs had been somewhat dogged, and were, therefore, inclined to be skittish. The Cabiness hogs were gentle. Witness knew that the defendant had a very poor faculty for distinguishing the ear marks of animals. It is possible that the defendant might be able to distinguish his own hog mark from that of another person, but the witness doubted such fact.

J. W. Robinett testified, for the defence, that he knew that the defendant owned hogs running in the same range with the Cabiness hogs. They were a fine lot, numbering some five or six sows, and some twenty or thirty pigs or shoats. Witness had made an ineffectual effort to trade with the defendant for his bunch of hogs. Witness knew the defendant well. His, defendant's, faculty for distinguishing ear marks of animals was exceedingly poor. He had no ability to identify ear marks at all. Among the hogs owned by the defendant there was a black, a black and white spotted, and a sandy colored sow. This latter had some spots on her body. There was some resemblance between these three and some sows owned by Cabiness.

The proof in this case further showed that the complaint was made before a justice of the peace on March 10, 1883, and that the defendant had no notice of such complaint until he was arrested on the thirteenth day of the following April.

That the verdict was against the evidence, that the court erred in its general charge, and in the refusal to give certain requested charges, were the grounds urged in the motion for new trial.

WHITE, P. J. The appellant was convicted of the theft of certain hogs, the property of one Cabiness. Without discussing the many errors assigned, we propose to discuss but two questions, to wit: (1) As to the sufficiency of the facts to establish theft as defined in our code; and (2) the sufficiency of the evidence to establish the guilt of the defendant.

A fraudulent "taking" is the essential element of theft as that offense is defined in our code.[1] At common law, a carrying away or asportation was necessary in connection with a fraudulent taking, but under our code, "to constitute theft, it is not necessary that the property be removed any distance from the place of taking; it is sufficient that it has been in the possession of the thief, though it may not be moved out of the presence of the person deprived of it; nor is it necessary that any definite length of time shall elapse between the taking and the discovery thereof; if but a moment elapse, the offense is complete."[2]

What is a taking under our law? Must actual, manual possession, or the exercise of actual custody and control, be established to constitute a taking?

[1] P. C., art. 724.

[2] P. C., art. 726.

These questions are suggested, and necessary to be determined from the facts in this case. It is shown by the evidence, beyond controversy, that the appellant sold the hogs to Grooms, and that the hogs belonged to Cabiness. The hogs were running in Groom's field, who, believing them to belong to defendant, informed the latter that they were in his field. "Defendant said he thought they were his hogs; that he had hogs running in the same range." Witness (Grooms) and defendant "called the hogs right at (up to?) them." Defendant sold the hogs to Grooms, and Grooms, the next day, put them into his pen, where they were afterwards fonnd, and claimed by Cabiness.

Was this such a "taking" by defendant as constitutes theft under our statute? At common law there was required to be not only a taking, but asportation also. And Mr. Russell says: "There must be an actual taking or severance of the goods from the possession of the owner, on the ground that larceny includes a trespass. If, therefore, there was no trespass in taking goods, there can be no felony in carrying them away. But the taking need not be by the very hand of the party accused; so that if the thief fraudulently procure a person innocent of any felonious intent to take the goods for him (as if he should procure an infant within the age of discretion to steal the goods), his offense will be the same as if he had taken the goods himself, and it should be so charged. It appears to be well settled that the felony lies in the very first act of removing the property; and, therefore, that the least removing of the thing taken from the place where it was before, with an intent to steal it, is sufficient asportation, though it be not quite carried away." [1]

In the case before us, the hogs were in their accustomed range, and Grooms, after his purchase, did uot drive or pen them for a day or so. Did the single act of defendant in selling him the hogs, under the circumstances, amount to theft? At the request of the district attorney, the court charged the jury "that the selling of property belonging to another by one who knows the same is not his own is sufficient in law to constitute a taking as meant in the definition of theft; and if all the other ingredients of theft, as given you in the general charge, are proven, and a taking is shown by a sale of the property, then such sale is a taking under the law."

This charge simply affirms that a sale is equivalent to a taking.

In *Hardeman* v. *State*,[2] Hardeman sold a steer running on the range, the property of one May, to one Wear, and this court said: "The evidence fails to show that the steer was ever in possession of the defendant. To constitute theft, there must be a fraudulent taking by some person. In this case, the defendant did not take the animal, nor did Calvin Wear, to whom defendant sold the animal; and, if Wear had taken the property, his taking would not have been fraudulent, but honest, he having bought and paid for it, and received the bill of sale for the steer. This steer, running on the range all the time, was not taken fraudulently or otherwise by any person, hence there was no theft." This decision fully refutes the proposition announced in the charge given — that a sale alone constitutes a taking. Under the Hardeman decision, it would appear that a defendant must have some sort of possession of the stolen property, else a sale of such property by him would not amount to theft; and we are of opinion that this proposition is well sustained by authority and reason. There must be an actual taking or conversion of the stolen property to support

[1] 2 Russ. on Cr. (9th ed.) 152.

[2] 12 Tex. (App.) 207.

a verdict of guilty of theft. In *White* v. *State*,[1] the Supreme Court say that intention and conversion were both "necessary elements to make out a charge of theft. In all criminal cases nothing is presumed against the accused. The proof must show that there was a conversion, which under the code is the synonym of taking."[2] In *Martin's Case*, the proof was that the owner of the alleged stolen hog, while in his field, heard the report of a gun; advancing he saw, just over a hill, the defendant loading his gun, and on approaching the defendant he saw, about fifteen feet from where defendant was standing, one of his hogs freshly shot. He said to the defendant, "that is my hog." Defendant replied, "I did not shoot it." It was held that actual conversion or possession was not shown, and that the intent and act constituting the offense must both exist to make out the offense.

In *State* v. *Wilkerson:*[3] "When A. was indicted for stealing a hog, and on the trial it was shown that a hog belonging to the prosecutor had been killed and concealed in the corner of the fence, covered with leaves, and that A. was seen at night to go to the place, and look carefully around and stoop over, as if to take the hog, and upon being hailed fled, *held*, that these facts alone would not justify a verdict of guilty."

The case we are considering is not, it will be noticed, precisely similar to any of the other cases we have cited. In this case, though the hogs were in their accustomed range, yet they were gentle and were called up by defendant or Grooms, and were right up at them, in their presence, and could have been immediately driven off by either or both when defendant made his sale and constructive delivery of them to Grooms. Under these circumstances, had not the hogs been taken, in legal contemplation, by defendant before the sale? He called them up; this was exercising control over them certainly, and after they came up, and whilst they were thus in his control if he, knowing them not to be his property, sold and constructively delivered them to Grooms, who afterwards took them into actual possession, under the purchase, it would, in our opinion, bring the case fully within the rule quoted above from Russell, viz: that "if the thief fraudulently procure a person innocent of any felonious intent to take the goods for him, his offense will be the same as if he had taken the goods himself." The appropriation, so far as defendant is concerned, was obvious, and the taking did not rest solely upon the subsequent exercise of ownership and possession by Grooms.

But, as stated above, the charge given at the request of the district attorney was erroneous.

In addition to this error, we are not satisfied that such fraudulent intent is established by the evidence as warrants the conviction.

Appellant had hogs which he had bought of Roberts, running in the same range. Grooms believed these to be defendant's hogs. Defendant said that he also believed them to be his. The marks, it is true, were somewhat different, but defendant is shown to be little acquainted with the difference in marks. There was no concealment or attempt at concealment with regard to any part of the transaction by defendant. His actions are not inconsistent with honest and fair dealing, under an honest but mistaken claim of right to the hogs. He certainly promptly, and fully righted the wrong, if any had been done as far as

1 11 Tex. 771.

2 Martin *v.* State, 44 Tex. 172.

3 72 N. C. 376.

could be by satisfying Cabiness and Grooms in so far as they were likely to be injured by a loss of the hogs alleged to have been stolen.

In our opinion, the evidence does not support the verdict and judgment, and in connection with our conclusions upon this point, we cite the following cases: *Mullins* v. *State*,[1] *McHenry* v. *State*,[2] *Clark* v. *State*,[3] *Landin* v. *State*, *Shelton* v. *State*,[5] *Taylor* v. *State*,[6] *Mapes* v. *State*,[7] *Dresch* v. *State*.[8]

The judgment is reversed and the cause remanded.

*Reversed and remanded.*

§ 573. **Evidence Insufficient to Convict — Martinez v. State.** — In *Martinez* v. *State*,[9] the indictment charged the appellant with theft of a saddle, bridle and saddle blanket, of the aggregate of thirty dollars, the property of Juan Montex, in Bexar County, Texas, on the eighth day of December, 1883. A verdict of guilty was returned against the appellant, and his punishment was assessed at a term of two years in the penitentiary.

Juan Montez was the first witness introduced by the State. He testified that on the eighth day of December, 1883, his son, Jose Montez, left his, witness', house near the mission, nine miles below San Antonio, to go to the city. When Jose reached the suburbs of the city, he was thrown from the horse, and the horse, with saddle, bridle and saddle blanket, made its escape from Jose. As soon as the witness was apprised of this fact, he started out to hunt for the horse, saddle, bridle and blanket. When he reached the Goliad road, he saw two gentlemen traveling that road, going in the direction of San Antonio. From them he learned that they had met a man riding a paint horse, and leading a horse answering the description of witness' horse. The man they said, was going eastward from San Antonio. Witness continued his search, and after a time found his horse on the range, but the bridle, saddle and blanket were gone. Witness subsequently learned that there was a paint horse on the ranch of Alejos Perez, which answered the description of the horse given him by the two gentleman he met on the Goliad road. Witness went to the ranch of Mr. Perez, and there learned that the defendant had taken up a horse with a new saddle and bridle on, and had taken them to San Antonio. Witness had the parties at the ranch to describe the horse and saddle, and became satisfied that the saddle was the one he was searching for. At Perez's ranch, witness talked to Trinidad Cortinez, and from him learned of the defendant's having had the horse, saddle and bridle. Witness received this information from Cortinez on the evening of December 10, 1883. Next day witness went to San Antonio, distant from Perez's ranch fifteen miles, and began a search for the saddle in the city. Preliminary to his search, he secured the professional services of Police officer Pancho Galan. They finally learned that a party had taken a saddle to pawn to the pawn shop of Don Carlos Guerguin, on the night of December 9, 1883. The saddle so pawned to Guerguin, was a full-rigged new saddle, and answered the description of the one the witness had taken from him. On the night of December 9, 1883, the witness and Galan went to the house of Crecencio Bueno, across the San Pedro Creek, and there found the saddle. This saddle was the property of the witness and was taken without his

1 37 Tex. 337.
2 40 Tex. 46.
3 7 Tex. 57.
4 10 Tex. (App.) 63.
5 12 Tex. (App.) 513.
6 *Id.*, 489.
7 14 Tex. (App.) 129.
8 *Id.* 175.
9 16 Tex. (App.) 122 (1880).

knowledge or consent. Witness did not know the actual value of the saddle. It was quite new, having been used but two or three times in riding from witness' ranch to San Antonio and back, a distance of nine miles. The saddle tree was a present to the witness, and was worth at least four or five dollars. The witness had paid twenty dollars to have it rigged. The saddle exhibited on this trial was the one lost by witness and recovered from Crecencio Bueno. This all occurred in Bexar County, Texas. Cross-examined, the witness stated that the saddle was his property, but was lost by his son Jose. It was worth twenty-five dollars. Witness did not know who got it. He did not know the defendant. He learned in following up the saddle, that a man named Garcia, took the saddle to Guerguin's pawn shop, to pawn it. Pancho Galan was with the witness when the saddle was recovered at the house of Crecencio Bueno. The witness did not know from whom Crecencio Bueno got the saddle, except from his statement. Witness did not know, except from hearsay, that the defendant ever had the saddle in his possession at all. So far as the witness knew, the defendant may have sold the saddle for Quireno Garcia. Witness would not swear that the defendant stole his saddle; he did not know whether he did or not.

J. S. Ramsey, testified for the State, that he was the proprietor of a saddle and harness establishment on Maiu plaza, in the city of San Antonio. He had been engaged in that business for the past fifteen years, and was a judge of the quality and value of saddles. He had examined the saddle involved in this proceeding. That saddle has been used a little, but not enough to greatly depreciate its value. In the opinion of the witness, that saddle is worth at least twenty-five dollars. Cross-examlned, the witness testified that he did not deal in second-hand saddles, and would not keep them in stock. This saddle showed to have been used somewhat, and witness would not buy it. It is a second-hand saddle, but well worth twenty dollars, though the witness would not give that price for it to put in stock. If, however, he wanted to buy a saddle for his individual use, witness would pay twenty dollars for it, and esteem the price cheap. On redirect examination, witness said that the saddle in the hands of the original purchaser, after being ridden back and forth over a distance of nine or ten miles, as often as three or four times, would, in the condition of this saddle, be worth to the original owner as much as twenty-five dol lars. It would deteriorate intrinsically by such use, but little, if at all.

Francisco Galan (spoken of as Pancho Galan by the prosecuting witness), was next called to the stand by the State. He testified that he was, and for fifteen years past had been, on the police force of the city of San Antonio. He knew Juan Montez. On or about December 11, 1883, Montez applied to him for assistance in searching for a saddle, bridle, and blanket he had lost. Witness went with Montez, and on that night they found and recovered the saddle from the house of Crecencio Bueno, west of the San Pedro Creek. The saddle exhibited on this trial was the saddle found by Montez and witness at Bueno's house and claimed by Montez as his. Cross-examlned, witness stated that he at no time saw the defendant in possession of that saddle. The witness did not know the value of the saddle, but would think it worth from twelve to fourteen dollars. It was probably worth a little more before it was used. Redlrect, the witness stated that he was a policeman, and not a dealer ln saddles, and was not posted as to the value of saddles. He named the value stated merely as matter of individual oplnion, and not from a knowledge of values. In his opinion the saddle was worth, when new, fifteen or sixteen dolars, and was now worth twelve or fourteen.

Crecencio Bueno was the next witness for the State. He testified that he recognized the saddle exhibited on this trial as the one he purchased from the defendant, and which was afterwards reclaimed from him by Montez and Galan. Defendant brought that saddle to the witness' house, and sold it to him on the night of December 10, 1883. On cross-examination, the witness stated that he paid the defendant ten dollars for the saddle, which was all that he thought he could afford to pay for it. Defendant did not tell where he got the saddle, nor did the witness know.

Trinidad Cortinez was the last witness introduced by the State. He testified that in December, 1883, he lived on the ranch of Alejos Perez. He saw Juan Montez at that ranch during that month. Montez was looking for a horse that had escaped from his son, with saddle, bridle, and blanket. Montez described the horse and saddle, and witness told him that the defendant had brought such a horse and saddle to the ranch, and had taken them to San Antonio, as he said, to hunt an owner for them. Witness could not recall the day of the month on which this happened, but it was sometime near the first. Witness did not know that he could identify the saddle, as he looked at it from some little distance. He knew, however, that it was a new-looking full rigged saddle. Montez, on getting this information from witness, started off toward San Antonio to look for the saddle. This was two or three days after defendant started to San Antonio with the horse and saddle. Perez's ranch is on the Goliad road, some twelve or fifteen miles from San Antonio. On cross-examination, the witness declined to swear positively that the saddle shown him was the same that was brought to Perez's ranch by the defendant. He could say, however, that it looked very much like it. When defendant left Perez's ranch he said he was going to hunt the owner of the horse and saddle and deliver up the property. Witness did not know what he eventually did with the horse and saddle.

William Roach testified, for the defence, that he was a saddler and a judge of the value of saddles. The saddle shown the witness was worth, new in the shop, twenty-five or twenty-six dollars. In its present condition, the saddle, having been used to some extent, was not worth so much by six or eight dollars. It could not now be sold, as a second-hand saddle, for more than eighteen or twenty dollars. Cross-examined, the witness testified that the saddle, because of such use as it has had, is not intrinsically depreciated in value to the original owner. To him, it would be worth quite as much as when he got it new. Articles, when once used by one person, are less desirable for sale or market, and, because of such use, they lose much more in market than in intrinsic value. Intrinsically, this saddle is worth quite as much as ever it was. It is not worth so much in the market.

Carlos Guerguin was the defendant's next witness. He testified that he had seen the saddle in evidence before. A man who gave his name as Quireno Garcia brought it to witness' pawn shop one night, and wanted to pawn it. Garcia said that he brought the saddle from Kansas. Garcia was not the defendant. Witness would willingly pay sixteen dollars for the saddle, but no more. Witness stated, on his cross-examination, that, were he to buy the saddle, he would buy it on speculation. Witness, in mentioning the price he would pay for the saddle, mentioned the speculation price. The saddle, in the opinion of the witness, was really worth more than sixteen dollars. It was worth twenty or twenty-five dollars. In buying articles, the witness, in his

business, would pay but two-thirds of the actual value, and this was the rule applied by the witness in estimating the value of the saddle in his examination in chief. It was on the night of the ninth or tenth of December, 1883, that Quireno Garcia brought the saddle to the witness to pawn. Witness examined the saddle closely, for one reason, because it was a much better article than was usually brought by the class of men to whom Garcia apparently belonged; and, for another reason, because it bore the stamp of a San Antonio manufacturer, whereas Garcia said that it was made in Kansas.

WILLSON, J. (after other rulings). 4. There is another question in this case of more importance than those we have discussed. Conceding that the defendant took the saddle, did such taking, under the facts of this case, constitute theft? and did the court charge all the law applicable to the issues raised by the evidence? That the owner of the saddle had lost it was proved beyond a question. It was, then, lost property, but was, nevertheless, the subject of theft. To constitute theft, however, the fraudulent intent, which is the gist of this offense, must exist in the mind of the taker at the very time of the taking; and, in the case of lost property, the time of the taking is the time of the finding of the property. If the fraudulent intent did not exist at the time of the taking, no subsequent fraudulent intent in relation to the property will constitute theft.[1]

In this case it was proved that on the day the saddle was lost, the defendant was seen in possession of such a saddle, and said that he was going to the city of San Antonio to search for the owner of it in order to deliver it to the owner. He did not then pretend that the saddle belonged to him, but admitted that he had found it, and intended to search for the owner of it. There is no evidence which shows that, even if the defendant took the saddle, he at the time intended to deprive the owner of the value of it, and to appropriate it to his own use or benefit. On the contrary, his own statements, above alluded to, which were proved by the State, show that after he had taken the property, his intention with regard to it was an honest one; he intended to restore it to the owner, if such owner could be found. Upon this state of facts we think it was the duty of the trial court to instruct the jury clearly and specifically upon the issues as to the intent of the defendant at the time he took the property, if he did take it.

The charge of the court did not explain this issue to the jury any farther than to give the general definition of theft. Defendant requested the following special instruction, which the court refused to give, viz.: "If the property came into the possession of the defendant by lawful means, the subsequent appropriation of it is not theft, and you will acquit the defendant, unless it was obtained by false pretext, or with intent to deprive the owner of the value thereof and appropriate the property to the use and benefit of the person taking." This charge would have been more directly applicable to the evidence if it had read: "If you believe from the evidence that the property was lost, and that the defendant found it, he can not be convicted of the theft of it unless you believe from the evidence that at the time he found it he fraudulently took it with the intent at that time to deprive the owner of the value of it, and to appropriate it to his own use or benefit. No fraudulent intent in the mind of the defendant in relation to the property, which was formed after he had taken the property, will authorize his conviction of the theft of such property."

We think a charge in substance such as we have suggested was demanded by

[1] Robinson *v.* State, 11 Tex. (App.) 403.

the evidence in this case, and that the court erred in omitting to give such an one. The charge of the court was excepted to by the defendant, because it failed to give the jury all the law of the case, and for other reasons. We think the court erred in not instructing the jury upon the question of intent as above indicated.

The judgment is reversed and the cause remanded.

*Reversed and remanded.*

§ 574. **Evidence Insufficient to Convict — Pettigrew v. State.** — In *Pettigrew* v. *State*,[1] WILLSON, J., delivered the following opinion. The defendant was indicted for the theft of a mare, and was convicted, and his punishment assessed at confinement in the penitentiary for five years. The evidence to support the charge is substantially as follows: The mare was the property of J. N. Rape. She was stolen from him in Hill County, on the 4th day of September, 1881. A few days after the mare was stolen in Hill County, the defendant had the mare at his father's house in Bell County. The defendant had been absent from his father's about two years, but it does not appear where he had been during this two years. No other facts were proved connecting the defendant with the theft of the mare. The fact of possession stands alone to support the conviction. On the part of the defendant it was proved that he was about twenty-one years of age; that he was very weak-minded, had scarcely any mind at all in some things, and was particularly deficient in memory and reason; that he could not count one hundred and could not learn to count, and could never learn anything at school, Several witnesses who had known him from childhood tesfied that in their opinion he did not have as much intellect or mind as a child ten or twelve years old, and not enough to know right from wrong; that he has always been regarded in the community in which he lived as a fool, and not responsible for his acts, on account of his want of mind. We think the evidence insufficient to support the verdict, and that the court below should have set it aside and granted the defendant a new trial. We are also of opinion that the evidence establishes such a deficiency of intellect as renders the defendant irresponsible for crime.[2] The judgment is reversed and the cause remanded.

§ 575. **Evidence Insufficient to Convict — Saltillo v. State.** — In *Saltillo* v. *State*,[3] the prisoner was charged with the theft of a horse the property of W. M. Reynolds, and was convicted of driving it from its accustomed range with intent to defraud the owner. The punishment awarded by the jury was a term of two years in the penitentiary.

W. M. Reynolds was the first witness for the State. He testified that he knew and had known the defendant for a short time. Defendant lived in that part of the town of Uvalde known as Mexico. Some time in the month of January, 1884, the witness hoppled and turned a certain mare out on his range, which extended from the town of Uvalde to Salt Creek, a distance of about seven miles. On the morning following the evening on which the mare was turned out, the witness' son Lonnie, as usual went out to drive her up. Failing to find her after a search which was kept up until the morning of the third day after her disappearance, Lonnie returned home.

[1] 12 Tex. (App.) 225 (1882).

[2] Thomas *v.* State, 40 Tex. 60; Webb *v.* State, 5 Tex (App.) 596; Williams *v.* State, 7 Tex. (App.) 163.

[3] 16 Tex. (App.) 249 (1884).

Acting on certain information he had received, the witness went to, and found his mare at the defendant's house. He asked defendant what he was doing with the mare. Defendant replied that two or three evenings before, he had hobbled his two horses out on the range near Knox's ranch, seven miles southeast from Uvalde; that when he went to hunt them next day, he found but one of his horses, and the witness' mare with him; that he concluded some one had taken his horse and left the mare; that he wanted to take the mare to Uvalde and find and deliver her to her owner if he could. He did not claim the mare, but delivered her to the witness on demand. The mare had been hard ridden, and was considerably used up. Defendant had no consent from the witness to take the mare. The mare was under witness' control.

Lonnie Reynolds testified, for the defence, that he was the son of W. M. Reynolds, the State's witness. He owned the mare in question. He turned her out on the range one evening, between Uvalde and Salt Creek, and failed to find her as usual next day, but, within two or three days, found her at defendant's house, in that part of Uvalde known as Mexico. Defendant made to witness the same statement concerning his possession of the mare, and his intention with regard to her, as he subsequently made to W. M. Reynolds, as set forth in the latter's testimony. Defendant refused to deliver the mare to witness, who then went for his father, W. M. Reynolds, to whom defendant delivered her.

Lanatho Calsado testified, for the defence, that the defendant worked on Knox's ranch, in Uvalde County, but that his family lived in the town of Uvalde. At the time that he was employed on the Knox ranch, the defendant owned two horses, one a bay with white face, and one a sorrel. One evening in January, 1884, in the presence of the witness, the defendant hoppled his two horses out near Knox's ranch. On the next morning, the defendant went out to hunt his two horses, and returned with but one of them and a black mare. At this point, the testimony referred to in the first head-note of this report was offered, and excluded. The defendant had never recovered one of the horses he hoppled out at Knox's ranch. At least, the witness had never seen that horse since he was turned out.

Wm. Reynolds testified, for the State, on being recalled, that he was the father and natural guardian of Lonnie Reynolds, who was but fifteen years old. He had control of both Lonnie Reynolds and the mare. The mare was both belled and hoppled when she was turned out. She had on neither bell nor hopples when recovered.

WHITE, P. J., (after passing upon other points): —

We are of opinion that the evidence is insufficient to support a conviction for either theft or driving the animal from its accustomed range with intent to defraud the owner; of which latter offense defendant was convicted. There is no proof that defendant ever drove the animal from its accustomed range. When found by Lonnie Reynolds, the owner, in possession of the mare, it was in the town of Uvalde, in or near her range, where the owner had hobbled her out; and defendant stated to said witness that "he had brought the mare to Uvalde to find an owner for her, and in case he found an owner for said mare he would give her up." In view of the insufficiency of the evidence, the court also erred in overruling defendant's motion for new trial.

The judgment is reversed and the cause remanded.

*Reversed and remanded.*

§ 576. **Evidence Insufficient to Convict — Seymore v. State.** — In *Seymore v. State*,[1] Hunt, J., delivered the following opinion: Seymore, the appellant, was convicted of the theft of a trough of the value of three dollars. The evidence is as follows: —

J. W. Stewart, a witness for the State, being sworn says: "I reside in Robertson County, Texas. I know the defendant W. P. Seymore. He is in court (identifies him). I rented for the year 1881, the Durant and Edrington farms. I am living on the Durant farm. When I took charge of the Edrington farm, on the first day of January, 1881, there was upon the place the wooden trough now in controversy. W. P. Seymore, defendant, had the farms rented for the year 1880, and by order of Edrington the farm implements and fixtures were turned over to me by Seymore. I moved the trough from the Edrington farm to the Durant farm, where I am now living, and placed the trough in my lot and had the same in use. The cedar trough was worth three dollars. I rented both places or farms from E. C. Edrington. W. P. Seymore has nothing to do with the same. I pay my rent to Edrington and settle with him for the farms. On the 13th day of July I was away from my home. On my return I found that the trough had been taken away; I never gave my consent to any one to take the trough. Edrington never gave his consent to any one for them to take the trough. There was no one at my house but my wife and children and servant. The defendant Seymore never notified me that he had taken the trough, nor informed me that he had done so. Cross-examined. "Seymore lives in two hundred yards of my house, keeps a store, and leases one acre of land from Edrington. There was a plank trough on the Edrington farm, belonging to Seymore. When I took possession of the place I moved the plank trough together with the cedar trough now in controversy from the lower end of the Edrington farm to the Durant farm, and put them in my lot. Some time in April last Mr. Seymore wrote me a note stating that the troughs, that is the plank trough and cedar trough, were his, and to either send them home or pay for them. I replied that the plank trough was his, and he could either come and get it or that I would pay him one dollar for same; also that the cedar trough was not his property, that belonged to the Edrington farm, and I would not give it up. Mr. Seymore claimed the property openly in April. In 1879 Seymore was agent for Edrington, and in 1880 he had the place leased; he has nothing to do with the place this year, except the one acre upon which his place is situated. I afterwards saw the trough in Seymore's lot at his well. He claimed to own the trough in April last."

Cæsar Grant, a witness for the State, being sworn, says: "In 1878 Billy Redden and myself dug the cedar trough. We were tenants on the Edrington farm. It was dug from a tree grown on the Edrington farm, and was dug by permission of Fulks, the agent. We used the trough to water our hogs. When we left the farm we left the trough there, and I left the same on the farm, considering that it became the property of the Edrington farm. Mr. Seymore collected some of the rents in the year 1878; in 1879 he was agent, and in 1880 he worked or leased the place."

Bob Lee, a witness for the State, being sworn, says: "I am living with Mr. Stewart on the Durant farm. On the 13th of July last Mr. Seymore came to Mr. Stewart's house in the absence of Mr. Stewart, opened Mr. Stewart's lot gate, and Wash Lockett drove the wagon in the lot, and Mr. Seymore and Wash

[1] 12 Tex. (App.) 391 (1882).

Lockett put the troughs in the wagon, and drove the wagon off, without saying anything to any one about the taking, or speaking to any one as far as I know. My house is about fifty yards from the lot; I was standing in my door. The trough was taken by Mr. Seymore about ten o'clock in the morning. Mrs. Stewart was at home."

Wash Lockett, a witness for defendant, being sworn, says: "On or about the 13th day of July, 1881, Mr. Seymore told me to drive my wagon up to Mr. Stewart's lot, and that he wanted me to help him bring his troughs home; said that Mr. Stewart had them in his lot and he wanted them. Mr. Stewart's house is about one hundred yards from Mr. Seymore's store. I drove the wagon, Mr. Seymore walked behind. I drove to Stewart's lot, which is about thirty yards from Mr. Stewart's house. Mr. Seymore walked through the yard of Stewart and opened the gate, and I drove in. We put both troughs in the wagon, the cedar and plank trough, and I drove the wagon back to his store and put the troughs in the yard. When we drove up to the gate Mrs. Stewart was sitting on the gallery, and she went in the house; and when we were putting the troughs in the wagon I saw Mrs. Stewart at the window looking at us. And as I drove off Mrs. Stewart was sitting by the window looking at us. His daughter was sitting on the gallery. His servant was in the back yard. I did not see or hear Mr. Seymore speak to any one; he walked behind the wagon. This was about ten o'clock in the morning, in day time. They were taken openly, Mr. Seymore telling that they were his; there was no concealment. He put the cedar trough up at his well."

This evidence does not show the defendant to be a rogue. We can not and will not sustain a verdict and judgment which have for their support such facts as appear in this record. If this man can be legally convicted of the nefarious crime of theft upon such evidence as the above, then, indeed, hundreds of good and honest but imprudent citizens of the State deserve to fill our prisons as felons. We will not confer gravity upon these facts by analyzing them; they utterly fail to support the verdict. The judgment is reversed and the cause remanded.

*Reversed and remanded.*

§ 577. **Evidence Insufficient to Convict — Shelton v. State.** — In *Shelton v. State*,[1] HURT, J., delivered the following opinion: —

HURT, J. The appellant was convicted of the theft of a certain steer, upon the following evidence: —

T. A. Kirk, State's witness, testified: "I live in Milam County, Texas. I know defendant Matt. Shelton. I own stock in Milam County, Texas; have a mark and brand, and the same is recorded in Milam County. I have stock in the range in Milam County near the residence of J. B. Rawls, and had some cattle in said range in the fall of 1879 and spring of 1880, near Mr. J. B. Rawls. My brand is k, mark, short crop in the left ear, and swallow fork in the right ear. I think it was the spring of 1880 I saw one of my steers, four years old, at Mr. Rawls'; it was a white steer with a red head and in my mark and brand. I intended to make a work-ox of the steer. I never sold it to the defendant or any one else, nor did I give the defendant my consenst to take it. I have never seen the steer in the range since, nor have I ever seen the steer in the defendant's possession."

[1] 12 Tex. (App.) 513 (1882).

J. B. Rawls, State's witness says: "I live in Milam County, Texas, about four miles from Milano Junction. I know the defendant. In the fall of 1879, the defendant came to my house. He had two young men with him, neither of whom I knew. They drove up to my house and penned with my cattle some cattle that I had sold, and one white steer with a red head, branded k, marked with a short crop off of the left ear, and a swallow fork in the right. This steer came to my place and took up with my cattle when it was two years old, and remained there, and slept at my pen most of the time until he was driven away by defendant at four years old. At the time the defendant drove up the steer, I asked him if he knew the owner of this beef. I had always thought it an estray. He said it belonged to Tom Kirk, and said that some time before he had bought a steer from Tom Kirk; that it had got away from him, and said that you will just take this one in the place of the one he had lost. This was a white steer with a red head. Defendant penned the bunch of cattle, cut out those I had sold to another man some time before, and turned out this white beef with a red head marked as above stated, and drove him away. I have never seen the steer in that range since. His accustomed range was within two miles of my house. The defendant came to my house twice and gathered and drove away cattle. The first time was about one month before the time he drove away this beef. He came in the morning and penned about ten or eleven o'clock, and left after noon. The first time he penned in the evening, and drove off next morning. Defendant told me he was engaged in the butcher business, and was slaughtering one beef a day. I helped the defendant cut the cattle out of my pen, and among the rest, the white steer with a red head, branded k, and left my cattle in the pen.

J. S. Martin, for the State testified as follows: "I live in Milam County, Texas, three-quarters of a mile from the residence of Mr. J. B. Rawls. I know the defendant. I know the steer charged to have been stolen. I know him well; he was a white steer with a red head and had some red spots back on his shoulders. He ranged about my place with Mr. J. B. Rawls' cattle, and sleeping at Mr. Rawls' pen from the time it was about two years old until it was about four years old. The steer was marked a short crop off of the left ear, and a swallow fork in the right ear and branded k. The last time I saw the beef it was in the possession of the defendant. In the fall of 1879, the defendant drove a small bunch of cattle past my place, and had the steer charged to have been stolen with the bunch. I have never seen it since. I am well acquainted with the range, and have been hunting stock in the range. Have never seen the steer in the range. The defendant drove it past my house in the direction of Milano."

Tom Shelton, for the defendant, testified: "I know the defendant. He is my brother. I was with him when he went to get the Rawls' cattle. Bob Stevens was also with us. We drove up the cattle with all the cattle belonging to Mr. Rawls. Among them was a staggish looking steer of a red and white color, branded k and marked crop off of left, and swallow fork in the right ear. The cattle all remained in the pen at Rawls' until the next day, when he drove them away. When the cattle were turned out of the pen to drive, this steer came out with them. We drove them altogether about three-quarters of a mile, and past Martin's house. As we crossed a gulley about two hundred yards from Martin's house, the cattle separated a little, and defendant instructed us to cut the k steer out, which we did, and ran him back through the woods towards Rawls' house. I never saw the steer

afterwards, and don't think the defendant ever did. Defendant left Milam County in the latter part of December, 1879, to work on the railroad. He was getting out ties in Burleson County on the line of the Gulf, Colorado and Santa Fe Railroad. He did not return to the county until the fall of 1881. We drove the bunch of cattle from Rawls' to R. K. Stevens', where we got some more, and from there drove them to my father's house, where we penned, counter-branded and turned them upon the range. I never saw the k steer after we cut it out near Martin's house. There was no four year old steer in the bunch of any description, and I know there was none there branded k. Defendant had been buying cattle for a man by the name of White, who was making up a herd at Milano, but when he got these cattle there White had gone or moved his herd west, and for that reason defendant counter-branded the stock and turned them on the range. He did not buy or sell any more cattle after that time; he was not in the cattle business after that. He stayed at my father's until he went to Burleson County to work on the railroad. We drove these cattle from Rawls' about the 10th day of October, 1879. From that time until he went on the railroad he was on my father's farm all the time. He was not on the range after that time. I know because I lived with the defendant on my father's farm, and was with him every day. There was not so much as half a day passed that I was not in his company, and if he had gone on the range I would have known it." On cross-examination, the witness stated: "The steer we drove from Rawls' pen was more red than white. He had some white on the sides, and some red pides on his sides. It was a red color with white spots.

Bob Stevens, for defendant, testified: "I was with the defendant Matt. Shelton when he got the cattle from Mr. Rawls. We drove up all the Rawls cattle and penned them to cut out what we wanted. Rawls was there when we drove the cattle that we wanted out of the pen. The steer branded k ran out with them. I remember the steer well. He was a red and white steer, branded k. I knew Mr. Kirk's brand well. I knew this to be his brand. It was the only steer in that range in that brand. Don't remember the mark; don't know that I ever knew Kirk's mark. Don't notice marks much. I identified the steer as Mr. Kirk's by the brand. The steer went along with the bunch of cattle until we passed Mr. Martin's about two hundred yards, and, as we crossed a gully, defendant instructed us to cut the k steer out, and we did so, and run him back toward Rawls' house through the woods. I never saw the steer afterwards. We drove the bunch of cattle to my brother R. K. Stevens' house, and there put in some of my brother's that he had sold to defendant, and then defendant, Tom Shelton, and my brother R. K. Stevens drove them to the house of defendant's father. They there penned, counter-branded and turned them on the range again. Defendant left the county about two and a half months after that, and went to Burleson County to work on the railroad. He did not come back to Milam County any more until last fall. The time we drove the steer from Rawls' we penned the steer with other cattle at Rawls', and the cattle remained there all night, and next morning we drove them away."

R. K. Stevens, for defendant, testified: "I know the defendant Matt. Shelton. He left Milam County to go to Burleson County on the railroad in December, 1879. I remember the time when he drove the Rawls cattle. Tom Shelton and my brother were with him. They drove the cattle to my house and there put in some that I had sold defendant. I helped to drive them from my house to the house of the defendant's father. I know Tom Kirk's brand, and have known

it for years. It is k, but I can't say that I know his mark. I don't pay much attention to marks, but always pay close attention to brands. There was no k steer or animal of any sort in the bunch that defendant drove to my house. I noticed the brand of all the cattle in the bunch and know there was no such animal there as the one charged to have been stolen. I know the description of the animal described by the State's witness as the one charged to be stolen. I saw a steer in the range near Rawls' house in the spring of 1880, I think in March or April, that suited the description of the Kirk steer. He was branded k. I never heard that Kirk had but two head of cattle in that range, and one of them was a two year old heifer and the other a four year old steer. This steer, I would say from the description, is the one I saw in the spring of 1880. The defendant, after driving the cattle to his father's, counter-branded and turned them again on the range." On cross-examination: "I do not remember the mark or brand of any other animal that was put in my pen by the defendant at the time he penned at my house. The one I saw on the range in the spring of 1880 was a red and white pided steer."

Milton Shelton, for the defendant, testified: "I know the defendant. He is my brother. He quit the cattle business in October, 1879. From that time till the latter part of December, 1879, he lived at my father's in Milam County, Texas. I lived two or three miles distant. I saw defendant often, and know that during that time defendant was not on the range, because he was working on my father's farm near where I lived. In the latter part of December, 1879, defendant went to Burleson County to work on the railroad. He did not come back to Milam County, or make it his home, until the fall of 1881, after he got through his contract on the Santa Fe Railroad, in Burleson County. He went to Denton County on the Dallas and Wichita Railroad, and remained in Northern Texas up to the time he returned to Milam County. I was with defendant most of the time, and know that he was not in the cattle business after October, 1879. When defendant went to Burleson County he took no cattle with him."

A. S. Russell, for defendant, testified: "I live in Milam County, Texas, and know the defendant. He is my son-in-law. He left Milam County, in December, 1879, in company with me, to work on the Santa Fe Railroad in Burleson County. He took no cattle with him. From Burleson County he went to Northern Texas, to take contracts on railroads building there. He did not return to Milam County until the fall of 1881. He was not on the range in Milam County after he left here in December, 1879. If he had been I am satisfied I would have known it."

J. B. Rawls, recalled by defendant, stated: "The defendant was at my house twice in the fall of 1879 after cattle, and on one occasion he penned cattle at my house, and the cattle remained there all night. He drove them off next morning. This was not the time he drove the steer in controversy off. At this time one of the boys, Tom Shelton or Bob Stevens, was with him. Don't know whether the other was or not. It was about a month after this that he drove off the red-headed steer, and at this time he penned the cattle in the day, and drove them off the same day."

We are not satisfied to a reasonable certainty that the defendant stole the steer. The evidence, whether positive or circumstantial, should lead the mind to the conclusion of guilt, to a moral certainty. This conclusion should be reached easily, naturally and conclusively, and with that degree of certainty which places the mind at rest on the question. We do not think that the evi-

dence in this case is of such character as would make it safe for a conviction to to be sanctioned, thereby making it a precedent.

The facts relied upon for a conviction are not in conflict with the fact that defendant turned the steer out of his bunch within three-quarters of a mile of the place of the supposed fraudulent taking. That defendant did have this steer cut out from his bunch is not only sworn to by two of his relatives, but two other witnesses (one being the owner) swore they saw the steer on that range subsequent to the time of the supposed taking.

We do uot believe the evidence to be of that conclusive nature which should be held sufficient to support a conviction. The motion for new trial should have been granted. The judgment is reversed and the cause remanded.

*Reversed and remanded.*

§ 578. **Evidence Insufficient to Convict -- Taylor v. State.** — In *Taylor* v. *State*,[1] WILLSON, J., delivered the following opinion: The defendant was convicted of the theft of horses and his punishment was assessed at five years confinement in the penitentiary. The indictment is a good one, and the charge of the court is full, and very clearly instructed the jury as to the law, as applicable to the evidence. The only question which presents to our minds any difficulty is as to the sufficiency of the evidence to support the verdict of the jury. The horses in controversy were in the brand of W. H. Burrows, the alleged owner. This was also the defendant's brand, which he had used for fourteen or fifteen years. The defendant had stock, both horses and cattle, branded with this brand, and running in the range where these horses were running. He took the horses openly, claiming that they belonged to him. Bright, who had the horses in charge at the time of the taking, told the defendant that the belonged to Burrows, and that he had better not take them, and must not take them, without giving to him, Bright, a writing showing that he had taken them. Defendant said the horses were his property, and he would take them, and would give Bright the writing demanded, and did give it, and also told Bright that if any one inquired for the horses to tell them that he, defendant, had them, and told Bright his name, and that he lived in the town of Pleasanton. Defendant took the horses to his home in Pleasanton, and kept them there until they were demanded by the owner. When the owner called for them the defendant still claimed them as his property, but did not refuse to surrender them, and did surrender them. These are the facts of the case substantially as disclosed by the record. It also appears from the record that the defendant made application for a continuance, and the court overruled his application, but no exceptions were taken to the overruling of the application, and without a bill of exceptions thereto we would not revise the action of the court below upon that subject; but we are of the opinion that the application showed that there was testimony very material to defendant which was absent, and that he had used due diligence to obtain this testimony. We are not satisfied from the record in this case that the defendant has been properly convicted. We think the evidence is insufficient to establish a fraudulent intent on his part, in taking the horses, and that the court below should have granted him a new trial.

*Reversed and remanded.*

§ 579. **Evidence Held Insufficient — Wolf v. State.** — In *Wolf* v. *State*,[2] the information charged the theft of sixteen bushels of corn of the value of twelve

[1] 12 Tex. (App.) 489 (1882).

[2] 14 Tex. (App.) 210 (1883).

dollars, the property of H. C. Martin, on the sixth day of December, 1882. The penalty imposed by the judgment of conviction was a fine of ten dollars and confinement in the county jail for one hour. The motion for new trial assailed the judgment as against the law and the evidence. The evidence showed that Martin owed the defendant about eight dollars, and that in Martin's absence the defendant went to Martin's place, and, with the assistance of an employe of Martin, measured and took off sixteen bushels of Martin's corn.

WHITE, J. This case was tried by the court without the intervention of the jury. A statement as to the conclusions formed by him is made by the county judge as follows, viz.: —

"This cause was submitted to the court, and from the evidence the court found the defendant guilty, concluding that defendant took the corn in question to pay himself for what he considered the prosecuting witness owed him, without his consent and in his absence." If this finding of the court is correct — and we concur in its correctness as shown by the facts between us — then the defendant, however liable he might be in trespass, is not guilty of theft. A fraudulent intent is the essential ingredient of theft, and this intent must exist at the time of the taking. "The taking must be an actual and intended fraud upon the rights of another; the taking must include the purpose and intent to defraud; it must be an intentional taking without the consent of the owner, an intentional fraud, and an intentional appropriation."[1] All the circumstances attending the taking, as developed in the statement of facts, indicate to our minds a total want of those criminal elements which constitute theft. The judgment is reversed and the cause remanded.

*Reversed and remanded.*

§ 580. **Evidence Insufficient to Convict — Womack v. State.** — In *Womack v. State*,[2] the prisoner was jointly indicted with one E. M. Fuller, for the theft of six hogs of the aggregate value of twenty-seven dollars, the property of John B. Henderson, in the county of Erath, Texas, on thirtieth day of September, 1881. The appellant, being alone upon trial, was convicted, and his punishment was affixed at a term of one month in the county jail and a fine of one hundred dollars.

W. H. Trent was the first witness for the State. He testified that he knew the defendant, and also E. M. Fuller, who was indicted with him in this case. He identified the defendant on trial as J. D. Womack. In the summer of 1881 witness contracted with E. M. Fuller for the purchase of four hundred hogs. In accordance with this contract, Fuller, on the fourth day of October, 1881, delivered to the witness a car load of hogs numbering one hundred and forty-one head. These hogs the witness sold and delivered to A. Wheeler, of Waco, Texas. These were the only hogs witness ever sold to Wheeler. They were delivered to Wheeler at Waco. Witness did not make the contract with the defendant. The witness did not know, and had never seen the defendant until after the hogs were delivered.

The next witness for the State was A. Wheeler. He testified that he knew the witness Trent, who had just testified. He made a contract with Trent in the summer of 1881, for the purchase of hogs. In pursuance of that contract,

[1] Mullins v. State, 37 Tex. 337; Johnson v. State, 1 Tex. (App.) 118.

[2] 16 Tex. (App.) 179 (1885).

Trent delivered to the witness a car load of one hundred and forty-one hogs, in Waco, Texas, on the fifth day of October, 1881. These were the only hogs ever delivered to the witness by Trent. Witness turned these hogs into a pen with about four hundred other hogs which he had purchased from several different parties. Witness knew J. B. and J. P. Henderson, the gentlemen who were present as witnesses in this case. Some two or three weeks after Trent delivered these hogs to witness, J. B. Henderson came to the pens of the witness in Waco, looking for hogs which he said had been stolen from him. He found four head in the witness' pen which he claimed. One was a white and black spotted sow, two were shoats, and the fourth was a black barrow with white feet. The hogs claimed by J. B. Henderson were marked with a swallowfork and underbit in each ear, and were a portion of the number delivered to witness by Trent. The two shoats would, in the judgment of witness, have weighed about eighty pounds each, the sow would have weighed about one hundred and twenty, and the black barrow about one hundred and ten pounds. The barrow's ears looked as though they had been dog bitten and afterwards infested by worms, but the mark described was plainly discernible. In addition to this pen, the witness had what he termed his "invalid pen." Henderson did not go through the invalid pen, as witness told him he had put none of the hogs purchased of Trent in that pen. Some of the hogs purchased by witness from Trent died before the arrival of Henderson. Within a week after the visit of J. B. Henderson to the witness' pens, J. P. Henderson, a son of J. B. Henderson came to the pens, examined the hogs, identified and claimed the same hogs that were claimed by J. B. Henderson. J. P. Henderson found also in the invalid pen another sow in the same mark as the four described, which he claimed for his fathsr. The two Hendersons claimed to know each of their hogs by their flesh marks. Witness paid Henderson fifteen dollars for the hogs, which, in the opinion of the witness, was their full value. None of the hogs were caught and examined at the time of young Henderson's visit in the presence of the witness. The hogs were mast fed or range raised hogs, sometimes called "razor-backs."

J. B. Henderson was the next witness for the State. He testified that he knew the defendant Womack, the man Fuller, and the witness Wheeler. In September, 1881, the witness owned a bunch of forty head of hogs, running at what is known as McDow's hollow, in Erath County, Texas, from which the witness lived three miles distant. The witness last saw the hogs which the defendant is accused of stealing, about the last of August or the first of September of the year 1881. On his return home from court about the tenth of October, 1881, the witness missed eight head of hogs from his bunch. Two of the missing animals were shoats, and six were large hogs. They were all marked with a swallowfork and underbit in each car. They were mast fed or range raised animals. One of them was a black barrow with white feet. The witness made careful and unsuccessful search for the missing hogs through the range, and then, taking Mr. Norton with him, went to see the defendant about them. At that time the witness had no acquaintance with the defendant, and had no recollection of having seen him before. When witness and Norton rode up to defendant's house, the defendant met them at the fence. Witness told him where a bunch of his and Fuller's hogs were. Defendant replied that he was grateful for the information. Witness then asked him if he and Fuller were partners, and he said that they were. Witness asked him if he knew his,

witness', hogs. He replied that he knew the bunch of hogs on McDow's hollow, reputed to be witness' property. Witness then asked him if he knew his, witness', mark. He said that he knew the mark that was said to be that of the witness, which was a swallowfork and underbit in each ear. Witness then asked him if he and Fuller owned or claimed any hogs in that mark. He replied that they did not; that they had owned some in that mark, but that they had run off the preceding spring, and gone back to Eastland County, whence they came; that they had heard of one of them on Armstrong Creek, but of none of the others. Witness then asked him if he and Fuller, or either of them, had used or shipped any of his hogs. Defendant replied in the negative. Witness then asked if they had shipped or used any hogs marked with a swallowfork and underbit in each ear, and he replied that they had not. A few days after this conversation with the defendant, the witness went to Waco and examined the hogs in A. Wheeler's pens. He found four of his hogs in Wheeler's pens. He knew the four animals both by their ear and flesh marks. One was a spotted sow, two were shoats, and the remaining one was a black barrow with white feet. The barrow's ears were injured — had been evidently bitten by dogs, and afterward infested by worms. The sow and shoats, when found by witness, were together in a part of the pen remote from that part of the pen where the barrow was found. The witness had been in the habit of seeing his hogs on the range, sometimes once, and sometimes three times a week, and, again, he would not see them for two or three weeks. Witness claimed the hogs when he found them in Wheeler's pens, and Wheeler gave him a written instrument, agreeing to hold the hogs subject to such judicial proceedings as witness might institute for their recovery. Wheeler had a second pen on his premises, which he called his "invalid pen." The witness did not examine the hogs in that pen. Witness, a few days after his return home, sent his son, J. P. Henderson, to look at the hogs in Wheeler's pen. The witness again went to see the defendant, and found him in Dublin. He told the defendant that he wanted to have a talk with him, and suggested that each should select a friend to hear the conversation. To this proposition the defendant agreed, and selected a Mr. Carlysle. Witness selected Mr. Calvin Martin. The four parties stepped off from the public thoroughfare and sat down. Witness then said to defendant: "Mr. Womack, I am not satisfied about my hogs, and I want some further talk with you about them." The defendant replied: "All right." Witness then said: "I want you to tell these gentlemen what you told Mr. Norton and me." The defendant replied that he had forgotten what he told Norton and the witness. "Then," said the witness, "let me tell it over, and you say whether or not I tell it correctly." To this proposition the defendant agreed, and witness asked: "Didn't you tell me that you knew my hogs that run on McDow's hollow?" Defendant replied that he did, and witness asked: "Didn't you tell me that you knew my hog mark, and that it was a swallowfork and underbit in each ear?" Defendant admitted that he did, and witness asked: "Didn't you tell me that you and Fuller did not claim any hogs in that mark; that you had had some, but that they ran away from you, and went back to Eastland County, and that you had only heard of one old sow since, and that she was on Armstrong Creek?" Defendant replied that he did, and witness asked him: "Didn't you tell me that you and Fuller had not shipped any of my hogs, or any hogs in my mark?" The defendant replied that he did, and witness said: "Well, Mr. Womack, I have been to Waco and found my hogs. That won't do. Now, your neighbors

tell me that you have stood well until you got into this thing with Fuller, and I believe you have been led into it. I have been to town and seen the district attorney, and he tells me that if you will come out and tell the thing just as it occurred, and be a witness for the State against Fuller, he will not prosecute you, and will dismiss the case against you, if you should be indicted." The defendant studied awhile, and replied: "I will do it." Proceeding to repeat the defendant's confession, the witness said: "Womack then said to me: 'We got six of your hogs, and shipped them to Waco. I had been over to meet the pay train on Sunday morning, and when I returned Fuller had six of your hogs in the pen. I told him he had better be careful about handling his neighbors' hogs, and he replied that the hogs belonged to him, and that he would do as he pleased with them. We took the hogs from the pen and put them in my field. The next morning we drove them up to Mount Airy and shipped them.' "

The witness promised the defendant not to prosecute him if he would testify for the State against Fuller. After the indictment in this case was presented, the witness and the district attorney went to the defendant and asked him to state what his testimony would be. The defendant denied then that he had made any statement to the witness concerning the theft of the hogs; said that he remembered nothing he had said to witness about the matter, and refused absolutely to testify for the State against Fuller. The defence objected and excepted to the admission of the evidence of this witness about the confession.

The stolen animals belonged to the witness, and were taken in September, 1881, without the knowledge or consent of the witness. The two shoats were worth three dollars each, and the six larger hogs were worth six dollars each. Before the witness' conversation with the defendant in Dublin, in which he, defendant, agreed to turn State's evidence, the witness had seen the district attorney and obtained his consent to the propositions to defendant to turn State's evidence. In making the propositions, the witness acted under the directions and advice of the district attorney. Witness proposed, on his own responsibility, not to include the defendant in the complaint he intended making, if he would turn State's evidence. He, however, told the defendant that the grand jury would most probably include him in the indictment, but, in that event, the district attorney would dismiss the case as to him, if he would testify fully for the State against Fuller. After this conversation, witness went to Stephensville and filed a complaint against Fuller, but not against the defendant.

J. P. Henderson was the next witness for the State. He testified that he was the son of the witness J. B. Henderson. He remembered his father's loss of some hogs late in September, 1881. His father went to Waco in October, and a few days after his return the witness went to that city to examine some hogs in Wheeler's pens. In one pen he found one sow, two shoats, and a black barrow with white feet, which he knew by the flesh and ear marks to belong to his father. He found another of his father's sows in another pen, which Wheeler called his invalid pen. All of the five hogs bore the swallowfork and underbit mark in each ear, which was the hog mark of J. B. Henderson. Witness had often seen the hogs on the range. When the witness saw the black barrow in Wheeler's pen, one of his ears had been injured, and had been attacked by worms; so much so that the witness could not identify the mark until he caught the hog and examined it. He did not positively know whether or not Wheeler was present when he caught the hog, but thought he was. At all events one of his hands was present and helped witness catch the hog.

S. L. Norton was the next witness for the State. He testified that some time in October, 1881, Colonel Henderson asked him to go with him to see the defendant, and he did so. When they reached the fence Colonel Henderson called the defendant, who came out to the fence. Colonel Henderson introduced himself, and the defendant replied to Henderson that he knew him. The witness then gave substantially the same account of what transpired, and what was said by Henderson and defendant at the fence, as was given by Henderson, except that he did not remember hearing defendant say that he and Fuller were partners. The witness had discussed the matter with Colonel Henderson as late as the day before this trial. Henderson reminded him of some parts of the conversation which he had forgotten, but which, his mind being refreshed, he remembered distinctly.

Calvin Martin was the next witness for the State. He testified that he and a Mr. Carlysle were present at a conversation between the defendant and J. B. Henderson, in the town of Dublin, some time in October, 1881. This witness repeated the conversation in detail substantially as it was related by the witness J. B. Henderson. The witness stated in conclusion that he had not talked over his testimony with Henderson. At this point the State closed.

Mr. Carlysle, the first witness for the defence, gave a different version of the conversation between Henderson and defendant in the presence of himself, the witness, and Martin. Henderson said to defendant: "I have been at Waco, and found four or five of my hogs that you and Fuller drove. Now, if you will come out and tell the truth, and help prosecute Fuller, you shall not be hurt. I have talked with Bell, the district-attorney, and he says that if you will come out with the truth and help prosecute Fuller you shall not be hurt. Now, Womack, do you know my mark?" The defendant replied: "Yes, I know a mark said to be yours." Henderson then asked: "Did you and Fuller drive any hogs in that mark?" Defendant replied that he and Fuller drove five or six head in that mark. Henderson asked, "Where did you get them?" Defendant replied, "The first I saw of them they were in the pen at old uncle Daniel Fuller's. I had to go to the wood yard to meet the pay train, and when I got back to old man Fuller's the hogs were in the pen." Henderson asked, "Who penned them?" Defendant replied, "Uncle Daniel and E. M. Fuller." Henderson then asked him, "Did you not tell me the other day that you did not drive any hogs marked with a swallowfork and underbit in each ear?" Defendant replied, "I said that I did not remember driving any in that mark; that I did not have the list of marks with me. I told Fuller that he ought to be careful about driving hogs in marks given in the county; that he might get his foot into it; and that Fuller said that they were his hogs, that he had the marks recorded and would do with them as he pleased." Henderson then said, "Yes, he has my mark, and five or six others given in the county, recorded. Is that all you know about it?" Defendant said, "Yes." Henderson replied, "Well, Womack, I will pledge you my word as a man, a neighbor and a Mason, that you shall not be hurt. I will go right to town and have Fuller arrested." Henderson then left, thanking witness, and Martin. Witness heard every word of that conversation. Defendant did not tell Henderson that he and Fuller were partners. He said nothing about a dog catching the barrow and injuring his ears as he was driven into the pen.

Mrs. E. M. Fuller, the wife of the party jointly indicted with the defendant, testified that, in January, 1881, E. M. Fuller brought home a small bunch of

hogs that included a spotted sow, a black barrow, and four small shoats. Witness knew nothing about their ages. She knew nothing about their marks, but knew that these animals were said to be marked with a swallowfork and underbit in each ear. The black barrow had some white feet; witness did not know how many. One of his ears was a little crimped, by a dog catching him. These hogs were quite gentle, and ran at and about Fuller's place from January until he drove them off in September, 1881. Witness had not seen them since. She frequently fed them a little corn to keep them gentle, before they were driven off. E. M. Fuller and his father, Daniel Fuller, drove these hogs to Daniel Fuller's house about the first of October, since when witness has not seen them.

Wash. Hammett testified, for the defence, that he lived on E. M. Fuller's place in the year 1881, and was at his house in January of that year. Fuller, at that time, asked witness to look at some hogs he had just brought home. Among them was a two year old spotted sow, a black barrow with some white feet, about eighteen months or two years old, and four spotted shoats about six months old. These six hogs were all marked with a swallowfork and underbit in each ear. Witness saw these hogs almost every day after that, until they were driven off by Fuller, about the first of October, 1881. Some time in July, or August, a dog caught the black barrow, and so injured his ear that it crimped considerable, but not enough to disfigure the mark. All of the hogs described were gentle. Witness had frequently seen Fuller and his wife feed them. Fuller claimed them and said that he bought them from William Payne, of Eastland County. Witness had not seen those hogs since Fuller drove them off in October, 1881. He had heard Fuller say that he had the defendant hired. George Johnson's testimony, for the defence, was, in substance, the same as that of the witness Hammett.

Mat. Tucker testified, for the defence, that Fuller penned some hogs at his, witness', house in September, 1881. The defendant was then with him, and seemed to receive his directions from Fuller, and obey them. Fuller told the witness that defendant was hired to him.

M. E. McLaren testified that about the first of October, 1881, he went with Holcomb to the hog pens of A. Wheeler, near Waco. Holcomb had a list of marks on a piece of paper. They found four hogs in the pen which Holcomb said belonged to J. P. Henderson. Three were spotted hogs and one was a black barrow. They were small, inferior hogs, in reasonably good order.

Holcomb testified, for the defence, that he found none of the other hogs for which he was hunting in Wheeler's pens, except the four that belonged to Henderson.

Moses Hurley, Mat. Tucker, Carlysle, County Surveyor Lowe, Land Agent Hymen, Sheriff Slaughter and State's witness Calvin Martin qualified themselves, and testified that the defendant's reputation for honesty was good.

White, P. J. (after passing on questions of law). In addition to this error committed by the court in the admission of the confession of defendant, we are of the opinion, even taking the confession to have been properly admitted, and as part of the evidence, that the testimony is not sufficient to establish the guilty complicity of defendant in the taking or theft of the hogs, however much it may show his conduct and subsequent connection with the stolen property to be reprehensible in morals and law.

The judgment is reversed and the cause remanded.

*Reversed and remanded.*

# PART IV.

## RECEIVING STOLEN PROPERTY.

---

### RECEIVING STOLEN PROPERTY—ELEMENTS OF THE CRIME.

### WILSON *v.* STATE.

[12 Tex. (App.) 48.]

*In the Court of Appeals of Texas, 1882.*

1. **The Want of the Owner's** consent to the taking of the property must, in a trial for theft, be proved like any other element of the offense, and can not be presumed or inferred. It may, however, be proved by circumstantial evidence.
2. **Where one Owns the Property and Another has the Possession,** management, control or care of it, the want of the consent of both to the taking must be proved. And this proof should be made by the persons themselves if attainable, and if they are not, their absence should be accounted for before the State can be allowed to resort to circumstantial evidence.
3. **Receiving Stolen Property.**—Before a defendant can be convicted of receiving stolen property, it must satisfactorily appear beyond a reasonable doubt: (1.) That the property was acquired by theft, and (2) that, knowing it to have been so acquired, he concealed the same.

APPEAL from the District Court of Wise. Tried below before the Hon. C. C. POTTER.

The penalty imposed was a two years' term in the penitentiary. The opinion discloses the nature of the case, and also the evidence so far as it relates to the want of consent to the taking of the animal.

With reference to the other questions involved, Gordon testified that he, Railey, Ray, Piper, and McDaniel made two trips to Black Creek in search of this and two yearlings of Railey's that had been stolen, That on their second trip, having divided into two parties and traversed considerable territory, they finally discovered defendant and one Tate driving three yearlings at a distance of three hundred yards. They were driving the yearlings very fast, going towards Black Creek bottom. As the witness and his party approached the bottom, into which the men and yearlings had disappeared, one of the other pursuing party exclaimed: "Come on, here are our cattle, and here are our men." The men, whom the witness recognized as the defendant and Tate, wheeled their horses and ran in an opposite direction from that they were going with the yearlings. The witness, Railey and Ray followed them as fast as their horses could carry them but failed to get sight of them after they crossed a neighboring ridge. The yearlings when lost

were unmarked, but when recovered were marked in what the witness understood was Jim Friel's mark. The witness saw no more of the defendant until six months afterwards, when he had been arrested.

Railey, Ray, Piper and McDaniels corroborated the testimony of Gordon.

For the defence, W. W. McDaniels testified that he was at Friel's the Sunday before the defendant was seen with the yearlings, and assisted him to water thirty or forty yearlings which were in Friel's mark. He seemed to own the yearlings. Friel has not been in the county since, but now lives in the "Nation."

The defendant's brother John Wilson, testified that a few weeks before the excitement about the cattle he heard Friel employ the defendant to work for him with cattle. Friel was to pay the defendant fifteen dollars per month, and board. The witness was at Friel's on the day defendant was seen with the cattle, and saw Friel cut three yearlings from a bunch, and heard him tell the defendant and Mack Tate to drive them down to the creek, turn them loose and let them go to h—ll. They started off with the yearlings, and witness saw no more of defendant for about a week. Defendant was then in Friel's employ. On cross-examination the witness denied that he, Mack Tate and Marion Wilson drove these yearlings or any of them from their range about the 1st of January, or at any other time.

The defendant introduced certified copies from the records of Denton County District Court, showing that he had been tried for the theft of Railey's two yearlings and was acquitted.

In rebuttal, Horton testified in substance, that, about the last of December or first of January he saw John Wilson, Mack Tate and Marion Wilson driving three yearlings answering the description of Railey's and Gordon's by his house.

*L. C. Sparkman* for the appellant (omitting argument on other points.

I submit that the fifth assignment is well taken. The court charged the jury that circumstantial evidence was sufficient upon which to base a finding of want of consent, etc. In the case of *Erskine* v. *State*,[1] it was held that if property be stolen from the agent of the true owner want of consent of both agent and owner must be proved, and that this could be done by circumstantial evidence only when direct testimony could not be procured. In *Jackson* v. *State*,[2] it was held that want of consent must be shown by the party himself or his absence accounted for. I ask the court's attention, specially, to the evidence on this point.

1 1 Tex. (App.) 405.

2 7 Tex. (App.) 363.

There is another view in which the testimony is insufficient to support the verdict. Gordon had no such special property in the animal as would sustain the allegation that the property was his. Gordon says: "The yearling belonged to Wilkinson," etc. "He had left this one in my charge, that is, he sent me word to look after it for him." I insist that this fails to show that Gordon had such special property in the animal as would have made him responsible to the true owner for its loss. He could not have sued for it. He had no interest in it whatever, but was merely acting as a servant for Wilkinson.[1] There can be no theft without a trespass. I think this case is not as strong as the case of *Blackburn* above cited, where it was held that the proof was not sufficient. If it was not Gordon's property that was stolen, then can a conviction for "concealing stolen property" be sustained? The indictment charged him with theft of Gordon's property, under which a conviction could be had for concealing only Gordon's property.[2]

*H. M. Holmes*, for the State.

WILLSON, J. A motion to dismiss this appeal is made by the Attorney-General. The ground of the motion is that the defendant has taken his appeal from an interlocutory order, overruling his motion for a new trial, and not from the final judgment. Defendant's notice of appeal was given upon the overruling of his motion for a new trial. The judgment had been previously entered against him, and when his motion for a new trial was overruled, the judgment was then a final one so far as the court could make it final, and then was the proper time for the defendant to give notice of appeal to this court. The motion to dismiss the appeal is therefore overruled. The case having been submitted finally, as well as upon the motion to dismiss, we will proceed to consider and determine the questions presented by the record, in so far as we may deem it necessary to so do.

The defendant was indicted for theft of one head of cattle, alleged to be the property of G. C. Gordon. The verdict of the jury as we find it in the record is as follows: "We, the jury, find the defendant guilty of concealing stolen property, and assess his punishment in the State prison for two years."

The evidence as to the ownership of the animal alleged to have been stolen, is, substantially, that it belonged to one Wilkerson, who resided at McKinney in Collin county, Texas; that Wilkerson had some cattle running near G. C. Gordon's, and moved them away from there, leaving still in that range this particular animal; that Wilkerson left this animal in charge of said Gordon, "That is," says the witness Gordon, "he sent me word to look after it for him. I

[1] 44 Tex. 460.

[2] Penal Code, art. 743.

was looking after it for him. I had the yearling and its mother in my pasture awhile, but when it was taken it was running on the range." This was all the evidence showing ownership of the animal to be in G. C. Gordon, as alleged in the indictment. Defendant's counsel insist that there is no sufficient proof of ownership as alleged.

Article 426,[1] provides that, "Where one person owns property, and another person has the possession, charge or control of the same, the ownerwership thereof may be alleged to be in either." Article 728 of the Penal Code provides: "It is not necessary, in order to constitute theft, that the possession and ownership of the property be in the same person at the time of taking;" and article 729 reads: "Possession of the person so unlawfully deprived of the property is constituted by the exercise of natural control, care or management of the property, whether the same be lawful or not." Proof of either a general or special property in the alleged owner will be sufficient.[2]

We think the proof of ownership in this case met the requirements of the law. It showed that G. C. Gordon had the animal in charge, and was actually taking care of it, by watching after it in its accustomed range. The case of *Blackburn* v. *State*,[3] cited by counsel for defendant upon this point, differs materially from the case at bar. In that case the ownership of the animal was alleged to be in one Esparza, and the proof showed that it was an estray, and that at the time it was taken he had neither a general nor a special property in the animal.

But we think there is an insufficiency of evidence in this case to show a want of consent on the part of Wilkinson, the owner of the animal to the alleged taking. The want of the owner's consent must be proved like any other element of the offense. It can not be presumed or inferred. It may be proved by the circumstantial evidence, but still it must be proved.[4] Where one person owns the property, and another person has the management, control or care of it, the want of the consent of each of these persons must be proved; and this proof should be made by the persons themselves if they are attainable, and if they are not to be had, their absence should be accounted for before the State can be allowed to resort to circumstantial evidence.[5] In the case before us there is no evidence proving or tending to prove a want of consent to the taking of the alleged stolen animal, on the part of Wilkinson, the owner. The only circumstance pointing in that direction is the one that he resided in a distant

1 Code Cr. pr.

2 Dignowitty *v.* State, 17 Tex. 521.

3 44 Tex. 475.

4 Garcia *v.* State, 26 Tex. 209; Wilson *v.* State, 45 Tex. 76; McMahon *v.* State, 1 Tex. (App.) 102; Welsh *v.* State, 3 Tex. (App.) 422; Foster *v.* State, 4 Tex. (App.) 246; Trafton *v.* State, 5 Tex. (App.) 480.

5 Erskine *v.* State, 1 Tex. (App.) 405; Jackson *v.* State, 7 Tex. (App.) 363.

county at the time of the taking. His absence from the trial was not accounted for; while the evidence showed that he resided within the urisdiction of the court, and could have been reached by its process.

Before the defendant can be properly convicted of concealing stolen property, it must be made to appear satisfactorily, and beyond a reasonable doubt: 1. That the property was acquired by the theft. 2. That, knowing it to have been so acquired, he concealed the same. The evidence in this case tending to prove a guilty knowledge on the part of the defendant is, to say the best of it, meagre, and to our minds insufficient to support the verdict.

Under the authority of *Taylor* v. *State*,[1] the verdict is insufficient. It does not find the defendant guilty of any offense.

We think the court erred in overruling the defendant's motion for a new trial.

*Reversed and remanded.*

---

RECEIVING STOLEN GOODS—PRISONERS MUST HAVE POSSESSION OF THE PROPERTY.

## R. *v.* WILEY.

[1 Den. & P., 43.]

*In the English Court for Crown Cases Reserved, 1850.*

**A. and B., two Thieves,** were seen to come at midnight out of a house belonging to C.'s father, under the following circumstances: A. carried a sack containing the stolen goods; B. accompanied him; C. preceded them, carrying a lighted candle. All three go into an adjoining stable belonging to C., and then shut the door. Policemen enter the stable and find the sack lying on the floor tied at the mouth, and the three men standing round it as if they were bargaining; but no particular words were heard. *Held,* by eight judges to four, that on this evidence C. could not be convicted of receiving stolen goods; inasmuch as although there was evidence of a criminal intent to receive, and of a knowledge that the goods were stolen, yet the exclusive possession of them still remained in the thieves, and therefore C. had no possession, either actual or constructive.

At the General Quarter Sessions for the County of Northumberland, holden at Newcastle-upon-Tyne, on the 26th day of February, A.D. 1880, Bryan Straughan, George Williamson and John Wiley, were jointly indicted under statute 7 and 8 George IV.,[2] for stealing and receiving five hens and two cocks, the property of Thomas Davidson. It was proved that, on the morning of the 28th of January in the same year, about half past four, Straughan and Williamson were seen to go

[1] 5 Tex. (App.) 569.

[2] ch. 29, sec. 54.

into the house of John Wiley's father with a loaded sack that was carried by Straughan. John Wiley lived with his father in the said house, and was a higgler, attending markets with a horse and cart. Straughan and Williamson remained in the house about ten minutes, and then were seen to come out of the back door, preceded by John Wiley, with a candle, Straughan again carrying the sack on his shoulders, and to go into a stable belonging to the same house, situated in an enclosed yard at the back of the house, the house and stable being on the same premises. The stable door was shut by one of them, and on the policemen going in, they found the sack on the floor tied at the mouth, and the three men standing round it as if they were bargaining, but no words were heard. The sack had a hole in it, through which poultry feathers were protruding. The bag when opened was found to contain six hens, two cocks, and nine live ducks. There were none of the inhabitants up in the house, but John Wiley, and on being charged with receiving the poultry, knowing it to be stolen, he said "he did not think he would have bought the hens."

The jury found Straughan and Williamson guilty of stealing the poultry laid in the indictment, and John Wiley guilty of receiving the same knowing it to be stolen.

The court told the jury that the taking of Straughan and Williamson with the stolen goods as above by Wiley into the stable, over which he had control, for the purpose of negotiating about the buying of them, he well knowing the goods to have been stolen, was a receiving of the goods by him within the meaning of the statute.

The question for the opinion of the court was, whether the conviction of Wiley was proper.

The three prisoners were again jointly indicted for stealing and receiving the nine ducks which were found in the sack mentioned in the last case and upon the same direction by the court. The jury again found Straughan and Williamson guilty of stealing, and John Wiley guilty of receiving the nine ducks, knowing them to have been stolen. The question for the opinion of this court was, whether this second conviction was proper?

This case was argued on the 27th of April, A. D. 1850, before Lord Campbell, C. J., Parke, B., Alderson, B., Cresswell, J., and Erle, J.

*Otter*, for the prisoners. The first statute on the subject of receiving is 3 William and Mary,[1] and that and all the subsequent statutes up to statute 22 George III.,[2] make it felony to receive or buy. Statute 7 and 8 George IV.,[3] makes it a felony to receive only; it is, therefore,

[1] ch. 9, sec. 4.

[2] ch. 58.

[3] ch. 29, sec. 54.

no longer a felony to buy unless there is also a receiving. *R.* v. *Hill*,[1] shows that there must be either an actual or potential receiving. Here there was neither.

PARKE, B. You say that there must be a parting with the possession by the thief?

*Otter.* Yes; a joint receiving with the thief will not do; though a joint receiving with any one else will. The possession of the thief is inconsistent with that of the receiver. The question here is — can a person who takes a thief with stolen goods into a secret place for the purpose of negotiating about the purchase of them, knowing them to have been stolen, be thereby a receiver within the statutes. *Farina* v. *Home*,[2] shows, that to constitute an actual receipt of goods there must be a parting with the possession of them by the holder, and a delivery of them to the receiver.

PARKE, B. You say that he was intending to receive but had not actually received them.

Lord CAMPBELL, C. J. Suppose he had said to the thieves, "let me take them into my hand and see if they are fat," and that the thieves had consented but had said, "mind you let us have them back again." Would that be a receiving?

*Otter.* Yes; because they would have parted with the corporal possession of them. Potential possession must mean the having some control over the goods or the person in whose actual possession they were.

*Liddell*, for the Crown.

1. Is there any question for this court to decide?

There is some evidence of receiving at all events; for he had them in the house, and there is some evidence that he had actually bought the cocks and the ducks, though not the hens.

2. What is meant by potential possession?

PARKE, B. Could the receiver have brought trover against the policeman if he had taken the goods wrongfully?

*Liddell.* The prisoner assisted in carrying the fowls; he lighted the thieves to the stable. Had he held the candle while the larceny was going on he would have been a principal in the larceny. Had he done so while a third party received them he would have been a principal receiver. He did more than evince an intent to receive. He in part received. His acts were, at all events, an inchoate receiving; therefore there was a receiving, though unsuccessful, because interrupted. No one was in the actual corporal possession of the goods, they were lying on the ground before them. The law of vendor and vendee is not applicable.

[1] 1 Den. C. C. 453.

[2] 16 M. & W. 119.

*Otter* replied.

*Cur. adv. vult.*

On Wednesday, 26th of November, A. D. 1850, this case was re-argued in the Court of Exchequer before the twelve following judges: LORD CAMPBELL, C. J., PARKE, B., PATTESON, J., ALDERSON, B., MAULE, J., COLERIDGE, J., CRESSWELL, J., ERLE, J., PLATT, B., V. WILLIAMS, J., TALFOURD, J., and MARTIN, B.[1]

*Otter*, for the prisoner.

The prisoner might have been an accessory after the fact, but he was not a receiver.[2]

PARKE, B. I question very much whether he could have been indicted at common law as an accessory after the fact, unless what he did was with a view of aiding the felon or furthering his escape.

*Otter*. The question is as to the meaning of the word receiving. The statutes taken together show that it is no longer an offense merely to buy; therefore the mere fact of admitting the goods with a view to buying them is not a receiving. The property remains in the prosecutor; the thief gets the actual possession, and nothing more. The word receive is to be constructed with a reference to the rights of all the parties who had anything to do with the goods. The thief having no legal property in the goods can only pass the actual possession; and if he passes that he has no possession left in him, and therefore has not even constructive possession, and so he can not be taken to be holding the goods as agent for the prisoner. Therefore the prisoner can not be held to have had constructive possession. It is doubtful whether mere naked possession will entitle a party to maintain trover even against a wrong doer.[3] Here the prisoner had not even such possession, and therefore if the right to bring trover be a test of receiving, it is clear that he is not a receiver. There must be a willing parting with the possession by the thief, and a willing taking on the part of the receiver.

LORD CAMPBELL, C. J. Can there not be a joint possession between a receiver and a thief?

*Otter*. Receiving means something more than having possession.[4]

LORD CAMPBELL, C. J. The latter case shows that actual or potential possession is enough. There may be possession without corporal touch.

MAULE, J. What is potential possession?

*Otter*. There must be a disposing power over the goods.

1 The judges had resolved that whenever the Court of Criminal Appeal, created by stats. 11 and 12, Vict., ch. 78, were not unanimous, the case should be brought before the consideration of the whole bench.

2 1 Hale's C. P. 618.

3 Per Parke, B., Fryson *v.* Chambers, 9 M. & W. 467.

4 R. *v.* Wade, 1 C. & K. 739; R. *v.* Hill, 1 Den. C. C. 453.

Lord Campbell, C. J. Suppose the thief and receiver to have at the same time the joint manual possession, will not that do?

Alderson, B. Suppose there was a large bale, and A., a thief, had hold of one end of it, and B., a receiver, had hold of the other end, there would be actual possession in both; here the question is only as to the actual possession; that may be in two persons.[1]

We have to decide whether the direction to the jury is right. It is consistent with that direction that the thieves alone had actual possession at the time of going into the stable. For all the circumstances set out in the case are not to be taken as incorporated into the direction by the words "as above."

*Liddell*, for the Crown.

The direction to the jury must be taken to incorporate all the circumstances set out in the case. On the other side, the fallacy has been to confound constructive with joint actual possession. Here the prisoner had the latter with the thieves.

A man may be a receiver under the statute who would not be an accessory at common law, *e.g.* A., a thief, gets B. to take stolen goods; B. knows that they are stolen, but thinks that A. is not the thief; he would be a receiver though not an accessory, for he would not have the intent of aiding the thief.[2]

The right to bring trespass or trover is inapplicable as a test, for the question here is, had the prisoner had possession or no; not what civil right had he, supposing him to have possession. Nor is there any question as to constructive possession, nor as to the right of property. At common law receiving a felon would mean knowingly harboring with a view to aid. Substitute the word goods, and the meaning will be the same, and so make a man a receiver under the statute. The object of all the statutes relating to receivers was to extend the subject-matter of the receipt, so as to include the goods stolen, as well as the receiver, thereby enlarging the definition of an accessory after the fact. In this case the possession must be conaidered to be in all three prisoners. They are all treating it as a chattel in their possession and power; they were only undecided as to the mode of partition.

Lord Campbell, C. J. If a man receives stolen goods, for any purpose, *malo animo*, knowing them to be stolen, is he not a receiver? Snpposing the prisoner to have carried the sack, then he would have been a receiver; supposing him to have carried the candle, in order to aid one of the thieves in carrying the sack, where is the legal difference? The act is a joint act. It is difficult to see why the prisoner

[1] R. *v.* Parr, 2 M. & R. 346.

[2] See definition of "receiving," in 2 East's P. C. 765; R. *v.* David, 6 C. & P. 178, *per* Gurney, B.; R. *v.* Richardson, 6 C. & P. 336, per Taunton, J.

had not joint possession of the sack as much as the other thief who is not said to have had the manual possession. As to the word potential, I think that must be put out of consideration. I do not understand its legal meaning.

*Liddell.* *R.* v. *Rogers*,[1] *R.* v. *Gerrisch*,[2] show that there may be a personal possession in A. without a manual possession by him.

MAULE, J. To make these cases applicable the money should have been stolen.

*Otter* replied.

The judges retired to consider their judgment, and on their return, there being a difference of opinion, gave judgment *seriatim.*

MARTIN, B. I think the conviction wrong. The question turns on the meaning of the word "receiving," in statutes 7 and 8 George IV.[3] The true rule for the construction of statutes is stated by Parke, B., in *Becke* v. *Smith.*[4] "It is a very useful rule in the construction of a statute to adhere to the ordinary meaning of the words used, and to the grammatical construction, unless that is at variance with the intention of the Legislature to be collected from the statute itself, or leads to any manifest absurdity or repugnance, in which case the language may be varied or modified so as to avoid such inconvenience, but no further." Upon the facts which are stated in this case I think the prisoner can not be taken to have received the goods. The direction of the judge can only be taken to refer to so much of the circumstances stated as relates to the taking into the stable, and the subsequent facts. And upon these facts it seems to me that Straughan and Williamson had possession of the goods as vendors, and therefore, adversely to Wiley, and never intended to part with the goods until the bargain was concluded.

TALFOURD, J. I think the conviction wrong. The possession of the thieves seems to exclude the notion of possession by the prisoner. I think the case only incorporates so much of the transaction as relates to the taking into the stable, and what occurred there.

V. WILLIAMS, J. I think the conviction right. I think the case made out against the prisoner, if he is proved to have had possession of the goods *malo animo* knowing them to be stolen. Here the knowledge and the *animus* are clear. The only question is as to the possession. I think it was only necessary for one of the party to have possession of the goods; the prisoner was proved to have had a common purpose with the thieves, although he had not the manual possession. They were all agents for each other, and the possession of the thieves was, therefore, in law, the possession of the prisoner.

[1] 2 Moo. C. C. 85.
[2] 2 M. & R. 219.
[3] ch. 29, sec. 54.
[4] 2 M. & W. 195

PLATT, B. I think the conviction wrong. It seems to me that the goods must have been in such a condition as to be under the dominion of the prisoner, and exclusive of that of the thief. If they all are to be deemed in joint possession of them, the possession of the thieves would be different in kind from that of the receiver; for, in him it would be treated, as a receiving, and in them, as an asportation. I think that the thieves have retained the control and possession, and never intended to part with it until after their bargain was concluded.

ERLE, J. I think the conviction right on two grounds. *First.* The prisoner co-operated with the thieves in removing the goods into the stable *malo animo*, with the intent of bargaining there more securely. If he had actually carried them, there would then have been joint possession; what he actually did was legally equivalent to carrying them himself. If A. steals goods, and B. afterwards assists him in carrying them, B. is not punishable as a thief; but if he be not punishable as a receiver either, there would be a failure of justice, arising out of the principles of constructive law. *Secondly.* I attach a wider meaning than some of my brethren to the word receive. The rules of the criminal and the civil law are in many respects different, and have little or no bearing on each other. The state of the common law with regard to receiving seems to show that the word must here be construed in a different sense to what it might bear in a case of vendor and purchaser. The common law failed to provide for the evil which the statutes were passed with the express view of meeting. They should, therefore, be construed with analogy to the word harboring at common law in the case of the thief. Here the prisoner must be taken to be the owner of the stable, and he authorizes the thieves to deposit the property. It makes no difference as far as his act is concerned that the thieves remained there with the property. The earlier statutes did not contemplate a bargain as being essential to a receiving. Statute 29 George II.,[1] makes the crime consist in buying or receiving by suffering any door, window, or shutter, to be left open, or unfastened between sunsetting or sun-rising for that purpose, or in buying or receiving the [goods], or any of them at any time in any clandestine manner from any person or persons whatsoever, etc.[2] So that evidently the Legislature then contemplated the case of there being no contract of bargain, or any direct communication between the thief and the receiver, but a mere deposit by the thief in some place belonging to the latter with his consent. In 2 East's Pleas of the Crown,[3] it is said: "In order to constitute a receiver, generally so-called, it is not necessary that the goods

[1] ch. 30, sec. 1.

[2] Compare Stat. 21, Geo. III., ch. 69.

[3] p. 765.

should be actually purchased by him; neither does it seem necessary that the receiver should have any interest whatever in the goods; it is sufficient, if they be, in fact, received into his possession *malo animo;* as to favor the thief, or without lawful authority, express or implied from circumstances." It has also been twice laid down that there may be a receiving without any profit to be derived thereby to the receiver.[1] In my opinion the case submitted to this court embodies all the circumstances there set forth.

CRESSWELL, J. I agree with V. WILLIAMS, J., and ERLE, J., in thinking this conviction right. The direction of the bench is the only thing to be considered. I think that direction must be to be taken to incorporate all the circumstances set forth in the case. And although I am inclined to agree with the observations of my brother ERLE with respect to the meaning of the word "receiving," I ground my opinion on the fact, that the prisoner was clearly co-operating with the thieves. If the goods had been removed by the thieves from one part of the owner's premises to another part of those premises and there left, and the prisoner had taken them from the latter place jointly with the thief, he would have been jointly liable as a thief. If then he assisted the thieves in taking them elsewhere, that was a joint taking by him, and as he did it *malo animo*, he was criminally co-operating with them, and, therefore, guilty of receiving.

MAULE, J. I think the conviction wrong.

COLERIDGE, J. I think the conviction wrong, because we must decide whether it be so or not upon the direction; and the direction did not make it the duty of the jury to consider circumstances sufficient to establish the guilt of the prisoner, if all were found against him, and to these we have no right to add anything. If the direction be construed strictly, it would limit us to consider only the effect of the facts of leading the two thieves with the stolen goods from the house to the stable, and into it, with the knowledge that the goods had been stolen, and the guilty purpose of buying them. But it is better for the sake of the argument, and, perhaps, more correct to consider it as including also all the circumstances under which the fowls were brought to the house and taken from it to the stable, and all beyond that is excluded. Among these circumstances are not included any previous invitation or consent; not even any consent is stated.

So, considering the facts, the prisoner was guilty of being in the house with the thieves, having the goods in their possession, and helping them with the goods still in their possession to a place under his control, with the knowledge that they were stolen, and the guilty pur-

[1] R. *v.* Davis, 6 C. & P. 178, *er* Gurney B.; R. *v.* Richardson, 6 C. & P. 336, *per* Taunton, J.; *s. c.* 2 Russ. on Cr. 247.

pose of buying them, and so himself acquiring a possession distinct from that of the thieves, on a contingency, which never happened.

Until that should happen he never intended to have a possession, nor is it found, in fact, that he had, nor did the thieves intend to admit him to any such possession, actual or constructive. No case of joint possession with them intermediately arises; it did not exist in fact; it is excluded by the common intention.

Now, I conceive that receiving imports possession, actual or constructive, and, therefore, that the verdict was wrong. I think it right to add my concurrence in what has fallen from my brother MARTIN on the great importance of proceeding in all questions on the criminal law on broad grounds intelligible to the common sense of ordinary people.[1]

PATTESON, J. I think the conviction wrong. I don't consider a manual possession or even a touch essential to a receiving. But it seems to me that there must be a control over the goods by the receiver, which there was not here. How far the other circumstances stated in this case might affect the question, I don't think we need inquire, for, in my opinion, they are not brought before us for consideration. The case as submitted to us, does not put the matter on that ground. However, though I entertained some doubts on that point, I am inclined to think that those additional facts would make no difference.

ALDERSON, B. I agree with the majority of the other judges in thinking this conviction wrong. I think that there may be a joint possession of goods in a thief and a receiver. But there was no evidence of that here. The case submitted to us does not embody all the circumstances of the transaction. The sack may have been on Straughan's back all the time during the taking into the stables; and it is that part of the transaction alone which I think was treated by the chairman as amounting to a receiving, and left by him to the jury as evidence of it. The thieves seem always to have had possession of the goods, and the prisoner to have had only the intention of receiving them, not the actual receipt. In all these cases boundary lines are matters of great nicety, and seem to unthinking persons to involve absurd and frivolous distinctions; but those who are particularly acquainted with the administration of the law, have daily experience of their necessity, and know that without them acts and principles essentially different from each other in nature and operation would be confounded together, and that cases like the present have a peculiar value, owing to their furnishing precise definite rules.

[1] The editor is indebted to the kindness of Mr. Justice Coleridge for a copy of the above judgment.

PARKE, B. I think the conviction wrong. We have only to consider the precise point submitted to us in the case reserved. The taking "as above" was said by the chairman to amount to a receiving; that only incorporated so much of the transaction as relates to the taking of the goods into the stable. We must not, therefore, speculate on the question whether the three prisoners were all participating in the wrongful act, or what would be the legal consequences to each of their so doing. Receiving must mean a taking into possession, actual or constructive, which I do not think there was here. The prisoner took the thieves into the stable, but he never accepted the goods in any sense of the word except upon a contingency, which, as it happened, did not arise. I think the possession of the receiver must be distinct from that of the thief, and that the mere receiving a thief with stolen goods in his possession would not alone constitute a man a receiver.

LORD CAMPBELL, C. J. I think the conviction right. I concur in the reasoning of the minority of the judges, and I think that there is a receiving whenever the prisoner, knowing the goods to have been stolen, has possession of them *malo animo*. I think we need not enter into considerations respecting the right of property, or the right to bring trespass or trover. I think there need be no manual possession to constitute a receiving. The facts were that the sack was brought into the house, and taken thence to the stable with the knowledge and co-operation of the three prisoners. There was therefore a common criminal purpose. Was not Williamson then in possession of the sack? Straughan alone carried it, but it is agreed that for the purposes of larceny, the possession of Straughan was the possession of Williamson. If so, why was not the possession of Straughan equally the possession of Wiley? There was a criminal intent in all three at that time; and a co-operation for the purpose of carrying that intent into execution. What difference can it make that one party alone had manual possession of the goods, when if they all had been on or near the owner's premises, such possession by one would have been clearly in law the mutual possession of them all? That there may be a joint possession in the thief and the receiver I have no doubt. Moreover, I think that on a fair interpretation of the case before us, we are asked our opinion of the whole transaction; and that the circumstances set forth show that the goods were in the possession of Wiley quite as much as in that of the thieves. Therefore, in either view of the extent of the case submitted to us, I am of opinion that there was ample evidence of a receiving, and that the conviction was right.

## RECEIVING STOLEN GOODS — STOPPAGE IN TRANSITU FROM THIEF TO OWNER — DELIVERY BY OWNER.

# R. v. Schmidt.

[10 Cox, 172.]

*In the English Court of Criminal Appeal, 1866.*

**A Passenger's Baggage in Charge of a Railway** company, was stolen from the railway station. Afterwards the thieves sent a portion of it in a bundle, and delivered it to the same railway company to be forwarded by them to B., at Brighton. When it arrived at Brighton, the police officer attached to the railway company examined the bundle, and finding it to contain part of the stolen property, directed a porter not to part with it until further orders. The thieves were then arrested and on the following day the bundle was sent by the railway company to B., who having received it, was charged with feloniously receiving it. *Held*,[1] that the charge could not be sustained, the property having been obtained by the owners from whom it had been stolen before the receiving by the prisoner.[2]

Case reserved for the opinion of this court by the deputy-chairman of the Quarter Sessions for the Western Division of the county of Sussex.

John Daniels, John Scott, John Townsend, and Henry White, were indicted for having stolen a carpet-bag and divers other articles, the property of the London, Brighton and South Coast Railway Company, and the prisoner, Fanny Schmidt, for having feloniously received a portion of the same articles, well knowing the same to have been stolen.

The evidence adduced before me as deputy-chairman of the Court of Quarter Sessions at Chichester, for the Western Division of the county of Sussex, on the 20th October, 1865, so far as relates to the question I have to submit to the Court of Criminal Appeal, was as follows: —

On the 29th July, 1865, two passengers by the prosecutor's line of railway left a quantity of luggage at the Arundel Station, which luggage was shortly afterwards stolen therefrom.

On the 30th July a bundle containing a portion of the stolen property was taken to the Augmering Station, on the same line of railway, by the prisoner Townsend, and forwarded by him to the female prisoner, addressed, "Mr. F. Schmidt, Waterloo Street, Hove, Brighton." The bundle was transmitted to Brighton, in the usual course, on Sunday morning the 30th.

Meanwhile the theft had been discovered, and shortly after the bundle had reached the Brighton Station a policeman (Carpenter), attached to the railway company opened it, and having satisfied himself that it contained a portion of the property stolen from the Arundel Station,

[1] *per* Martin, B., Keating and Lush, J. J.

[2] Erle, C. J., and Mellor, J., *dissentientibus*.

tied it up again and directed a porter (Dunstall), in whose charge it was, not to part with it without further orders.

About 8 p. m. of the same day (Sunday 30th), the prisoner, John Scott, went to the station at Brighton and asked the porter (Dunstall) if he had got a parcel from the Augmering Station in the name of Schmidt, Waterloo Street. Dunstall replied, "No." Scott then said, "It is wrapped up in a silk handkerchief, and is directed wrong; it ought to have been directed No. 22, Cross Street, Waterloo Street." Dunstall, in his evidence, added, "I knew the parcel was at the station, but I did not say so because I had received particular orders about it."

The four male prisoners were apprehended the same evening in Brighton, on the charge for which they were tried before me and convicted.

On Monday morning, the 31st of July, the porter (Dunstall), by the direction of the policeman (Carpenter), took the bundle to the house No. 22 Cross Street, Waterloo Street, occupied as a lodging house and beer house by the female prisoner and her husband (who was not at home and did not appear), and asked if her name was Schmidt, on ascertaining which he left the bundle with her and went away. Carpenter and another policeman then went to the house, found the bundle unopened, and took the prisoner to the town hall.

All the prisoners were found guilty, and I sentenced each of them to six months' imprisonment with hard labor. They are now in Petworth gaol in pursuance of that sentence.

At the request of the counsel for the female prisoner, I consented to reserve for the opinion of this court the question: —

Whether the goods alleged to have been received by her had not, under the circumstances stated, lost their character of stolen property, so that she ought not to have been convicted of receiving them with a guilty knowledge within the statute?

HASLER HOLLIST.

*Pearce* (*Willoughby* with him) for the prisoner. The conviction is wrong. To support a conviction for receiving stolen goods, it must appear that the receipt was without the owner's authority. In this case, in consequence of the conduct of the railway company, the property had lost its character of stolen property at the time it was delivered at the receiver's house by the railway porter. The property is laid in the indictment as the property of the railway company, and Carpenter was not an ordinary policeman, but, as the case states, a policeman attached to the railway company. He opens the bundle, and finding therein some of the stolen property, he gives it to Dunstall and orders it to be detained until further orders, and in the meantime the

thieves were arrested; Carpenter then directs Dunstall to take the bundle to the receiver's house, so that the receiver got the stolen property from the railway company, who alone on this indictment are to be regarded as the owners of the property. The railway company, the owners, having got their property back, make what must be considered a voluntary delivery of it to the receiver. The case is similar to *Regina* v. *Dolan*,[1] where stolen goods being found in the pockets of the thief by the owner, who sent for a policeman, and then, to trap the receiver, the goods were given to the thief to take them to the receiver's, which he did, and the receiver was afterwards arrested, and it was held that the receiver was not guilty of feloniously receiving stolen goods, inasmuch as they were delivered to him under the authority of the owner. In that case *Regina* v. *Lyons*[2] was expressly overruled. Lord Campbell, C. J., said, in *Regina* v. *Dolan:* "If an article once stolen has been restored to the owner, and he having had it fully in his possession, bails it for any particular purpose, how can any person who receives the article from the bailee be said to be guilty of receiving stolen goods within the meaning of the act of Parliament?"

*Hurst*, for the prosecution. Unless the case is distinguishable from *Regina* v. *Dolan*, the conviction, it must be conceded, is wrong. But the facts of this case are more like the view taken by Cresswell, J., in *Regina* v. *Dolan*, "that while the goods were in the hands of the policeman, they were in the custody of the law, and the owner could not have demanded them from the policeman, or maintained trover for them." In that case the real owner intervened, and had manual possession of the stolen goods; here he does not. The goods belonged to the railway passenger, and the company are only bailees. [MELLOR, J. The policeman merely opened the bundle in the course of its transit to see what was in it, and then sent it according to its direction. It was in the hands of the policeman, not of the company. ERLE, C. J. Suppose a laborer steals wheat, and he sends it by a boy to his accomplice, and the policeman stops the boy, ascertains what he has got, then tells him to go on, and follows and apprehends the accomplice, is not the accomplice guilty of feloniously receiving? MELLOR, J. Here the policeman does nothing to alter the destination of the bundle. The elements of the real owner dealing with the stolen property is wanting in this case. KEATING, J. Scott directs the address to be changed.] The bundle was sent by the thieves through the railway company to the receivers; the real owner had nothing to do with this part of the transaction. [LUSH, J. If the true owner had sued the company for the property the company could not have justified detaining or converting it.] If a

[1] 6 Cox, C. C. 449; 1 Dears. C. C. 436.

[2] Car. & M. 217.

policeman knows of stolen goods being in the hands of an innocent agent, and does not take possession for the owner, and the innocent agent by the policeman's directions, delivers them to a receiver, that does not prevent the receiver being guilty of feloniously receiving.

*Pearce*, in reply. Before the bundle was sent out for delivery the thieves were in custody, and having secured them Carpenter then gives orders for the bundle to be delivered to the receivers. Carpenter was the servant of the railway company, who are the owners for the purpose of this indictment, and the delivery therefore was by the owners.

[ERLE, C. J. and MELLOR, J., were of opinion that the conviction was right, but MARTIN, B., KEATING and LUSH, JJ., held the conviction wrong. In consequence of the prisoner having suffered half the term of imprisonment from inability to get bail, and the further unavoidable delay, the case was not sent to be argued before all the judges.]

MARTIN, B. I think that this conviction was wrong on two grounds, the one substantial, the other formal. I think that Mr. *Pearce's* argument, founded on the indictment, that the property is there laid to be property of the railway company, is well founded; and it seems to me that *Dolan's Case* applies to this.

ERLE, C. J. I am of opinion that the conviction was right. The question is whether at the time this stolen property was received by the prisoner, it was the property of the London and Brighton Railway Company; and if so, whether, when the Policeman Carpenter caused the delivery to be stopped for the purpose of detecting the parties implicated it thereby lost the character of stolen property. If it had lost the character of stolen property at the time it was received by the prisoner the receiving by her will not amount to felony. But in this case I think that the railway company, when they took this bundle into their possession, were acting as bailees of the thief, and were innocent agents in forwarding it to the receiver, and that the things did not lose their character of stolen prope ty by what was done by the policeman.

KEATING, J. I agree with by brother MARTIN that the conviction was wrong. It seems conceded, on the authority of *Dolan's Case*, that if the property had got back again for any time into the hands of the true owner, the conviction would be wrong. It is said that. in this case, the owners mentioned in the indictment, the railway company, were not the real owners, whereas in *Dolan's Case* the real owner intervened. But I think there is no distinction in principle between this case and that. The railway company are alleged in the indictment to be owners of the property, and we sitting here can recognize no other persons than them; they are the owners from whom the property was stolen, and it got back to their possession. I can see no real distinction between this case and Dolan's. All the reasons given for the judgment in that case

apply equally to the case of the ownership in this case. The principle I take to be, that when once the party having the right of control of the property that is stolen, gets that control, the transaction is at an end, and there can be no felonious receipt afterwards. I think the test put by my brother LUSH in the course of the argument, as to the real owner suing the railway company for the property after they had got the control of it, is decisive of the matter.

MELLOR, J. I agree entirely with my brother ERLE, C. J., and think the conviction was right. The indictment rightly alleges the property to have been in the railway company at the time it was stolen, they had the bailment of it from the true owner. Then it is stolen while in their custody, and the next step is, the thieves afterwards send a portion of it by the same railway company to be forwarded to the receiver at Brighton. So that the railway company get possession of this part from the thieves under a new bailment. Then the policeman examines the property, and directs it not to be forwarded until further orders; but this was not done with the view of taking possession of it, or altering its transit, but merely to see whether it was the stolen property. I agree with *Dolan's Case*, but in the present case I think, the stolen property had not got back to the true owner.

LUSH, J. I agree with my brothers MARTIN, B., and KEATING, J., and think that the conviction was wrong. I think that the goods had got back to the owner from whom they had been stolen. Had the railway company innocently carried the goods to their destination, and delivered them to the prisoner, the felonious receipt would have been complete; but while the goods are in their possession, having been previously stolen from them, the goods are inspected and as soon as it was discovered that they were the goods that had been stolen the railway company did not intend to carry them on as the agents of the bailor. The forwarding them was a mere pretense for the purpose of finding out who the receiver was. It was not competent to the railway company to say, as between them and the original bailor, that they had not got back the goods, they were bound to hold them for him. In afterwards forwarding the goods to the prisoner, the company was using the transit merely as the means of detecting the receiver.

MARTIN, B. I only wish to add, that I meant to say, that I think the conviction wrong in substance in consequence of the interference of the policeman with the property, and this independently of the form of indictment.

*Conviction quashed.*

## RECEIVING STOLEN GOODS — RESTORATION TO OWNER BETWEEN STEALING AND RECEIVING — SUBSEQUENT SALE.

## R. *v.* DOLAN.

[6 Cox, 449; 1 Dears. 436.]

*In the English Court for Crown Cases Reserved, 1855.*

**If Stolen Goods are Restored** to the possession of the owner, and he returns them to the thief for the purpose of enabling him to sell them to a third person, they are no longer stolen goods, and that third person can not be convicted of feloniously receiving stolen goods, although he received them, believing them to be stolen. Where, therefore, stolen goods were found in the pocket of the thief by the owner, who sent for a policeman; and it was proved that after the policeman had taken the goods, the three went together towards the prisoner's shop, where the thief had previously sold other stolen goods; that when near that shop, the policeman gave the goods to the thief who was sent by the owner into the shop to sell them, and that the thief accordingly sold them to the prisoner, and then returned with the proceeds to the owner. *Held*, that the prisoner was not guilty of feloniously receiving stolen goods; inasmuch as they were delivered to him under the authority of the owner by a person to whom the owner had bailed them for that purpose. R. *v.* Lyons, Car. & M. 217, overruled.

*Semble, per* CRESWELL, J.: That the mere possession of the goods by the policeman would not be equivalent to a restoration to the owner.

The following case was stated by M. D. Hill, Esq., A. C., Recorder of Birmingham: —

At the session held in Birmingham, on the 5th day of January, 1855, William Rogers was indicted for stealing, and Thomas Dolan for receiving certain brass castings, the goods of John Turner. Rogers pleaded guilty, and Dolan was found guilty.

It was proved that the goods were found in the pockets of the prisoner Rogers by Turner, who then sent for a policeman, who took the goods, and wrapped them in a handkerchief, Turner, the prisoner Rogers, and the policeman going towards Dolan's shop. When they came nearer the policeman gave the prisoner Rogers, the goods, and the latter was then sent by Turner to sell them where he had sold others; and Rogers then went into Dolan's shop, and sold them, and gave the money to John Turner as the proceeds of the sale. Upon these facts it was contended on the part of Dolan, that Turner had resumed the possession of the goods, and Rogers sold them to Dolan as the agent for Turner, and that consequently, at the time they were received by Dolan, they were not stolen goods within the meaning of the statute.

I told the jury, upon the authority of the case of *Regina* v. *Lyon*,[1] *and another* cited by the counsel for the prosecution, that the prisoner was liable to be convicted of receiving, and the jury found him guilty.

[1] C. & M. 217.

Upon this finding, I request the opinion of the Court of Appeal in Criminal Cases on the validity of Dolan's conviction.

Dolan has been sent back to prison, and I respited judgment on the conviction against him, until the judgment of the court above shall have been given.

*O'Brien*, for the prisoner. This conviction can not be sustained. The objection is, that when the goods reached the hands of Dolan they were not stolen goods. They had been restored to the possession of the owner, and the sale to the prisoner was with the owner's authority.

Lord CAMPBELL, C. J. There seems to be great weight in that objection, but for the authority of the case cited. It can hardly be supposed that if goods were stolen seven years ago, and had been in the possession of the owner again for a considerable period, there could be a felonious receipt of them without a fresh stealing.

*O'Brien.* That was the view taken by the learned recorder; and *R.* v. *Lyons*,[1] which was cited for the prosecution, does not appear to have been a case much considered. Coleridge, J., in that case, said, "that for the purposes of the day, he should consider the evidence as sufficient in point of law, to sustain the indictment, but would take a note of the objection.

COLERIDGE, J. I certainly do not think so, to-day.

*O'Brien.* There is also a slight circumstance of distinction between that case and the present. It does not appear in that case that the stolen property was ever actually restored to the hands of the owner, nor that he expressly directed the thief to take it to the prisoner. (He was stopped.)

*Beasley* for the prosecution. *R.* v. *Lyons* is expressly in point, and the learned judge who decided it does appear to have had his attention recalled to the point after the conviction, and still, upon deliberation, to have thought there was nothing in the objection. The facts are thus stated in the marginal note: "A lad stole a brass weight from his master, and after it had been taken from him in his master's presence it was restored to him again with his master's consent, in order that he might sell it to a man to whom he had been in the habit of selling similar articles which he had stolen before. The lad did sell it to the man; and the man being indicted for receiving it of an evil-disposed person, well knowing it to have been stolen, was convicted and sentenced to be transported seven years." The report adds, that after the sentence "the matter was subsequently called to his lordship's attention by the prisoner's counsel, yet no alteration was made in the judgment of the court; from which it is to be inferred that, upon con-

[1] C. & M. 217.

sideration, his lordship did not think that in point of law the objection ought to prevail." The present is, however, a stronger case than that; because here in truth the master did not recover possession of the stolen goods. They were in the hands of the police; and what the master did must be considered as done under the authority of the police.

Lord CAMPBELL, C. J. No; the policeman was the master's agent.

PLATT, B. And the sale was by direction of the master.

*Beasley.* The statute does not require that the receipt should be directly from the thief. It only required that the prisoner should receive stolen goods, knowing them to have been stolen, and that is proved in this case. In many cases it has been held that where the owner of property has become acquainted with a plan for robbing him, his consent to the plan being carried out does not furnish a defence to the robbers.[1]

Lord CAMPBELL, C. J. But to constitute a felonious receiving, the receiver must know that at that time the property bore the character of stolen property. Can it be said that, at any distance of time, goods which had once been stolen would continue to be stolen goods for the purpose of an indictment for receiving, although in the meantime they may have been in the owner's possession for years.

CRESSWELL, J. The answer to that in this case seems to be that the policeman neither restored the property nor the possession to the master; that the goods were in the custody of the law; and that the master's presenee made no difference in that respect.

*Beasley.* That is the argument for the prosecution; and it is manifest that if the policeman had dissented from the plan of sending Rogers to Dolan's shop, the master could not have insisted upon the policeman giving up the property to him.

Lord CAMPBELL, C. J. I feel strongly that this conviction is wrong. I do not see how it can be supported, unless it could be laid down that, if at any period in the history of a chattel once stolen, though afterwards restored to the possession of the owner, it should be received by any one with a knowledge that it had been stolen, an offense would be committed within the statute. I think that that would not be an offense within the statute, any more than it would make the receiver an accessory to the felony at common law. If the article is restored to the owner of it, and he, having it in his possession, afterwards bails it to another for a particular purpose of delivering it to a third person, and that third person receives it from that bailee, I do not see how it can, under these circumstances, be feloniously received from that

[1] R. *v.* Egginton, 2 Bos. & P. 508.

bailee. Then what are the facts here? (His Lordship stated the facts as above.) Turner, the owner, therefore, had, I think, as much possession of the goods, as if he taken them into his own hands, and with his own hands delivered them to another person for a particular purpose, which was performed.

He was, subsequent to the theft, the bailor, and the other person was the bailee of the goods. Then they were carried to the prisoner by the authority of the owner; and I can not think that, under those circumstances, there was a receiving within the statute. As to the case cited, I can not help thinking that the facts can not be quite accurately stated, and that there was something more in that case than appears in the report; but if not, I am bound to say that I do not agree in that decision.

Coleridge, J. I have no recollection of the case cited; and I have no right, therefore, to say that it is not accurately reported; but assuming it to be so, I am bound to say that I think I made a great mistake there. What is the case? If for a moment the interference of the policeman is put out of the question, the facts are, that the goods which had been stolen were restored to the possession of the real owner, and were under his control, and having been so restored, they were put again into the possession of Rogers for a specific purpose, which he fulfilled. It seems then, to me, that when the second time they reached the hands of Rogers, they had no longer the character of stolen goods. Then, if that would be the case, supposing the policeman to be out of the question, does the interference of the policeman, according to the facts here stated, make any difference? I think not. It is the master who finds the goods and sends for a policeman; and it is by the authority of the master that the policeman takes and keeps the goods, and afterwards hands them back to Rogers. Indeed, it seems to me that all that was done, was done by Turner's authority; and that it must be considered that the property was under the control of the real owner when he sent Rogers with them to the prisoner. In this state of facts, the interference of the policeman seems to me of no importance.

Cresswell, J. I do not dissent from the decision that the conviction is wrong; but as we are called upon in this court to give the reasons of our judgment, I must say that I can not concur in all the reasons which I have heard given in this case. If it had been necessary to hold that a policeman, by taking the stolen goods from the pocket of the thief, restores the possession to the owner, I should dissent. I think we can not put out of the question the interference of the policeman, and that whilst the goods were in his hands they were in the custody of the law, and that the owner could not have demanded

them from the policeman or maintained trover for them. But as the case finds that the policeman gave them back to Rogers, and then the owner desired him to go and sell them to Dolan, I think that Rogers was employed as an agent of the owner in selling them, and that consequently Dolan did not feloniously receive stolen goods.

Platt, B. I am of the same opinion. The case is, that the stolen goods were found by the owner in the pocket of the thief. They were restored to his possession, and it does not appear to me very material whether that was done by his own hands or by the instrumentality of the policeman. Things being in that state, it seems to have come into their heads that they might catch the receiver, and it was supposed that by putting the stolen property back into the custody of Rogers, they could place all parties *statu quo* they were when the property was found in the pocket of Rogers; but I agree with the rest of the court that the act of Parliament does not apply to a case of this kind, for if it did I see no reason why it should not equally apply to restored goods stolen ten years ago.

Williams, J. The reason why I think the conviction wrong is, that the receipt, to come within the statute, must be a receipt without the authority of the owner. Looking at the mere words of the indictment every averment is proved by this evidence; but then the question is whether such a receipt was proved as is within the statute, viz.: a receipt without the owner's authority, and here Rogers was employed by the owner to sell to Dolan.

*Conviction quashed.*

---

## RECEIVING STOLEN PROPERTY — PROPERTY RECEIVED MUST BE STOLEN.

### United States v. De Bare.

[6 Biss. 358.]

*In the United States District Court, Eastern District of Wisconsin, 1875.*

1. **One can not be Convicted** of receiving stolen property from a thief on proof that he received it from another person.
2. **On an Indictment** for receiving stolen property, when it is shown that before the defendant received the property it had been recovered, and had lost its character as stolen property, by passing into the hands of the owner or his agents, the charge fails.

The accused was indicted for receiving postage stamps, knowing them to have been stolen. The stamps were stolen by one Crawford, who put them into the express office directed to the defendant. Crawford

was arrested at Quincy, Illinois, and on a written order from him the stamps were delivered to the Quincy postmaster. Subsequently, under orders from the post-office department, the postmaster permitted the stamps to go forward to defendant. The indictment charged that the defendant received the stamps from Crawford.

DYER, J. Careful consideration of the question has confirmed me in the opinion that the instruction given to the jury was right. Undoubtedly it is not, in all cases, essential that an indictment against a receiver should allege by whom the property was stolen. A party may be indicted for receiving goods stolen by persons unknown. In a case where an indictment was objected to because it did not ascertain the principal thief, and did not, therefore, state to whom in particular the prisoner was accessory, it was held good; but "where the principal, however, is known, it seems proper to state it according to the truth."[1] It is laid down in the books as a settled principle, that, if an indictment allege that the goods were received from the thief, it must be proved that they were received from the thief, and if it appear that the thief gave them to a person from whom the accused received them, it is a fatal variance. In support of this principle, *Arundel's Case*,[2] cited by defendant's counsel on this motion, is the leading authority. The prisoner was indicted for receiving stolen goods, and the indictment alleged that he received them from the person who stole them, and that this person was a certain ill-disposed person to the jurors unknown. It was proved that the person who stole the property handed it to J. S., and that J. S. delivered it to the prisoner; and PARKE, J., held that on this indictment it was necessary to prove that the prisoner received the property from the person who actually stole it, and he would not allow it to go to the jury to say whether or not the person from whom he was proved to have received it was an innocent agent of the thief.

Now, in the case at bar, the indictment charges that the defendant received the postage stamps from Crawford. To convict, the proof should conform to the charge. If the proof is that the defendant received the stamps from the Quincy postmaster and not from Crawford, the variance is fatal. Crawford was the principal felon. After arrest, as we have seen, the stamps passed into the possession of the Quincy postmaster, who took them from the express office, and subsequently, by direction of the department, forwarded them to the consignee. There was no relation of principal and agent between Crawford and the postmaster. The former had originally authorized the express company to carry and deliver the stamps to the defendant. By his order in writing, given to the postmaster, he withdrew that authority, ceased

[1] 2 East's Cr. L. 781. [2] 1 Lew. 115.

to be a party to the contract of transportation, and surrendered the stamps to the postmaster. The subsequent re-deposit of the stamps in the express office was the act of the postmaster under direction of the department, and I think the case is directly within the principle of *Arundel's Case*, before cited. I am convinced, therefore, that it would not have been error to have instructed the jury that the variance between the allegation in the indictment and the proof is fatal to a conviction.

If there be any doubt upon the point thus far discussed, there can be none, I think, concerning the second ground urged in support of this motion. The ownership of these stamps was in the United States. The Quincy postmaster was the agent of the owner. When Crawford surrendered them to this agent they were reclaimed property that had been stolen, but their character as stolen property ceased in the hands of the postmaster, so far as the subsequent receiver was concerned. The moral turpitude of a receiver under such circumstances may be as great as in case the property comes directly from the hands of the thief, because the criminal intent on his part exists equally in both cases. But to create the offense which the law punishes, the property, when received, must, in fact, and in a legal sense, be stolen property. If these stamps were received by the defendant, they did not, when received, upon the proof made, bear this character. They had been captured from the thief by the owner, and the act of forwarding them to the alleged receiver was the act of the owner.

I regard this point conclusively settled upon authority. In *State* v. *Ives*,[1] it was held that an indictment for receiving stolen goods must aver from whom the goods were received, so as to show that the person charged received them from the principal felon. If received from any other person the statute does not apply. In *Queen* v. *Schmidt*,[2] the case was this: Four thieves stole goods from the custody of a railroad company, and afterwards sent them in a parcel by the same company's line addressed to the prisoner. During the transit the theft was discovered, and on the arrival of the parcel at the station for its delivery, a policeman in the employ of the company opened it and then returned it to the porter, whose duty it was to deliver it with instructions to keep it until further orders. On the following day the policeman directed the porter to take the parcel to its address, where it was received by the prisoner, who was afterwards convicted of receiving the goods knowing them to be stolen, upon an indictment which laid the property in the goods in the railway company. *Held*, that the goods had got back into the possession of the owner so as to be no longer stolen goods, and that the conviction was wrong.

[1] 13 Ired. 338.

[2] 10 Cox, 172.

The case of *Regina* v. *Lyons*,[1] was cited by counsel for the prosecution in support of a conviction in this case. The report of the case is meager, but it appears that a brass weight had been stolen by a lad in the employ of the prosecutors; and it having been taken from him by another servant in the presence of one of the prosecutors, it was restored to the lad again, in order that he might take it for sale to the house of the prisoner, where he had been in the habit of selling similar articles before. The lad took it and sold it for 6 1/2d. The point was made that as the property had been restored to the possession of the owner, it could not afterwards be considered as stolen property. Coleridge, J., said that for the purposes of the day he should consider the evidence sufficient to sustain the indictment, but would take a note of the objection. The prisoner was convicted and sentenced to transportation, and no change was subsequently made in the judgment of the court.

But this case of *Regina* v. *Lyons* is expressly overruled in the case of *Regina* v. *Dolan*,[2] Lord Campbell, C. J., delivering a judgment in which Justices Coleridge, Cresswell, Platt and Williams, concur. Lord Campbell says: "With regard to *Queen* v. *Lyons*, I think that the facts can not be accurately stated. But if they be, I must say that I can not concur with that decision, and I think that it ought not to be acted upon." Of his previous decision in that case, Coleridge, J., says: "Having no recollection of the case of *Queen* v. *Lyons*, I can not take upon myself to say it is wrongly reported. But if it is not, I am bound to say that I think I made a great mistake.'

Motion for a new trial granted.

---

RECEIVING STOLEN GOODS — CONCEALMENT — INTENT — PROOF NECESSARY.

## Aldrich *v.* People.

[101 Ill. 16.]

*In the Supreme Court of Illinois, 1881.*

1. **In Order to Convict under Section 239,** of the criminal code, for receiving and aiding in concealing stolen goods for gain, or to prevent the owner from receiving the same, etc., it is essential, first, to show that the property alleged to have been received or concealed, was in fact stolen; secondly, that the accused received the goods, knowing them to have been stolen, guilty knowledge being an essential ingredient of the

1 41 Eng. Com. L. 122.

2 29 Eng. L. & Eq. 533.

crime; and lastly, that the accused, for his own gain, or to prevent the owner from recovering the same, bought, received or aided in concealing the stolen goods.

2. **Where a Defendant**, on behalf of the owner, receives stolen goods from the thief, for the honest purpose of restoring them to the owner, without fee or reward, or the expectation of any pecuniary compensation, and in fact, immediately after obtaining their possession restores all he receives to the owner, and is not acting in concert or connection with the party stealing, to make a profit out of the transaction, he will not be guilty, under the statute.

WRIT OF ERROR to the Criminal Court of Cook County; the Hon. ELLIOTT ANTHONY, Judge, presiding.

*John Lyle King*, for the plaintiff in error.

*Luther Laflin Mills*, State's Attorney, for the People.

Mr. Chief Justice CRAIG delivered the opinion of the court.

This was an indictment in the Criminal Court of Cook County against Charles Aldrich and Emanuel Isaacs, for larceny. In two of the counts it was charged in the indictment that for their own gain, and to prevent the owners from again possessing their property, the defendants did buy, receive and aid in concealing the goods of certain named persons lately before feloniously stolen, the defendants well knowing they were stolen. The jury, before whom the cause was tried, returned a verdict of guilty of receiving stolen property, and found the property to be of the value of $6,000. The court overruled a motion for a new trial, and rendered judgment on the verdict, and the defendants sued out this writ of error. In order to obtain a clear understanding of the questions presented by the record, a brief statement of the facts seems necessary.

On Friday night, November 26, 1880, four persons, Mike Bauer, Nick Bauer, Herman Schroeder, and Matthew Ash, stole a trunk from the Clifton House, in Chicago, belonging to J. H. Morrow, which contained jewelry belonging to Eaton & Faas, and Ernest Thoma, of New York, of the value of from $7,000 to $8,000. Morrow had the goods for sale as agent of the owners. On the night the trunk was stolen, one of the thieves, Mike Bauer, told the defendant Isaacs, who was a pawnbroker in Chicago, that he had a quantity of jewelry for sale, and offered to sell to the defendant, but he declined to buy. Bauer desired the defendant to see the goods, which he promised to do at a future day. On the following Sunday, Isaacs, in company with Bauer, went to a room where the latter had the goods concealed, and looked over them, and was offered the property for $600 or $700. Isaacs declined to buy, but told him not to be in a hurry, he would talk to him the next day. On Saturday night, before this occurred, defendant, Aldrich, a policeman, and one Levi, were at Isaacs' place, and the robbery having been mentioned, Isaacs remarked that he could have had the goods for a small sum of money. After obtaining this information from Isaacs, Aldrich and Levi conceived the scheme to recover the property and return it to the owners through Isaacs. On Monday, a meeting was had

between Aldrich and Morrow, at the Union National Bank, in the presence of Pinkerton, where Aldrich was employed as special policeman, which resulted in an arrangement that Aldrich should obtain the goods belonging to Thoma for $700, or less, if he could, without disclosing the name of the person with whom he should deal, and without reward to himself, save only the reputation which he anticipated would follow the transaction, as a detective of stolen property.

On the following Wednesday, Morrow paid over to Aldrich $700, on the guaranty of the vice-president of the Union National Bank, that the goods or the money should be returned. On the same day, Aldrich paid over to Levi $600 of the money, to be paid to the party who had the goods, through Isaacs, who alone knew such party.

Out of the money thus received by Levi, he paid over $450 to Isaacs. The $450 Isaacs paid to Bauer, who had the goods, as he testified; but Bauer says he only received of Isaacs $300. However that may be, upon the payment of the money to Bauer, on Wednesday evening, he took the goods, and in company with Isaacs, carried them to a cigar store and barber shop on State Street. Then Isaacs notified Levi where the goods could be found, and he notified Aldrich, who went to the place designated, found the goods, and within ten minutes carried them in unopened packages, precisely as he had found them, to the Clifton House, and delivered them to Morrow.

Bauer represented to Isaacs that the packages returned contained all the goods which had been stolen; those belonging to Eaton & Faas and also those belonging to Thoma, and Isaacs and Aldrich both understood this to be the case; but upon a subsequent examination, it is claimed there was a shortage of $1,300.

These are, in brief, the substantial facts, as we understand the testimony.

In the argument a number of questions have been presented in regard to the admission and exclusion of evidence, but we have concluded to base our decisions on the merits of the case, and hence it will not be necessary to notice these questions.

The indictment in this case was found, and the conviction had, under section 239,[1] which declares: "Every person, who, for his own gain, or to prevent the owner from again possessing his property, shall buy, receive or aid in concealing stolen goods, or anything the stealing of which is declared to be larceny, or property obtained by robbery or burglary, knowing the same to be so obtained, shall be imprisoned in the penitentiary," etc. On an indictment under this section of the statute for receiving goods, the first thing to be proven is, that the prop-

[1] ch. 38 of the Cr. Code, Rev. Stats. 1874, p. 388.

erty alleged to have been received was stolen. In this case, however, there is no controversy over that question. It is conceded that the goods in question were stolen. Indeed, several of the thieves who stole the property were introduced as witnesses and testified to the larceny of the goods. After the larceny has been proven it becomes necessary to establish the fact that those accused of the crime received the stolen goods knowing them to have been stolen. Guilty knowledge on the part of the defendant is essential to the constitution of the offense.[1]

The intent, as in larceny, is the chief ingredient of the offense. Thus, where A. authorizes or licenses B. to receive property lost or stolen, and B. receives the property from the thief knowing it to be stolen, with a felonious intent, he is guilty of a felony in receiving the property, notwithstanding the license.[2] Under our statute there is another essential fact to be proven — that is that the defendant, for his own gain, or to prevent the owner from again possessing his property, bought, received or aided in concealing stolen goods. There is no doubt, from the evidence in this case, in regard to the fact that the defendants knew the goods were stolen. Their knowledge is a conceded fact. It is also an undisputed fact that the stolen goods, in passing from the custody of the thieves to Morrow, the agent of the owners, passed through the hands, first, of defendant Isaacs, and second, through the hands of defendant Aldrich.

The question in the case is then narrowed down to this: Whether defendants received the goods for their own gain or to prevent the owner from again possessing his property. This, in our judgment, is the turning point upon which the decision of the case must hinge. In the disposition of the question, we will consider the case first as to the defendant Aldrich, and second, as to the defendant Isaacs, as the facts relating to each defendant are somewhat different.

It is not claimed that Aldrich undertook to secure the return of the goods for any fee or reward whatever, or that he expected to make any money out of the transaction. On the contrary, it was proven by the prosecution that all he wanted was the reputation of recovering the goods. Upon this point Morrow testified: "Prior to the time the goods were returned, Aldrich said he didn't expect to make a cent out of the transaction; said this on Monday; he never asked for compensation, or made offer, bargain or proposition for compensation; he said all he wanted was the glory of beating the other fellow and getting the goods." The city authorities and Pinkerton were after the goods. He never asked a dollar. It is true he retained in his possession $100 of the

1 Whart., vol. 2, sec. 1889. 2 Whart., sec. 1819.

money which Morrow gave to him, but this was not kept for his own benefit, but for the benefit of Morrow. Upon this point the same witness testified: "On Wednesday night he said he had got all the goods, instead of a part, and that he had saved me $100." How could he save for Morrow $100 if the money was retained for his services? This could not be the case, as he had paid over to Levi all he received of Morrow except this $100.

It is, apparent, from the evidence, that no agreement was ever made, under which Aldrich was paid anyting for his services,— that he expected nothing and received nothing for the services he rendered in securing the return of the goods. How can it then be said that he received the goods for his own gain? Nor did he receive the goods to prevent the owner from again possessing his property, but, on the other hand, he received them for the very purpose of restoring them to the owner, which he did within ten minutes from the time they came into his possession.

We will now consider the testimony as to the defendant Isaacs. He was a pawnbroker, and on the night the goods were stolen he was approached by one of the thieves, and requested to buy the goods. This he refused to do, but, having obtained information as to the custody of the goods, he undertook, afterwards, to assist Aldrich in the consummation of his scheme, to obtain the goods and restore them to the owner. There was no contract or agreement under which he was to receive any pay, for what he might do in the premises. All that he did was done as a favor to help Aldrich, who wanted the credit of getting the goods returned. Levi, who held $600 to be paid for the return of the goods, handed Isaacs $450, and retained the balance until it could be ascertained that all the goods were returned. This sum Isaacs testified he paid over to Bauer, but Bauer swears that Isaacs only paid him $300 promising to pay the balance the next day. This is the only evidence contained in the record tending to show money in the hands of Isaacs as compensation for what he did in the transaction. We do not regard the evidence sufficient. Conceding that the credibility of the two men is equal, which is quite as favorable a view on the side of the prosecution as they could ask, it would leave the matter standing one oath against another, which, under the circumstances of the case, could not be regarded as establishing the fact, beyond a reasonable doubt.

Again, if Isaacs had been endeavoring to make money out of the transaction, it is strange he did not avail himself of the opportunity to buy all the goods for the $600 for himself, and say nothing to the detectives in regard to the matter.

This would have been the course he doubtless would have adopted, had he undertaken to get the goods for his own gain. The fact that he

did not take this course is a circumstance tending to corroborate his evidence that all he did was without pay or reward. If then, Isaacs received no compensation, and had no arrangement under which he was to be paid for what he might do, we perceive no ground upon which it can be determined that he received the goods for his own gain, or that he received them to prevent the owner from again possessing his property, within the meaning of the statute.

It may, however, be said that as the goods passed through defendant's hands, they should be held liable for the shortage of $1,300, and in this way they received the goods for their own gain. If they retained the goods that were missing there might be force in the position, but from the evidence that was impossible. Isaacs only saw the property on two occasions, first on Sunday, when he looked it over in the presence of Bauer, who does not pretend that Isaacs offered to take any part of the goods; again on Wednesday evening, when the goods were carried by Bauer from Fourth Avenue, in packages, to the cigar store. While Isaacs was in company with Bauer, at the time, it does not appear that he in any manner handled the goods. As to Aldrich, his only possession of the property was during the ten minutes which it took him to carry the goods from the cigar store to the hotel, when the property was in packages, and unopened. We can see no ground upon which it can, from the evidence, be claimed that either of the defendants can be held liable for the shortage in the goods. The more reasonable view is, that the missing articles were taken by the thieves and appropriated to their own use while they had the goods in possession. It is, however, urged that the fact that the property could have been returned soon after the larceny for $500, and the fact that Aldrich, in his first interview with Morrow, in substance said it would require $1,400, to obtain the property, the long pendency of the negotiations as to the amount to be paid, and the fact that $200 more was paid to Aldrich than was demanded by the thieves, are facts which prove motive of gain. As we understand the evidence, the defendants could not at any time have obtained possession of the property so it could be returned, without paying the thieves the amount of money demanded by them. The defendants can not, therefore, be blamed for the delay, as they acted as soon as Morrow furnished the money to be paid to the thieves. It is true, Aldrich, in his first interview with Morrow, expressed the opinion, that $1,400 would be required to obtain the property, and this may be regarded as a circumstance against him; but his subsequent conduct, agreeing to obtain the property for one-half that sum, or as much less as he could, clearly repels the inference that he was seeking to make any gain out of the transaction. It has been suggested that Levi was a myth — that no such person ever lived. The fact that he was never

seen or heard of after the night the goods were returned looks somewhat suspicious, but we must be controlled by the evidence in the record, and unless Isaacs, Aldrich, and also the father of Aldrich, are guilty of willful perfury, then Levi was no myth, but was in Chicago at the time of this occurrence, and participated therein, as testified by the defendant.

We have given the evidence in the record a careful consideration, and the only conclusion we have been able to reach is that it has not been established that the defendants were receivers of the goods for their own gain, or to prevent the owners from again possessing their property. On the other hand, the only logical conclusion that can reached from the evidence is that defendant undertook on behalf of the owners, to obtain a return of the goods without compensation or reward, and that all the goods that came into their possession were in good faith returned to the owners. If it had been proven in this case, that the defendants had entered into negotiations with Morrow to secure a return of the stolen goods in pursuance of a prior arrangement or understanding with the persons who had stolen the property with the intent or purpose of making a profit out of the transaction, we would not hesitate to hold that they were guilty under the statute.

A party can not shield himself behind a supposed agency, growing out of an agreement made with the owner of stolen goods for their return, where it appears he is acting in conjunction with the thieves to make a gain or profit out of the transaction. But where the defendants are not actuated by the motive of gain, as they were not in this case, and do not aid in secreting the property, we do not understand that a conviction can be had.

The judgment will be reversed and the cause remanded.

*Judgment reversed.*

---

## RECEIVING EMBEZZLED PROPERTY.

## LEAL *v.* STATE.

[12 Tex. (App.) 279.]

*In the Court of Appeals of Texas, 1882.*

**Receiving Embezzled Property** is not a violation of the penal laws of this State.

APPEAL from the District Court of Bexar. Tried before the Hon. G. H. NOONAN.

The case is sufficiently stated in the opinion

*Bryan Callaghan*, for the appellant. It is submitted that no act or omission is an offense, unless so declared by the written law of the land.[1] The only provision bearing on the question at issue is a follows: —

"If any person shall receive or conceal property which has been acquired by another in such manner as that the acquisition comes within the meaning of the term theft, knowing the same to have been so acquired, he shall be punished in the same manner as by law the person stealing the same would be liable to be punished."[2]

The last cited article declares it to be an offense for any one to receive or conceal property when the acquisition by the previous wrong-doer comes within the meaning of the term theft. Substitute "word" for "term," and both the words as herein used have the same signification, and the article would then read: —

"If any person shall receive or conceal property acquired by another in such manner as that the acquisition comes within the meaning of the word theft;" — not, it is submitted, within any of the degrees of theft, but within the meaning of the word theft. The term "theft" in the Texas Code is synonymous with "larceny," as that term is employed at common law.[3] "Larceny" at common law is defined: "The wrongful or fraudulent taking of personal goods of some intrinsic value belonging to another, without his assent, and with the intention to deprive the owner thereof permanently."[4]

It may be said that receiving stolen property, knowing it to be stolen is included in theft, and that the indictment in this cause in one count charging theft in the original taker, is sufficient to sustain a conviction for receiving and concealing. In answer to this we say that the indictment and statement of facts prove conclusively that the original taker committed the crime of embezzlement, and we further say that "theft" and embezzlement are separate and distinct offenses.[5]

Embezzlement is not one of the offenses which includes different degrees; wherefore it is contended that an indictment charging embezzlement in the original taker, and that the receiver knew the property to be so embezzled as the indictment in this cause does charge, discloses no offense against the laws of the State of Texas.[6]

There can be no receiving of stolen property unless there was theft in the beginning.[7]

It is so that when a defendant is indicted for theft, and the evidence shows that he did not steal the property, but that he knowing it to have

1 Penal Code, art. 3.

2 Penal Code, art. 743.

3 Griffin *v.* State, 4 Tex. (App.) 411.

4 2 East's P. C. 553; 2 Russ. Cr. 93.

5 Griffin *v.* State, 4 Tex. (App.) 391; Blaadford *v.* State, 10 Tex. (App.) 627.

6 Griffin *v.* State, 4 Tex. (App.) 411.

7 Bish. Cr. L., sec. 1095; Cassels *v.* State, 4 Yerg. 149; Wright *v.* State, 5 Yerg. 154.

been stolen, did fraudulently receive the same, that he, under proper instructions from the court, might be convicted for receiving stolen property, knowing it to be stolen.[1]

In the cases last cited the indictment charged the greater offense, "theft;" and the conviction was for a lesser offense. The greater offense includes the lesser one, but the lesser does not include the greater. An indictment charging murder will support a conviction for aggravated assault; but the converse of the proposition in not true.[2]

Embezzlement is not a degree of the offense defined in article 743 of the Penal Code, and the offense charged in the indictment in this cause, to wit: receiving embezzled property knowing it to be embezzled, is not defined in the Penal Code of this State; and, therefore, the defendant has not violated any law, and the court should have sustained the motion to quash.

*B. Coopwood*, also for the appellant, filed an able brief and argument.

*H. Chilton*, Assistant Attorney-General, for the State.

Hurt, J. The appellant was convicted for receiving property which had been embezzled, his punishment being fixed at two years' confinement in the State penitentiary. The indictment charges that one Conception Torres embezzled certain hides; not only the facts constituting embezzlement are averred, but the offense of embezzlement is charged in terms. It then alleges that the defendant received the hides knowing them to have been embezzled.

The question presented, conceding all this to be true, is, has the defendant Leal violated article 743 of the Penal Code, which reads: "If any person shall receive or conceal property which has been acquired by another in such manner as that the *acquisition* comes within the meaning of the term theft, knowing the same to have been so *acquired*, he shall be punished in the same manner as, by law, the person stealing the same would be liable to be punished." (*Italics ours.*) If Torres acquired the hides, and his acquisition was in such manner as to constitute the crime of theft, and defendant received them knowing them to have been so acquired, he would be liable. But were the hides so acquired? By no means. The allegations in the indictment place this question beyond cavil. The acquisition by Torres was not fraudulent but was legal, — a duty, — and did not constitute theft. This being the case, receiving them by defendant was not a violation of the Code.

While it is true that a majority of this court have held that theft includes embezzlement, they have never held that embezzlement includes

[1] Parchman *v.* State, 2 Tex. (App.) 228; Vincent *v.* State, 10 Tex. (App.) 330.

[2] Griffin *v.* State, 4 Tex. (App.) 412.

theft. To thus hold would make the lesser include the greater. But, be this as it may, no person can be legally convicted of receiving stolen goods unless when the acquisition was in such manner as to constitute theft. We are therefore of the opinion that to receive property which has been embezzled constitutes no offense against the law of this State.

The judgment is reversed and the prosecution dismissed.

*Reversed and dismissed.*

---

## RECEIVING STOLEN PROPERTY — BANK-NOTES NOT GOODS AND CHATTELS.

### STATE v. CALVIN.

[22 N. J. (L.) 207.]

*In the Supreme Court of New Jersey, 1849.*

**Bank-Notes are not "Goods and Chattels,"** and the receiver of stolen bank-notes can not be indicted under the statute making it a misdemeanor to receive stolen "goods or chattels."

This case came before the court from the Passaic Oyer for an advisory opinion. The defendant was indicted for, and convicted of, receiving a large number of bank bills, amounting in value to $4,000 "of the property, goods and chattels" of Drew, Robinson & Kelly, the defendant well knowing said bank-bills were taken by robbery, etc., contrary to the statute, etc.

Argued before the Chief Justice, and RANDOLPH, Justice, by *Barkalow*, for the State, and *A. S. Pennington*, for defendant.

RANDOLPH, J., delivered the opinion of the court.

As choses in action and bank-bills had no intrinsic value at common law, and were not the subject of larceny or robbery,[1] the question is, whether they are included in the statute respecting the receiving of stolen goods or goods and chattels taken by robbery. The language of the act is,[2] "if any person shall receive or buy any goods or chattels, that shall be stolen or taken by robbery," etc. In the thirty-fourth, thirty-fifth and thirty-sixth sections of the same act, which treat of the crime of larceny, the phrase used is, "shall steal of the money or personal goods and chattels," but in the thirty-seventh sec-

[1] 1 Hawk. 142; 4 Bla. Com. 234; Archb. Cr. Pl. 65.

[2] Rev. Stats. 299, sec. 72.

tion, which applies to double larcenies, the words "goods and chattels," only are used. Sections 38 and 39 respecting robbery, and assault with intent to rob, etc., make use of the words "money, or personal goods and chattels," and the forty-fifth section makes the stealing or taking by robbery of any bank-bill or note, bill of exchange, order, etc., a misdemeanor of the same degree and nature as if the offender had stolen or taken by robbery "any other goods of like value, with the money due on such bank-bills," etc., "money, wares, merchandise, goods, or chattels" are used in the fifty-second section, which relates to obtaining goods under false pretenses. The same phraseology is used in all the preceding statutes applied to the respective crimes, as is now used in the Revised Statutes, they being copied almost literally from the English statutes. Thus the 3 William and Mary[1] states that if any person shall, "buy or receive any goods or chattels," feloniously taken or stolen, he shall be deemed an accessory; and 5 Anne,[2] George I.,[3] and 22 George III.,[4] all relating to receivers of stolen goods make use of the words "goods" or "goods and chattels" only. "But," says a learned author, "it has often been determined that receivers of stolen money are not within the statutes."[5] In the case of *Sadi* and *William Morris*,[6] it was directly ruled, by a majority of the ten judges, that bank-notes were not within the statutes relating to the receiving of stolen goods; one of the judges thought the construction would have been the same, if the act of 2 George II., which first made the stealing of bank-bills felony, had been passed prior to the act of 3 William and Mary; but other judges thought that inasmuch as 2 George II. had rendered the stealing of bank-notes felony, it drew after it all the incidents of felony at common law, and therefore included receivers as accessories after the fact; the majority, however, considered the offense not within the statute, and refer to *Cayle's Case*,[7] and *Miller* v. *Race*.[8] See also 3 Burn Justice[9] and 4 Blackstone's Commentaries.[10] In *Rex* v. *William and Anne Gaze*,[11] who were convicted, the former of stealing and the latter of receiving a promissory note, eleven of the judges were unanimously of the opinion that William Gaze was not rightfully convicted under the statute of 3 William and Mary. Upon the reason assigned by Justice Ashurst, in *Rex* v. *Sadi and William Morris*, that although 2 George II., making the stealing of notes and securities felony, would draw after it all the common-law incidents of felony, and render accessories liable, yet re-

[1] ch. 9 sec. 4.
[2] ch. 31, sec. 4
[3] ch.11.
[4] ch. 58.
[5] See 2 East's Cr. L. 748.
[6] 2 East, 748, and Leach's Cr. Cas. 404.
[7] 8 Co. 33; Yelv. 68.
[8] 1 Burr. 457.
[9] Tit. Larceny, 38.
[10] p. 133; note 12.
[11] R. & R. 388.

ceivers were not accessories at common law, and were not included. This appears to be the settled construction of the English statutes, though there are some cases not entirely reconcilable with it. Thus, in *King* v. *Crone*, defendant was convicted of a misdemeanor for receiving a promissory note, under the act 23 and 24 of George III., which mentions only goods and chattels.[1] So there have been several convictions for receiving bank-bills under 12 Anne[2] which mentions money, goods or chattels. In *Rex* v. *Vyse*,[3] the conviction was sustained only on those counts which charged the promissory notes as so many pieces of stamped paper of the goods and chattels of J. W. These difficulties, however, have all been obviated in England by the passage of the statute of 3 George IV.,[4] which makes the receiving of bank-bills, promissory notes and other securities a distinct and independent offense. The case of *Boyd and wife*[5] puts the same construction on the New York statute as *Rex* v. *Morris* does on the English acts; and since that decision the New York statute has been amended. Our statute makes the receiving of goods and chattels stolen or taken by robbery a distinct offense, and not as accessory to the larceny or robbery; and although subsequent sections render the stealing or taking by robbery bank-bills, as well as goods and chattels, an indictable offense, yet these can not draw after them, as a necessary consequence, another distinct and independent offense; so that whether common law or statutory accessories are included or not in the principal act under the English statute, neither can be included under ours, for that embraces no such offense as accessory to the larceny or robbery, but the receiving is a misdemeanor by the statute, and by that which alone creates the crime, must it be defined and specified; and as that does not include bank-bills, although the other sections of the act do, it is to be presumed that the Legislature never intended that the receiving of stolen bank-bills should be an indictable offense. In the case of *Sadi and William Morris* (before referred to) the court remark, that bank-bills having no peculiar mark may enter into the currency, be passed as such, and so received; and hence the propriety of including them in the offense for receiving stolen goods is much questioned.

The indictment, therefore, can not be sustained.

[1] 3 Br. Cr. Ca. 47.
[2] ch. 7.
[3] 1 Br. Cr. Ca. 218.
[4] p. 24.
[5] To be found in 3 City H. Rec. 57.

## NOTES.

§ 581. **Receiving Stolen Goods — Goods Must be Stolen.** — The goods must be stolen.[1]

§ 582. —— **Receiving Embezzled Property.** — Receiving embezzled property is not within the penal code of Texas.[2]

§ 583. —— **Goods must be Actually in Prisoner's Possession.** — This is essential to the crime.[3] In *Commonwealth* v. *Sheriff*,[4] the prisoner swore that he found his stolen iron upon the prisoner's scales, who with the carter were weighing it; but it had not been delivered to the prisoner. BREWSTER, J., said: "If this had been a sale by the lawful owner of the iron, the right of property and of possession would have remained in the vendor until actual delivery. For aught that here appears, the defendant might have refused to complete the bargain or take the iron. There was a *locus pœnitentiæ*, very small, perhaps, but still sufficient to entitle the defendant to the benefit of the doubt.

§ 584. —— **Stoppage in Transitu Before Receipt.** — So if the goods get back into the owner's possession, or are stopped *in transitu*, the crime is not complete.[5]

In *R.* v. *Hancock*,[6] a lad was detained on leaving his master's premises, and a policeman sent for who searched him, and took a stolen cigar the property of his master, from him in the master's presence. In consequence of the lad's statement, the cigar was returned to him, with five others which the lad took to the prisoner and gave to him. It was held that the case was not distinguishable from *R.* v. *Dolan*,[7] and the prisoner could not be convicted.

§ 585. —— **Knowledge Essential.** — The receiver must know that the goods were stolen.[8] In *R.* v. *Wood*,[9] the prisoner was indicted for receiving stolen goods, knowing the same to have been stolen. The facts were that a boy had been convicted of stealing from his employer the silver tops of a whip and two walking sticks. It appeared he had sold them to the prisoner, a "a general dealer," and he was examined on the trial of the boy, and stated that he gave 3s for the articles, and that the boy had said he got them from the coachman, of one B. The value was stated to have been three times the sum which the prisoner gave for them.

The boy was now examined, and stated that he had broken up the sticks and taken the silver mountings in a detached state to the prisoner, and that he had given 2d, 6d, and 9d for them. On cross-examination it appeared that he had been in the service of B., whose man had sent him repeatedly to the prisoner with articles of a very varied character to sell; and that on the first occasion the prisoner asked him who he was, and had a note of introduction from B. or

[1] State *v.* Shoaf, 68 N. C. 378 (1873).

[2] Leal *v.* State, 12 Tex. (App.) 279 (1882).

[3] R. *v.* Wiley, 1 Den. 43 (1050).

[4] 3 Brewst. 342 (1868).

[5] R. *v.* Schmidt, 10 Cox, 172 (1866); R. *v.* Dolan, 6 Cox, 449 (1855).

[6] 14 Cox, 119 (1878).

[7] 6 Cox, 449; Dears. 436.

[8] Wilson *v.* State, 12 Tex. (App.) 48 (1882).

[9] 1 F. & F. 497 (1859).

his man; and that he was never told by the witness that he had left the employment of B.

MARTIN, B. (to the jury): If you think that the prisoner did not know that the boy had left the service of B. you should acquit him. For you must not find him quilty if you infer that he had no guilty knowledge.

*Verdict, not guilty.*

The fact that the goods are found on the prisoner's premises is not sufficient alone to sustain a conviction.[1]

§ 586. **Stealer not Receiver.** — The stealer of the property can not be convicted of receiving stolen goods.[2]

§ 587. —— **Principal and Accessory.** — One of several principals or an accessory can not be a receiver.[3]

§ 588. —— **"Goods" — Bank-notes.** — The receiver of a bank-note is not a receiver of stolen "goods" within the statute,[4] and bank-notes are not "goods and chattels."[5]

§ 588*a*. —— **Receiving Property Stolen from Mail.** — In *United States* v. *Montgomery*,[6] it was held that to constitute the guilty receiving of property stolen from the mail, as defined and punished by section 5470,[7] it must appear that the defendant voluntarily took the property into his control and possession, or voluntarily had it in his possession and control, with intent to prevent the larceny or the thief from being discovered, or the property from being reclaimed by the true owner, or for his benefit; but it need not appear that he received it with intent to make any gain or profit thereby to himself. A guilty concealing also implies that the defendant voluntarily secreted the property or put it out of the way, or in some manner disposed of it with like intent as in the case of receiving. To aid in concealing the stolen property the defendant must do some act with intent to assist the thief or other person, then in the guilty possession of the property, in concealing it, or furtively disposing of it, with a like intent as in the case of receiving. The possession by the defendant of gold coin received at the mint in exchange for gold dust stolen from the mail, will not support an indictment under section 5470,[8] for receiving or concealing, or aiding in concealing, property, knowing that it had been stolen from the mail.

DEADY, J., delivered the following charge: The indictment in this case is founded upon section 5470 of the Revised Statutes, which, among other things, provides that any person who shall receive or conceal, or aid in concealing, any article of value, knowing the same to have been stolen or embezzled from the mail of the United States, shall be punishable by a fine of not more than $2,000, and by imprisonment at hard labor not more than five years. The reason and necessity of such a statute is apparent. The post-office is one of the principal departments of the government. Upon the security and celerity with which the mails are carried and delivered throughout the country depends to a great extent the preservation of the business and social relations of the people. Upon

[1] R. *v.* Pratt, 4 F. & F. 315 (1865).

[2] State *v.* Honig, 9 Mo. (App.) 298 (1881).

[3] R. *v.* Coggins, 12 Cox, 517 (1873).

[4] Rutherford *v.* Com., 2 Va. Cas. 141 (1818).

[5] State *v.* Calvin, 22 N. J. 207 (1849); Boyd's Case, 3 City Hall, Rec. 59 (1818).

[6] 3 Sawy. 344 (1875).

[7] Rev. Stats.

[8] Rev. Stats.

the long-established maxim that "a receiver is as bad as a thief," the statute has also provided for the punishment of persons who assist others in stealing or embezzling from the mails by receiving the stolen property, or concealing it, or aiding in concealing it, substantially in the same manner as the thief himself. By this indictment the defendant is accused, in different modes or counts, of receiving, concealing, and aiding in the concealing, of three cans of gold dust, of the aggregate value of $1,830, the same having been stolen from the mails of the United States, to the knowledge of the defendant, in October, 1874, near Canyonville. But these seventeen counts only charge one crime, that of receiving, concealing, and aiding in the concealing of the stolen dust, under the circumstances stated, and the proof of receiving, concealing, or aiding in concealing, is sufficient to establish the guilt of the defendant. To this indictment the defendant has pleaded not guilty, and the effect of this plea is to put in issue or controvert all the material allegations of the indictment. This being so, the burden of proof is upon the United States to prove to your satisfaction each of such allegations, before it can ask a verdict of guilty at your hands. The defendant stands before you as a person charged with the commission of a grave crime, and the fact that she is also a woman and a mother does not change the rules of law or the duties of jurors in such cases. In determining the question of her guilt or innocence, you are not to be swerved by any sympathy for her sex or condition, but you are to say truly whether she is guilty or not as charged, irrespective of such considerations or the consequences to her or others that may follow your verdict. Of course, the fact that the defendant is a woman may be more or less material in judging of her conduct and motives in fleeing the country as she did with Harmison, the party who appears to have stolen this dust aud had it in his possession. In considering their relations and intimacy, upon the question of whether this stolen dust was received or concealed by her, or her aid, you may properly consider the fact of the difference in their sex — that they were traveling and cohabiting together as man and wife, with trunks and other traveling gear in common. The indictment charges that the defendant and Harmison both committed this crime, without alleging whether it was done jointly or severally, and counsel for defendant now insists that neither party can be found guilty of a separate receiving under such a charge. Waiving the consideration of that precise question, as not being material to the present aspect of the case, the fact being that Harmison has been discharged from this indictment upon his plea of *autrefois convict*, the defendant is now being tried upon it alone, and may be found guilty under it of committing the crime therein charged, separately. Before the defendant can be found guilty of the charge in the indictment the United States must show that the gold dust in question was stolen or embezzled from its mails. The record of Harmison's conviction in this court of the crime of stealing three similar cans of gold dust from the mails has been introduced in evidence. This is sufficient evidence of the fact until the contrary appears, it being also shown or proven to your satisfaction that the property mentioned in the two indictments is the same. It must also be shown that the defendant, knowing it to have been so stolen or embezzled, received it from the thief, or concealed, or aided the thief or some one else in concealing it. To constitute a guilty receiving of stolen property by the defendant, it must appear that she voluntarily took it into her control and possession, or voluntarily had it in her possession and control, with intent to prevent the larceny or the thief from being discovered, or the property

from being reclaimed by the true owner or for his benefit; but it need not appear that she received it with intent to make any gain or profit thereby to herself. A guilty concealing also implies that the defendant voluntarily secreted this dust, or put it out of the way, or in some manner disposed of it with a like intent as in this case of receiving. To aid in concealing stolen property, a party must do some act with intent to assist the thief or other person, then in the guilty possession of the property, in concealing it, or furtively disposing of it, with a like intent as in the case of receiving. The possession of property by the defendant for which the stolen dust was exchanged — as, for instance, gold coin for which it may have been exchanged by Harmison at the Philadelphia mint — will not support the charge in the indictment. The possession of such coin would not be the possession of the stolen property, and would not of itself tend to prove the defendant guilty of the charge in the indictment. But if the stolen dust was made into coin, this circumstance would not change its identity, and the possession of such coin would be the possession of the stolen property. But this can not be a material question in this case because it is admitted that, if this dust was changed into or for coin by Harmison, it was done at the Philadelphia mint. Now the defendant can not be convicted of the crime charged in the indictment upon proof of receiving, concealing, or aiding in concealing, this dust or the coin into which it may have been changed beyond this district — without the State of Oregon. Evidence has been given to you in regard to the conduct and declarations of Harmison and the defendant beyond this district, during their journey to Texas and back again, but only for the purpose of throwing light upon their acts and conduct while in the district. It being incumbent on the United States to show that this dust was stolen from the mails, instead of introducing the record of Harmison's conviction of the theft, in the first instance, the prosecution saw proper, as it had the right to do, to go into the original proof of the fact. In so doing the acts and declarations of Harmison, both within and without this State, tending to prove that the larceny was committed by him, have been given to you. But you are to remember that this evidence was only received for the purpose of proving the theft of the property, and that the defendant is not to be affected by the acts or declarations of Harmison, only so far as it appears the former were known to her or the latter were made to her, or in her presence, and assented to by her. Although you should find that the defendant knew from Harmison, or otherwise, that this dust had been stolen from the mails, that itself is not sufficient to convict her of the crime charged. And, in this connection, it may be material for you to consider the sex of the defendant for the purpose of determining whether her flight, and subsequent association with Harmison, was as his accomplice in the crime or his paramour. Proof that the defendant fled the country with the thief as his wife is not sufficient to sustain the charge in the indictment. A woman who deserts her husband and flees the country with another man who has committed larceny, ought not to complain if a jury finds her guilty of receiving, or aiding in concealing, the property stolen by her paramour, upon circumstances which would be deemed insufficient in the case of an honest woman. But you are not to convict the defendant of the crime charged in the indictment because she appears to have been guilty of the crime of adultery. The defendant's illicit relation with Harmison may have afforded her favorable opportunities, and offered strong temptations, to assist him in concealing the fruits of his crime, but it is not sufficient of itself to establish

the fact that she did so assist him. But whatever her conduct or condition the law presumes that the defendant is innocent of the crime charged against her until the contrary is proven beyond a reasonable doubt. In this respect, and so far as the crime charged in the indictment is concerned, she stands before the law as the peer of any woman, however virtuous or honorable. This presumption of innocence is the shield which the law interposes between her and her accusers, and it can not be thrust aside or beaten down except by the force of evidence which shall satisfy your minds, beyond a reasonable doubt of her guilt. A reasonable doubt is a substantial one — not a mere whim, caprice or speculation. It arises out of the case, from some defect or insufficiency in the evidence which makes a juror hesitate and feel that he is not satisfied. Mathematical certainty is not attainable in criminal trials. If you are morally certain of the defendant's guilt you should say so by your verdict, but unless you are, however you may suspect it, you must say not guilty. You are the judges of the credibility of the witnesses and the weight to be given to their testimony. The evidence of Cardwell, tending to show that the defendant attempted to suborn him to swear falsely on the trial of Harmison, was admitted without objection, but it is my duty to say to you that it is not relevant or competent proof of the crime charged in this indictment. It may tend to show that the defendant was willing to run any risk, or even commit a crime, to save her paramour from conviction and punishment, but it does not prove that she committed the crime for which she is on trial. Montgomery, the late husband of the defendant, is contradicted by several witnesses and by the reporter's notes of his testimony on Harmison's trial. Besides, it appears from his own evidence that he knew of the theft soon after it was committed, in October, 1874, and had had the gold dust in his buggy and in his house without disclosing the fact. Besides, Cardwell, a witness called by the prosecution, testifies that Montgomery saw him at Canyonville, about the time the warrants were sworn out for Harmison and the defendant, and urged upon him the necessity of their — that is, Montgomery and Cardwell — making up a good story about the robbery, and sending Harmison and the defendant "up." Upon this trial he testified that when Harmison left this dust for him at the toll house the defendant said he was foolish not to take it, when he spoke of their little child, and said it would ruin them. Upon cross-examination he stated that he testified to this conversation on Harmison's trial, but it appears from the reporter's notes that he did not. The witness was the husband of the defendant, and she deserted him for Harmison. He may entertain unkind feelings towards her on this account, he may desire, as he said to Cardwell, according to the latter's testimony, to "send her up." All these circumstances go to affect the credibility of this witness. What weight shall be given to his testimony you must judge, always remembering that a witness who is intentionally false in a material part of his testimony ought to be at least distrusted as to the rest of it. The postal agent, Mr. Underwood, who acted as deputy marshal in pursuing and arresting Harmison and the defendant at Seguin, Texas, and bringing them here for trial, testifies to conversations and confessions of the defendant all along the route from there here. This kind of testimony should be received with caution. The witness testified in a very indefinite manner as to the time and place of these conversations — giving them apparently in his own language and not always in the same words. After being on the stand one afternoon, and apparently going over the same subject, he came back the next morning and

testified to important conversations with the defendant in Texas, and between there and St. Louis, which he had not stated the day before, or apparently remembered. Besides, in stating a material part of a particular conversation, he first said she used the word "they," and afterwards said she used "we"—a change which makes a material difference in the sense and effect of the admission. I make these suggestions not by way of calling in question or casting doubts upon the integrity of the witness, but that his testimony may be received with due caution. Apparently this prosecution was set on foot by him, and he has since been earnestly engaged in the arrest of Harmison and the defendant and the pursuit of evidence to secure their conviction, and he is liable to be unconsciously influenced by his zeal in the premises and the very natural desire of success in what he has undertaken. Upon the subject of verbal confessions, I read to you, as a part of my charge, from 1 Greenleaf on Evidence,[1] as follows: "The evidence of verbal confessions of guilt, is to be received with great caution. For, besides the danger or mistake from the apprehension of witnesses, the misuse of words, the failure of the party to express his own meaning, and the infirmity of memory, it should be recollected that the mind of the prisoner himself is oppressed by the calamity of the situation, and that he is often influenced by motives of hope or fear to make an untrue confession. The zeal, too, which so generally prevails, to detect offenders, especially in cases of aggravated guilt, and the strong disposition in the persons engaged in the pursuit of evidence, to rely on slight grounds of suspicion, which are exaggerated into sufficient proof, together with the character of the persons necessarily called as witnesses, in cases of secret and atrocious crime, all tend to impair the value of this kind of evidence, and sometimes lead to its rejection, when, in civil actions, it would have been received." The weighty observation of Mr. Justice Foster, is also to be kept in mind, that this evidence is not, in the ordinary course of things, to be disproved by that sort of negative evidence by which the proof of plain facts may be, and often is, confronted. Subject to these cautions in receiving them and weighing them, it is generally agreed that deliberate confessions of guilt are among the most effectual proofs in the law. Their value depends on the supposition that they are deliberate and voluntary and on the presumption that a rational being will not make admissions prejudicial to his interest and safety, unless when urged by the promptings of truth and conscience. Such confessions, so made by a prisoner, to any person, at any moment of time, and at any place subsequent to the perpetration of the crime, and previous to his examination before the magistrate, are at common law received in evidence, as among proofs of guilt. The only direct evidence in the case which brings this defendant into what might be considered possession of this dust, in Oregon, is that of Montgomery, concerning the dust being left at the toll-house, near Canyonville, where he and she lived in the spring of 1875. According to his account, he came home one day and found his wife, the defendant, lying on the lounge in the front room, when she laughed and said: "Dan Smith (Harmison) has been here and left you a present." He asked what it was, and she replied by rising up and leading him into the back room, and pointing him to a sack in the potato box. He put his hand into the sack, felt the cans of dust, and drew one of them in sight, when he said: "It is that

1 secs. 214, 215.

d—d infernal dust! Give it back to him, and have nothing to do with it." The defendant urged him to keep the dust; but he declined, saying that it would be the ruin of them, when she promised to return it, and Montgomery never saw it afterwards. Upon this evidence, assuming it to be true, I do not think, as a natter of law, that the defendant was then and there guilty of the crime charged in the indictment. A package is brought to the house and left with her for her husband, which she delivered to him, and he refuses to accept it, and directs her to return it to the person who brought it, which she does. This alone, does not make her guilty of receiving, concealing, or aiding in the concealing of stolen property, even if we assume, as is probable, that she knew these cans of dust had been stolen from the mails. And although it was wrong to advise her husband to take it (if she did), yet she did not hereby commit the crime with which she is charged. Gentlemen of the jury, the case is now submitted to you, to say upon your oaths, under the law and evidence given you in court, whether the defendant is guilty or not. Take the law so given you, and apply it to the facts, as you may find them from the evidence, and make up your verdict accordingly.

*Verdict, not guilty.*

# PART V.

# ROBBERY.

---

## ROBBERY—FORCE AND VIOLENCE ESSENTIAL.

## McCLOSKEY v. PEOPLE.

*In the Supreme Court of New York, 1862.*

[5 Park. 279.]

1. **The Mere Snatching a Thing** from the hand or person of another without any struggle or resistance by the owner, or any force or violence on the part of the thief, will not constitute robbery. Where the court instructed the jury that feloniously taking another's property with violence sufficient to constitute an assault and battery would make out the crime of robbery, it was held to be erroneous, and the prisoner having been convicted under such a charge, the judgment was reversed.
2. **When the Property is not Obtained by Putting the Person** in fear of immediate injury to the person, the violence necessary to make the offense amount to robbery must be sufficient to force the person to part with his property, not only against his will, but in spite of his resistance.

The prisoner was indicted for a robbery, charged to have been committed on Halsey F. Wing, in taking violently from his person four silver coins of the value of one dollar, and one hat of the value of four dollars.

The prisoner pleaded not guilty, and was tried at a Court of Sessions held in the County of Kings, in March, 1862, before the county judge and the justices of the Sessions.

Halsey F. Wing, called by the district attorney, testified as follows: I never knew defendant before the evening in question; he came into White's drinking saloon; think it was about 11 o'clock p. m.; he came in with a young man and had a drink; he then asked if I couldn't treat; I said I supposed so; took a drink with them; I paid for it; started to go; he said I must go with him; took hold of my arm and pulled me out; said he was going down Ryerson Street; pulled me with him, asked me how much money I had; said not much; he said let me see it. I pulled out some change from my pocket, and held it close in my hand; he said I had more money than that; jumped around in front of me, had one arm around my neck, put his hand in my pocket, pulled out a half-dollar and a smaller coin and knife; said I could have the knife, and handed it back to me; he called me Belknap; said he would be easy with me if I'd give him some money. I asked

him if he wanted to rob me; I ran up on the stoop and rang the bell. He came up, I got hold of his hands and held him, and kicked against the door; I pushed him off the stoop; he came up again; I pushed him off again; he got up, took my hat and ran away; went to the station house, got an officer and had him arrested; he came out of a liquor store in Myrtle Avenue, not quite a block from where the difficulty took place.

During the cross-examination of the witness he stated: —

The defendant had been drinking that night; didn't consider him intoxicated; I consider a man intoxicated when he staggers from one side of the sidewalk to the other, not otherwise; he put his hand in my right side pocket; he stood in front of me at the time; stood so, probably fifteen seconds, or perhaps not so long; we walked along together; before that he had hold of my arm; he took a fifty cent piece and another coin; don't know what it was; smaller than fifty cents; he gave me the knife back; witness had some small coin in the right hand holding; don't know what was done with the other; remember I broke loose and ran away from him; I tried to get loose from him whilst he had his hand in my pocket; tried to shove him away with my left hand I think; am not positive; I shoved him away with my left or right hand; am not positive I shoved him with the other hand; I stepped back from him or tried to; he, defendant took the change out of his, witness' right pocket; knew a fifty cent piece and some other change remained; don't know how much I had in my hand; left fifty cents and coin in my pocket; didn't want him to know how much; didn't try to prevent his putting his hand in my pocket; it was there before I knew he intended to do it; I knew when he drew his hand out; he put it in and took it out in an instant; don't remember I said any thing at the moment he put his hand in or out; I turned round and tried to get into the house; don't know that I stepped in front of him.

Q. What were you doing with your right hand while the defendant had his arm over your shoulder, and his hand in your pocket? A. I had some small change in my right hand holding. Q. What were you doing with your left hand during this time? A. I don't know. Q. What did he say to you while he had his hand in your pocket? A. Nothing. Q. What did you say to him? A. Nothing. I tried to shove him away with my left hand I think; I am not positive; I can not say that I did any thing; he took his arm from my shoulder when he took his hand out of my pocket; I am not positive I shoved him with either hand; I stepped back from him or tried to. Q. Did you do any thing to prevent him from putting his hand in your pocket? A. I did not. Q. Did you do anything to prevent him from taking the money out of your pocket? A. No. Q. Did he make any threats? A. No. Q.

Were you frightened at the time he took the money? A. I did not know but he was playing or joking with me when he put his hand in my pocket. Q. Then it did not occur to you at the time that he was robbing you? A. No. Q. When did it first occur to you? A. After he took the money and asked me if I hadn't more; he did not injure me in any way; he talked friendly and good-naturedly the little way we came together. I walked along with him of my own accord, when he pulled me out of the door; I took it to be good natured.

*Re-direct:* I had bills about me; I paid for the drinks I took with him in change; he shoved my vest up; had bills in my pocket; that was after he took the money out of my pocket.

*By the Court*, EMMOT, J. The Revised Statutes define robbery in the first degree to consist in feloniously taking personal property of another from his person, or in his presence against his will, by violence to his person, or by putting such person in fear of immediate injury to his person.[1] The common-law definition of robbery was the same.[2] The mere snatching anything from the hand or the person of any one, without any struggle or resistance by the owner, or any force or violence on the part of the thief, will not constitute robbery.

In *Gascoigne's Case*,[3] the prisoner snatched some money out of the pocket of a woman whom he was conveying to prison on a criminal charge. The prisoner was not a constable, but attended the police office as a runner. He was convicted of robbery and the conviction was sustained on the ground, which was proved, that he had violently forced the woman into a coach and handcuffed her, with the felonious intent of getting her money, and the direction to the jury at the trial put the case upon this exclusively. The cases which are often cited of taking an ear-ring, which was held to be a robbery when it was taken with such violence as to lacerate the ear of the wearer, or a diamond hair ornament, tearing out with it a part of the lady's hair from her head, are illustrations of the rule as to the degree of violence necessary to constitute the offense of robbery.[4]

The court below in the present case instructed the jury in effect that feloniously taking another's property with violence sufficient to constitute an assault and battery, would make out the crime of robbery; and again, that if they believed the story of the principal witness, the offense was made out.

In these instructions the judge was in error.

In the cases to which I have referred, as well as to many others to be found in the books, the snatching of the property was sufficient to con-

[1] 2 Rev. Stats. 677, sec. 55.

[2] 4 Bla. Com. 243; 1 Hale's Pl. vol. 1, ch. 46; 2 East's Cr. L., ch. 16, sec 124, *seq.*

[3] Leach, 313; East Cr. L., vol. 2, p. 709.

[4] Leach, 238.

stitute an assault and battery, yet that alone did not make the felonious taking more than a larceny. The property must be taken by violence to the person, which means more than a simple assault and battery. The violence must be sufficient to force the person to part with his property, not only against his will but in spite of his resistance. The rule of law laid down by the court below went further than the authorities justify, and the application of the rules to the facts was also incorrect. The proof showed that the prisoner took the money which he stole out of the prosecutor's pocket, while they were walking together in a friendly manner. No more force was used than was sufficient to pull the money out of the pocket of the witness. Both men had been drinking, and the prosecutor, at the time of the act, evidently considered and treated the prisoner's conduct as a joke. He made no resistance, and yielded neither to force nor fear. If he was led to entertain the idea that the prisoner intended to rob him, or to any fear or apprehension of violence or injury from him, it was not, as he himself states, until after this offense was committed.

Under these circumstances, the violence to the person in taking the property, which is the essential element of robbery, was wanting, and the prisoner's offense was simply a larceny.

The judgment of the Court of Sessions must be reversed and a new trial ordered.

---

## ROBBERY — USE OF FORCE NECESSARY — OR TERROR.

## STATE *v.* JOHN.

[5 Jones (L.), 163; 69 Am. Dec. 777.]

*In the Supreme Court of North Carolina, 1857.*

1. **Robbery is Committed by Force, Larceny by Stealth,** and where there is no violence or circumstance of terror resorted to for the purpose of inducing the owner to part with his property, for the sake of his person, the crime committed is not robbery, but larceny.
2. **To Constitute Robbery,** the force used must be either before or at the time of the taking, and of such nature as to show that it was intended to overpower the party robbed, or to prevent resistance on his part, and not merely to get possession of the property.

Indictment for highway robbery. The only facts necessary to an understanding of the points decided, are, that one Brooks, the prosecuting witness, was sitting in and driving his wagon along a road one evening after dark, when he overtook the defendant. They traveled on together, the defendant walking, and Brooks riding, until defendant told

him that he had found a bill of money, and that he wished Brooks to tell him its denomination. Brooks objected, but defendant insisted. At length a torch was lighted and the bill examined. Its amount being large, excited the suspicions of Brooks, and caused him to take particular notice of defendant's face, his wearing apparel, etc. While Brooks was examining the bill, he felt defendant's hand in his pocket on his pocket-book. He seized defendant's arm, who at the same time snatched the bill. A scuffle took place. Brooks was thrown out of his wagon. When he arose, defendant had escaped, taking with him the bill, and also the pocket-book, containing two hundred and twenty-seven dollars. Brooks testified that defendant was the man who committed the crime. Defendant was convicted, sentenced to death, and took this appeal.

*K. P. Battle* and *William H. Bailey* and *William A. Jenkins*, Attorney-General, for the State.

Defendant was not represented by counsel.

*By the Court*, PEARSON, J. Robbery is committed by force; larceny by stealth. The original cause for making highway robbery a capital felony, without benefit of clergy, was an evil practice in former days very common, of meeting travelers, and by a display of weapons, or other force, putting them in fear ("stand and deliver"), and in this way taking their goods by force. Hence, the indictment (the form is still retained) contains this allegation: "And him [the person robbed] in bodily fear, and in danger of his life, in the highway, then and there, did feloniously put:" and it was for a long time held that the allegation must be proved.

In Foster's Criminal Law,[1] is this passage: "The prisoner's counsel say there can be no robbery without the circumstance of putting in fear. I think the want of that circumstance alone ought not to be regarded. I am not clear that that circumstance is of necessity to be laid in the indictment so as the fact be charged to be done *nolenter et contra voluntatem.* I know there are opinions in the books which seem to make the circumstance of fear necessary, but I have seen a good manuscript note of an opinion of Lord Holt to the contrary, and I am very clear that the circumstance of actual fear at the time of the robbery need not be strictly proved. Suppose the true man is knocked down without any previous warning to awaken his fears, and lieth totally insensible while the thief rifleth his pockets, is not this robbery? And yet, where is the circumstance of actual fear? Or suppose the true man maketh a manful resistance, but is overpowered, and his property taken from him by the mere dint of superior strength, this doubtless

[1] p. 128.

is robbery. In cases where the true man delivereth his purse without resistance, if the fact be attended with those circumstances of violence and terror which in common experience, are likely to induce a man to part with his property for the sake of his person, that will amount to a robbery. If fear be a necessary ingredient, the law *in odium spoliatoris* will presume fear, where there appeareth to be so just a ground for it."

In Foster's day, it would not have occurred to any lawyer, that the facts set out in the record now under consideration made a case of highway robbery. There was no violence — no circumstance of terror resorted to for the purpose of inducing the prosecutor to part with his property for the sake of his person.

Violence may be used for four purposes: 1. To prevent resistance. 2. To overpower the party. 3. To obtain possession of the property. 4. To effect an escape. Either of the first two makes the offense robbery. The last, I presume it will be conceded, does not. The third is a middle ground. In general, it does not make the offense robbery, but sometimes, according to some of the cases, it does. It is necessary, therefore, to see how the authorities stand in respect to it.

After Foster's day, the idea of robbery was extended so as to take in a case of snatching a thing out of a person's hand, and making off with it, without further violence, but in *Horner's Case*,[1] tried before Buller, J. and Thompson, B., it was held that snatching an umbrella out of a lady's hand as she was walking the street, was not robbery, and the court say: "It had been ruled about eighty years ago, by very high authority, that the snatching any thing from a person unawares constituted robbery; but the law was now settled that unless there was some struggle to keep it, and it were forced from the hand of the owner, it was not so. This species of larceny seemed to form a middle case between stealing privately from the person and taking by force and violence." In *Lapier's Case*,[2] an ear-ring was so suddenly pulled from a lady's ear that she had no time for resisting, yet being done with such violence as to injure her person, the blood being drawn from her ear, which was otherwise much hurt, it was held to be robbery. So in *Moore's Case*,[3] a diamond pin which a lady had strongly fastened in her hair with a corkscrew twist, was snatched with so much force as to tear out a lock of hair, it was held robbery, because of the injury to the person. Possibly the ground on which these two cases is put may be questioned, as the injury to the person was accidental, and seems not to have been contemplated; but they have no bearing on our case.

In *Davies' Case*,[4] the prisoner took hold of a gentleman's sword,

[1] 2 East's P. C. 703.
[2] *Id.* 708.
[3] 1 Leach, 335.
[4] 2 East's P. C. 709.

who, perceiving it, laid hold of it at the same time and struggled for it. This was adjudged to be robbery.

In *Mason's Case*,[1] the prisoner took a watch out of a gentleman's pocket, but it was fastened to a steel chain which was around his neck. The prisoner made two or three jerks, until he succeeded in breaking the chain. Parke, B., instructed the jury that this was robbery, but doubts being expressed, he referred it to all the judges who were unanimous in the opinion that it was robbery, because of the force used to break the chain which was around the gentleman's neck. This is all the report says. It is short, and to me unsatisfactory, seeming to go back to the idea of robbery that existed before *Plunket's Case.*

In *Gnosil's Case*[2] the prosecutor was going along the street, the prisoner laid hold of his watch chain, and with considerable force jerked it from his pocket; a scuffle then ensued, and the prisoner was secured. Garrow, B.: "The mere act of taking being forcible will not make this offense a highway robbery. To constitute the crime of highway robbery, the force used must be either before or at the time of the taking, and must be of such a nature as to show that it was intended to overpower the party robbed, or prevent his resisting, and not merely to get possession of the property stolen. Thus if a man walking after a woman in the street were, by violence, to pull her shawl from her shoulders, though he might use considerable force, it would not in my opinion, be highway robbery; because the violence was not for the purpose of overpowering the party robbed, but only to get possession of the property." This decision was four years after *Mason's Case*,[3] and I suppose Garrow, was then one of the judges. According to this case, which is the latest that we have met with, our case is not robbery, even if it be admitted to fall under the third head of violence above enumerated. Our case is clearly distinguishable from *Davies' Case*,[4] for both parties had hold of the sword and struggled for it. If Davies had let it go, there would have been no necessity for violence; and his holding on and struggling for it could only be imputed to his determination to take it by force. In our case, the prosecutor did not have hold of the pocket-book; there was no struggle for it; but he had hold of the prisoner's arm; so he could not by letting go the pocket-book, have avoided the necessity for violence; and the struggle, in which the prosecutor fell under the tongue of the wagon, is fairly imputable to an effort on the part of the prisoner to get loose from his grasp and make his escape. The only difference between this case and

1 2 Russ. & Ry. 419 (in 1820).

2 1 C. & P. 304; 11 Eng. Com. L. 400 (1824).

3 *supra.*

4 2 East's P. C. 709.

that of Gnosil is that the one succeeded in getting loose, and the other was less fortunate. Suppose in the struggle the prosecutor had been too strong for the prisoner, and had succeeded in arresting him, there was a taking of the pocket-book, and an *asportavit*, so as to constitute larceny in "picking of the pocket;" but would any one have said it amounted to robbery? Can the nature of the offense be changed by the accident, that the prisoner succeeded in getting away because the prosecutor happened to fall on the tongue and doubletree, which broke his hold from the arm of the prisoner?

Our case is also clearly distinguishable from *Mason's Case*.[1] The watch was fastened to a steel chain, which was round the neck of the prosecutor. Had Mason let the watch go, there would have been no necessity for violence; his holding on and jerking until he broke the chain could only be imputed to a determination to take the watch by force.

*State* v. *Trexler*,[2] was also cited in the argument. That was an indictment for forcible trespass. The defendant had taken a bank-note out of the pocket-book of the prosecutor, who tried to get it away from him. He resisted, and a struggle ensued. Seawell, J., *arguendo*, expresses the opinion that the evidence showed force enough to constitute robbery, although the prosecutor did not have hold of the bank-note. This, I suppose, was said to meet what Buller says in *Plunket's Case*, "unless there was some struggle to keep it, and it were forced from the hand of the owner." However that may be, it is sufficient to say that was a mere *dictum*. It is true, Judge Seawell was greatly distinguished as a criminal lawyer, but a *dictum* in reference to a capital offense can not be much relied on when thrown out in considering a misdemeanor.

After much consideration, I am convinced that the facts set out in this record do not constitute highway robbery. I am, therefore, of opinion that the judgment ought to be reversed and a *venire de novo* awarded.

NASH, C. J., absent.

Let the judgment be reversed, and this opinion certified, to the end that the prisoner may have a new trial.

[1] *supra*.

[2] 2 Car. Law Repos. 90 (6 Am. Dec. 558).

## ROBBERY — VIOLENCE ESSENTIAL — SNATCHING FROM HAND — SUBSEQUENT VIOLENCE.

## SHINN *v.* STATE.

(64 Ind. 13.)

*In the Supreme Court of Indiana, 1878.*

**Money was snatched** from A.'s hand by B. but without violence to his person, the only violence used being in preventing its recovery and struggling to retain it after it was taken. *Held*, that such snatching or taking was not such violence as to constitute robbery, and that subsequent violence, or putting in fear, will not make a previous clandestine taking robbery.

NIBLACK, J. The prosecution in this case was upon an indictment containing two counts.

The first count charged, that Robert Shinn and another person, whose name was to the grand jury unknown, "on the 15th day of August, A. D. 1878, at," etc., "did then and there unlawfully, forcibly and feloniously take from the person of Ithamar McCarty, by violence, three ten dollar National Bank bills, of the value of ten dollars each, and of the aggregate value of thirty dollars upon a national bank and national banks to the said grand jury unknown, of the personal property, goods and moneys of Jasper N. McCarty."

The second count charged the same person with stealing, taking and carrying away three ten-dollar national bank bills, describing such bills, in the same manner as in the first count.

Shinn, the appellant, plead not guilty, and, upon a trial by a jury, was found guilty of the robbery charged in the first count of the indictment. His punishment was fixed at a fine of one dollar and at imprisonment in the State prison for two years.

Disregarding a motion for a new trial, the court rendered a judgment of conviction upon the verdict.

One of the causes assigned for a new trial was the insufficiency of the evidence to sustain the verdict, and that constitutes the principal question to which our attention has been invited here.

Ithamar McCarty was the prosecuting witness, and the only witness as to most of the material facts relied on by the prosecuting attorney for a conviction.

He testified, that late in the evening of August 14, 1878, he went from Hancock County to the City of Anderson, in the county of Madison to sell some flax seed for his brother, Jasper McCarty; that he received a check for thirty-five dollars and eighty-five cents, the value of the flax seed, upon a bank of that city; that next morning, after he had received

the money on the check, he sat down on the step at a store door, to look over the money and to see that it was all right; that while so engaged, a man came up in front of him and engaged him in conversation; that this man, was the person designated in the indictment as the person unknown to the grand jury, and who was referred to upon the trial as the "padlock man," made some inquiry as to his (witness') future business intentions, saying that he had for sale a very remarkable padlock, denominated a burglar-proof padlock, or something of that kind, and suggesting that he, said McCarty, should become an agent for the sale of this padlock; that this unknown man, after some further conversation, left witness to get a specimen lock for his examination and further information; that after an apparent second effort to find a lock, the padlock man came to witness at an appointed place with a lock; that, thereupon, he and witness went walking together upon one of the streets, during which time he explained to witness how to unlock this specimen lock, claiming that no person not previously instructed could unlock it; that they soon came to the door of a church, where they sat down upon the step in the shade, and continued the discussion of the merits of the lock; that soon after they were thus seated, the appellant, who was a stranger to witness, came up in front of them and inquired when the train left for Rushville, remarking that his father, who lived in Marion, in Grant County, had had two horses stolen, and that he was in pursuit of the horses; that the padlock man then handed the lock to the appellant, with a remark that if his father had had such a lock on his barn as that, his horses would not have been stolen; that the appellant, taking the key, made a seeming effort to unlock the lock, but, failing, said the lock was a sham; that, being assured by the padlock man that it was a very easy thing to do if he only understood its workings, the appellant made another apparent effort to unlock the lock, but again failing, he handed the lock back, saying he would bet fifty dollars there was not a man in the State who could unlock that lock; that witness pulled out of his pocket three ten-dollar national bank bills, and holding them in his hands, remarked, that if he was a betting man, he would bet that amount that he would unlock the lock very easy; that at that point witness became suspicious that the padlock man was too anxious for him to bet, and was about to return these bills to his pocket, when the padlock man snatched them from his hand and handed them over to the appellant, who started off on a run; that the padlock man then took witness by the arms and shoved him over the steps in front of the church; that witness, getting loose, ran after appellant, and caught him by the arm and demanded a return of the money; that the padlock man again caught hold of witness, about which time the appellant handed back to witness a ten-dollar bill, requesting him to accept it as

compromise; that witness still hung on to appellant, insisting on a return of the remaining twenty dollars, when another tussle ensued, in which all three engaged, but the attention of others being attracted by this time, the padlock man very suddenly disappeared from the city, and the appellant was soon after arrested.

This we regard as a fair synopsis of so much of the testimony of the prosecuting witness as is necessary to indicate the character of the transaction for which the appellant was convicted as above set forth.

The synopsis above given embraces the substantial portions of the testimony which went most strongly against the appellant.

It is said that the principle of robbery is violence, but it has been held that actual violence is not the only means by which a robbery may be effected; that it may also be accomplished by fear, which the law considers as constructive violence.[1]

With respect to the degree of actual violence necessary to constitute a robbery, more than a sudden taking or snatching must be shown.

Archbold's Treatise on Criminal Practice and Pleading gives several illustrations in support of this rule, and concludes: "So that the rule appears to be well established, that no sudden taking or snatching of property from a person unaware, is sufficient to constitute robbery, unless some injury be done to the person, or there be some previous struggle for the possession of the property, or some force used in order to obtain it."[2]

The taking must not precede the violence or putting in fear. In other words, the violence or putting in fear will not make a precedent taking, effected clandestinely or without either violence or putting in fear, amount to a robbery.[3]

Applying the well established rules of law thus enunciated to the the cause in hearing, it is manifest that a case of robbery was not made out against the appellant, on the evidence.[4]

The evidence tended to show the fraudulent and felonious obtaining of money from the prosecuting witness by means of a previously arranged trick or contrivance, but did not sustain the charge of robbery contained in the indictment.[5]

The judgment is reversed, and the cause remanded for a new trial.

1 Donnally's Case, 1 Leach, 229; Long *v.* State, 12 Ga. 293.

2 vol. 2, p. 1290. See, also, 2 Whar. Cr. L., sec. 1701.

3 2 Russ. Cr. 108; 2 Archb. Cr. Pr. & Plead. 1289.

4 Brennon *v.* State, 25 Ind. 403; Hart *v.* State, 57 Ind., 102.

5 Huber *v.* State, 57 Ind. 341.

## ROBBERY — WITH INTENT TO MAIM OR KILL WITH DANGEROUS WEAPON.

## COMMONWEALTH *v*. GALLAGHER.

[6 Metc. 565.]

*In the Supreme Judicial Court of Massachusetts, 1842.*

**An Indictment, Which Alleges** that the defendant assaulted and robbed A., and being armed with a dangerous weapon, did strike and wound him, is not proved, as to the wounding, by evidence that the defendant made a slight scratch on A.'s face, by rupturing the cuticle only, without separating the whole skin; nor as to the striking, by evidence that the defendant put his arms about A.'s neck, and threw him on the ground, and held him jammed down to the ground.

An indictment was found against the defendants, on section 13 of chapter 125 of the Revised Statutes, which is in these words: "If any person shall assault another, and shall feloniously rob, steal and take from his person any money, or other property which may be the subject of larceny, such robber being armed with a dangerous weapon, with intent, if resisted, to kill or maim the person robbed, or if, being so armed, he shall wound or strike the person robbed, he shall suffer," etc. The indictment alleged that Thomas Gallagher and John Burns, on the 24th of February, 1842, with force and arms, at Tewksbury, in the county of Middlesex, "in and upon one Chauncy Cook, feloniously did make an assault and sundry bank-bills, current," etc., "of the value of thirty dollars, of the money and property of him the said Cook, from the person and against the will of him the said Cook, then and there feloniously and by force and violence, did rob, steal and carry away; and that they, the said Thomas Gallagher and John Burns, at the time of committing the assault and robbery aforesaid, were then and there armed with a certain dangerous weapon, to wit, with a pistol, and being then and there armed as aforesaid, they, the said Thomas Gallagher and John Burns, him the said Cook then and there feloniously did actually strike and wound, and with force and violence did then and there feloniously throw him on the ground, against the peace," etc.

The defendants were tried in the Court of Common Pleas, before CUMMINS, J., on the testimony of said Cook, which, so far as it related to the point now in question, was thus: "I asked the robbers what they wanted, and they replied, that they wanted my money, and if I did not deliver it, they would blow me through; and one of them drew a pistol, as I thought, and I turned and ran. They overtook me immediately, put their arms about my neck and threw me on the ground.

One of them held me jammed down to the ground, while the other opened my vest. I felt stiff the next day. There was a slight scratch on my face the next day. How it came there I do not know."

The counsel for the defendants objected that there was no sufficient evidence of an actual striking and wounding, to support the allegations in the indictment. The judge overruled the objection; but the question being, in his opinion, so important and doubtful, as to require the decision of the Supreme Judicial Court, he reported the case, as above, pursuant to the Revised Statutes.[1]

This case was decided at October term, 1842.

*B. F. Butler*, for the defendants. Under the section of the statute on which this indictment is founded, the striking and wounding must be with the dangerous weapon with which the robber is armed. In *Rex* v. *Harris*,[2] the defendant was indicted on statute 9 George IV.,[3] which enacts that any one, who "shall unlawfully stab, cut or wound any person, with intent to maim, disfigure or disable such person, etc., shall be guilty of felony." The proof was, that the defendant bit off the end of the prosecutor's nose. It was held that this was not a wounding, within the statute, which meant that the wounding should be inflicted by some instrument, and not by the hands or teeth.

But in the present case, there was neither a wounding nor striking. To constitute a wound legally or medically, the whole skin must be ruptured.[4] To strike is, "to make a quick blow or thrust," which is not done by putting one's arms about another's neck, throwing him down, and holding him jammed down.

*Austin*, Attorney-General, for the Commonwealth. The case of *Commonwealth* v. *Martin*,[5] shows that the striking need not be with the dangerous weapon. Striking with such weapon shows an intent to kill or maim. But it is not necessary to show such intent, in order to convict the defendants. Hence, it is not necessary that there should have been a wounding of Cook, and it might be conceded that the evidence did not prove a wounding. But there was a wounding, within the meaning of the statute. The English cases, cited for the defendants, were under statutes against stabbing and cutting. Where the word "wound" or "wounding" has been introduced, it is true that breaking a collar bone, or biting off the end of a finger or a nose, has been held not to be wounding under those statutes. Wounding is there connected with stabbing and cutting. But in *Regina* v. *Smith*, cited on the other side, Lord Denman and Mr. Justice Park, held that where the

1 ch. 138, sec. 12.

2 7 C. & P. 446.

3 ch. 31, sec. 12.

4 Reg. *v*. Smith, and Reg *v*. McLoughlin 8 C. & P. 173, 635; Rex *v*. Wood, 4 C. & P. 381; *s. c.* 1 Moo. Cr. Cas. 273.

5 17 Mass. 363, 364.

skin was broken internally, though not externally, there was a wounding, within the meaning of statute 7 William IV. and 1 Victoria. See also *Rex* v. *Shadbolt.*[1]

The Revised Statutes,[2] made it as penal to strike without wounding, as to wound, if the party be armed with a dangerous weapon. And there was a striking, in this case, within the meaning which common sense would give to the word "strike," and within the mischief which the statute was designed to meet.

*Butler*, in reply. As the indictment avers a striking and wounding, both must be proved. If the evidence shows a wounding and not a striking, or a striking and not a wounding, it can not be known on which the jury found the defendant guilty; for they were instructed that both were proved.

SHAW, C. J. The prisoners were indicted for robbery, on the Revised Statutes,[3] following the previous Statutes of 1818.[4] The indictment avers that the prisoners, at the time of the robbery, were armed with a dangerous weapon, and being so armed, that they did actually strike and wound the person robbed. This offense by the Revised Statutes, was made punishable with death; but by Statute 1839,[5] imprisonment for life in the State prison is substituted. In all other respects, this provision of the Revised Statutes remains in force.

The question raised on this bill of exceptions is, whether the evidence therein set forth was sufficient to warrant the jury in finding an actual striking or wounding, so as to bring the case within this clause of the statute.

This evidence depends wholly upon the testimony of Cook, the person robbed, which, after a verdict of conviction, and for the purposes of this inquiry, must be considered as entitled to full credit.

The proof of being armed with a dangerous weapon, is unquestionable; the doubt is as to actual striking or wounding.

1. First, as to wounding. In many cases there is great difficulty in determining what constitutes a wound. It has been a subject of considerable discussion under some of the English statutes; but we shall not attempt to give a definition. The scratch on the face, even if it were given by the prisoners on that occasion, which is left wholly doubtful by the testimony, we are satisfied was not a wound within the statute. At most it was a rupture of the cuticle, and not of the whole skin, and would not necessarily cause any blood to flow.[6]

2. And we are also satisfied that the evidence shows no blow stricken.

[1] 5 C. & P. 504.

[2] ch. 135, sec. 13.

[3] ch. 125, sec. 13.

[4] ch. 124, sec. 1.

[5] ch. 127.

[6] Reg. *v.* McLoughlin, 8 C. & P. 635; Rex *v.* Brackett, 1 M. & R. 526; Roscoe Crim. Ev. (2d Am. ed.) 729.

The prisoners ran after the prosecutor, put their arms around his neck and threw him on the ground; and one of them held him jammed down to the ground, whilst the other rifled his pocket. Here was force, undoubtedly, enough to do considerable violence to the man's person, and to produce the feeling of stiffness, of which he complained on the next day. But it was not the particular violence which is expressed by the term "striking" which implies force, applied with an impetus; a blow. The pressing with their arms and throwing him down, and holding him down, were neither of them a blow. The words "jammed down," in which they are used, do not come up to the idea of striking; the terms are, that they held him jammed down to the ground, from which we understand that they held him down firmly, and pressed on him forcibly, so that he could not extricate himself. This evidence proves a very atrocious crime, and one which under other provisions of the statute, must subject to the offenders to a severe punishment. But the court are of opinion that it does not prove a robbery, attended with the specific aggravation of being armed with a dangerous weapon, and actually wounding or striking the party robbed.

*Verdict set aside and a new trial granted.*

---

## ROBBERY—PROPERTY MUST BE PROPERTY OF OTHER THAN ROBBER—INDICTMENT.

## COMMONWEALTH *v.* CLIFFORD.

[8 Cush. 215.]

*In the Supreme Judicial Court of Massachusetts, 1851.*

**To Constitute the Offense made Punishable** by the Revised Statutes,[1] the articles stolen must be carried away by the robber, and must be the property of the person robbed, or of some third person; and these facts must be alleged in an indictment on that section, in the same manner, as in an indictment for robbery at common law.

This was an indictment for robbery, which alleged that the defendants, at the time and place named therein, "with force and arms in and upon one Charles Pendexter, then and there in the peace of said Commonwealth being, an assault did make, the said Isaac Clifford and James Bamerick not being then and there armed with a dangerous weapon, and him the said Charles Pendexter, did then and there by force and violence feloniously put in fear, and did then and there

[1] ch. 125, sec. 15.

feloniously rob, steal, and take from the person of him the said Charles Pendexter, against his will, one leather wallet of the value of one dollar, and sundry bank-bills of the value in all of twenty-nine dollars, against the peace of said Commonwealth, and the form of the statute in such case made and provided."

The defendants, after conviction in the Court of Common Pleas, moved in arrest of judgment, on the ground of the insufficiency of the indictment. But the presiding judge (MELLEN, J.,) ruled that the indictment was sufficient under Revised Statutes,[1] and overruled the motion. Whereupon the defendants alleged exceptions.

*B. F. Butler*, for the defendants.

*Clifford*, Attorney-General, for the Commonwealth.

METCALF, J. Robbery, by the common law, is larceny from the person accompanied by violence or by putting in fear; and an indictment therefor must allege that the taking was from the person, and that it was by violence or by putting in fear, in addition to the averments that are necessary in indictments for other larcenies.[2] If, therefore, the present indictment were for the common-law offense of robbery, it would be fatally defective, for want of the averments that the articles, alleged to have been stolen and taken from Pendexter, were his property or the property of some third person;[3] and that they were carried away by the defendants.[4] As the indictment is drawn, all the averments therein may be true, and yet the defendants not be guilty of robbery at common law. The wallet and the bank-bills may have been the property of the defendants, and may have been unlawfully taken from them by Pendexter. If so, the forcible retaking of them from him, by the defendants, would not be the offense of robbery.[5]

It was suggested, in argument, that as this indictment is on section 15, of chapter 125 of the Revised Statutes, and uses the statute words, it is sufficient. But we can not adopt this suggestion. The words of that section are, that "if any person shall, by force and violence, or by assault and putting in fear, feloniously rob, steal and take from the person of another, any money, of other property which may be the subject of larceny (such person not being armed with a dangerous weapon), he shall be punished," etc. This is a re-enactment of statute 1804,[6] which was substantially the same. In neither statute is the carrying away of the property mentioned as a part of the offense, nor is it declared, in either, that the property taken shall belong to the person robbed, or to any third person. Yet it was not the purpose of the

1 ch. 125, sec. 15.

2 King *v.* Rogan, Jebb's Cr. Cas. 62; Smith's Case, 2 East's P. C. 783, 784; King *v.* Donnally, 1 Leach (3d ed.), 229; 2 Stark. Cr. Pl. (2d ed.) 474.

3 2 Hawk., ch. 25, sec. 71.

4 Archb. Cr. Pl. (5th Am. ed.) 308.

5 Rex *v.* Hall, 3 C. & P. 409.

6 ch. 143, sec. 7.

Legislature to create a new offense, but merely to prescribe a new punishment of acts which constitute robbery at common law. And it was held, in *Commonwealth* v. *Humphries,*[1] that the statute of 1804 did not change the definition of the crime of robbery, nor render it necessary, in an indictment therefor, on that statute, to allege a putting in fear, in addition to the allegation of force and violence. The word "rob" was inserted in the indictment in that case, and also in *Martin's Case*,[2] in addition to the words "steal, take and carry away," which only are inserted in indictments at common law. And as that word was used in statute 1804, and is used in chapter 125 of the Revised Statutes, it is advisable, and perhaps necessary, to insert it in indictments on that chapter. But in framing an indictment on a statute it is not "sufficient to peruse the very words of the statute, unless by so doing you fully, directly and expressly allege the fact in the doing or not doing whereof the offense consists, without any the least uncertainty or ambiguity."[3] The words of the Revised Statutes,[4] do not set forth, and were not intended to set forth, fully, directly and expressly, all that is necessary to constitute the offense thereby intended to be punished. To constitute that offense, the articles stolen must be carried away by the robber, and must be the property of the person robbed, or of some third person. These facts, therefore, must be alleged, in an indictment on that section, in the same manner in which they are required (as we have seen) to be alleged in an indictment at common law. And as they are not alleged in this indictment, judgment must be arrested.

Under the English statute 7 and 8 George IV.,[5] which simply enacts that "if any person shall rob any other person of any chattel, money, or valuable security, every such offender, being convicted thereof, shall suffer," etc., it has been decided that an indictment, alleging that the defendant robbed A. of certain chattels mentioned, need not allege that he did it with violence; the word "rob" necessarily importing force and violence.[6] But that decision is not an authority for a similar decision under our Revised Statutes,[7] which have expressly made "force and violence, or assault and putting in fear," as well of robbing, stealing, and taking from the person, a part of the description of the offense thereby made punishable.

*Judgment arrested.*

[1] 7 Mass. 242.

[2] 17 Mass. 359.

[3] 2 Hawk., ch. 25, sec. 3; Bac. Abr. Indictment, H. 3.

[4] ch. 125, sec. 15.

[5] ch. 29.

[6] Lennox and Pybuss's Case, 2 Lew. Cr. Cas. 268.

[7] ch. 125, sec. 15.

## ROBBERY — CONSTITUENTS UNDER TEXAS CODE.

## KIMBLE *v.* STATE.

[12 Tex. (App.) 420.]

*In the Court of Appeals of Texas, 1882.*

1. **Robbery is Defined** by the Penal Code, and, to constitute the offense the property must be taken either by assault, or by violence and putting in fear of life or bodily injury. If it be by assault, violence and putting in fear may be omitted in the indictment, and if by violence and putting in fear, assault may be omitted.
2. **But Where the Indictment Charges** by "assault and putting in fear of bodily injury" though the indictment would be good on the ground of assault (treating "putting in fear" as surplusage), still if, as in this case, the ground of assault be abandoned, the conviction can not be sustained on the other ground, because of the omission of the necessary descriptive term "violence" in the indictment.
3. **Evidence Held Insufficient** to sustain a conviction for robbery by means of assault.

APPEAL from the District Court of Gaudalupe. Tried below before the Hon. E. LEWIS.

The opinion discloses the nature of the case, and sets out the charging part of the indictment. The punishment assessed by the jury was a term of two years in the penitentiary.

The injured party was the only witness examined, and he testified in effect that he was a youth of fifteen years at the date of this trial, May, 1882. During the spring of 1881, he was by himself on the San Marcos River, fishing. The defendant came to the river where he was, watched him a while, and asked him if he had any other lines and hooks. The witness replied that he had, and the defendant asked to see them. The witness handed him one, which he examined and proposed to borrow. The witness declined to lend it, and the defendant said: "If you won't lend it to me, I will take it, and give it back when I get through." The witness became frightened and started up the river to take up some lines he had staked out. The defendant followed him. Witness' line was staked out from a small peninsula which jutted into the river, and when he had recovered his line and started back, the defendant took a position with legs outstretched so that the witness could not pass without getting into the river. He had seen the witness' pocket-book, in which there was fifty cents in silver; he asked to see it. The witness was frightened and handed it to him. He examined it and handed it back, saying that times were very hard, and he wanted to borrow the money. The witness told him that he did not want to loan it. Defendant insisted on borrowing it, saying that his brother was going to San Marcos that evening, and he wanted to send for some whisky, that his name was Jeff Gray, and that he worked for Mr. Al-

bright, from whom he would get the amount and repay. The witness still refused, and the defendant, who was still between the witness and the main shore, said: "I have asked you like a gentleman to lend me the money, now if you don't lend it to me, I will take it from you," at the same time stretching his legs clear across the peninsula. There was no one in sight, and the witness being afraid of violence, handed him the money. The defendant made no threats or demonstrations of violence towards the witness.

*Ireland & Burges*, for the appellant.

*C. Edmundson*, for the State.

HURT, J. This is a conviction for robbery. The charging part of the indictment is as follows: "Mathew Kimble, late of said county, on the fifth day of July in the year of our Lord eighteen hundred, eighty-one, with force and arms in the county aforesaid, did then and there willfully, unlawfully fraudulently and feloniously, in and upon the person of Clayton McLelland make an assault, and him, the said McLelland put in fear of bodily injury, and while so in fear of bodily injury from him, the said Kimble, the said Kimble did then and there unlawfully, fraudulently and feloniously, and against the will of said McLelland, induce the said McLelland, by reason of said putting in fear, to deliver to him, the said Kimble, fifty cents," etc.

Article 722 of the Penal Code, defines robbery as follows: "If any person, by assault, or by violence and putting in fear of life or bodily injury, shall fraudulently take from the person or possession of another any property with intent to appropriate the same to his own use, he shall be punished by confinement in the penitentiary not less than two nor more than ten years."

It will be seen from this definition of robbery, that the taking of the property, to constitute robbery, must either be by assault or by violence, and putting in fear of life or bodily injury. If by assault, violence and putting in fear may be omitted; and if by violence and putting in fear, the assault may be omitted. If, however, the indictment should charge (as does this) the assault and putting in fear of bodily injury, omitting the violence, it would be good, treating "putting in fear" as surplusage. But the assault is abandoned in this bill; because it alleges positively and affirmatively that McLelland was induced to deliver the money "by reason of said putting in fear." If, therefore, the State relied upon this ground, which is evidently the case, the indictment is not sufficient, for the plain reason that a necessary ingredient is omitted, to wit, violence.

When both grounds are relied upon, the indictment should charge that the defendant, by assault, and by violence and putting in fear of life and bodily injury, did, etc. Under this form of allegation, if either

means by which the robbery was committed be proved, the conviction would be legal, because the charge covers both phases.

But, proceeding upon the hypothesis that the assault is not abandoned, this conviction can not be sustained, the evidence failing, beyond question, to show any assault whatever. The State, because of thus being forced to rely upon the other ground, to wit, "putting in fear of bodily injury," must, to support a conviction on this ground, charge all of its elements. This is accomplished by alleging that the defendant by violence and putting in fear of bodily injury, took the money, etc.

We are of the opinion that the indictment is insufficient, and that the exceptions of the defendant should have been sustained. We are also of opinion that if the indictment is sufficient by reason of the assault which is charged, still, there being no evidence of an assault the verdict upon this phase of the indictment is not supported.

The judgment is reversed and the prosecution dismissed.

*Reversed and dismissed.*

---

## ROBBERY — DEMANDING PROPERTY WITH MENACES.

## R. v. WALTON.

[L. & C. 289].

*In the English Court for Crown Cases Reserved, 1863.*

1. **In Order to Constitute the Statutory** offense of demanding property with menaces, the "menaces" must cause such alarm as to unsettle the mind of the person on whom it operates, and take away from his acts that element of free voluntary action which alone constitutes consent.
2. **Where the Menaces are not** necessarily of such character, the question is for the jury whether they were made under such circumstances of intimidation.
3. **W. had Obtained** money by threatening to execute a distress warrant, which he had no authority to do. The judge directed the jury, that as a matter of law, this constituted a "menace" within the statute: *Held*, error.

The prisoner was convicted as stated above, but his case was reserved for the full court, where it was argued on the 24th of January, 1863, before ERLE, C. J., BLACKBURN, J., KEATING, J., WILDE, B. and MELLOR, J.

*V. Blackburn*, for the prisoner. The prisoners are indicted under section 45 of the 24 and 25 Victoria,[1] which is a re-enactment of the

[1] ch. 96. This section is as follows: "Whosoever shall with menaces or by force demand any property, chattel, money, valuable security or other valuable thing of any person, with intent to steal the same, shall be guilty of felony, and being convicted

7 William IV. and 1 Victoria,[1] for demanding money with menaces with intent to steal. It is submitted that the menaces must be menaces of injury to the person. Menaces of injury to property are not sufficient. There is no decision to that effect; but all the cases that can be cited, are cases of menaces of injury to the person, such as holding a pistol to the prosecutor's head and demanding his money.[2] Threatening to injure the property is specifically provided for by Act of Parliament.[3] Here there is merely an endeavor on the part of the prisoners to clothe themselves with legal authority.

BLACKBURN, J. There is more than that. There is a threat to break open the door and take the goods.

*V. Blackburn.* The offense amounted to an obtaining of money by false pretenses. The prisoners can not be convicted of larceny, because the money was parted with absolutely.

*Hannay*, for the Crown. It is submitted that there is here such a menace as, if the money had been obtained by means of it, would have amounted to robbery. Putting in fear is of three kinds: 1st, fear of injury to the person; 2d, fear of injury to the character; 3d, fear of injury to the property; and, with regard to the latter, it is said in Russell on Crimes,[4] that such cases are principally those in which the terror excited was of the probable outrages of a mob; and several cases are there quoted, amongst them *Simon's Case*,[5] where the prisoner came with about seventy others, and threatened to tear the mow of corn, and level the house of the prosecutor, and *Taplin's Case*,[6] where money was extorted by the prisoner at the head of a mob without any particular threat being expressed.

BLACKBURN, J. It should be remembered that those were times of great riot.

*Hannay.* Section 45 seems intended to meet a class of cases differing from assaults with intent to commit robbery.

BLACKBURN, J. In order to constitute robbery there must be a threat of such a nature as to make the parting with the money an involuntary act.

*Hannay.* The parting with the money was involuntary here, and was the consequence of the menaces held out by the prisoners; for the prosecutor refused to part with his money until they threatened to break his door open and sent for a policeman.

thereof shall be liable, at the discretion of the court, to be kept in penal servitude for the term of three years, or to be imprisoned for any term not exceeding two years, with or without hard labor, and with or without eolitary confinement."

1 ch. 87, sec. 7.

2 Rex *v.* Parfait, 1 East's P. C. 416

3 24 and 25 Vict., ch. 97, sec. 50.

4 Russ. on C. & M., vol. 1, p. 881, 3d ed.

5 2 East's P. C., ch. 16, sec. 131, p. 731.

6 2 East's P. C., ch. 16, sec. 128, p. 712.

MELLOR, J. The presence of a policeman would surely prevent his feeling that he was not a free agent.

WILDE, B. A threat of enforcing legal process is different from a threat of making an unjust charge affecting a man's character.

*Hannay.* In Russell on Crimes,[1] it is said that a delivery of goods obtained by a fraudulent abuse of legal process is amongst the most aggravated of those cases of larceny where the taking is effected by procuring a delivery of the goods from the owner or other person authorized to dispose of them.[2]

ERLE, C. J. In East,[3] it is said: "It remains further to be considered of what nature this fear may be;" and after adverting to the opinions expressed in the acknowledged treatises upon the subject, the author says: "I have the authority of the judges as mentioned by Willes J., in delivering their opinion in *Donally's Case* at the O. B., 1779, to justify me in not attempting to draw the exact line in this case; but this much I may venture to state, that on the one hand the fear is not confined to an apprehension of bodily injury, and on the other it must be of such a nature as in reason and common experience is likely to induce a person to part with his property against his will, and to put him as it were under a temporary suspension of the power of exercising it, through the influence of the terror impressed; in which case fear supplies, as well in sound reason as in legal construction, the place of force or an actual taking by violence or assault upon the person." Several cases show that a menace to property is sufficient. Amongst them I find *Rex* v. *Astley*,[4] where the prisoner threatened to bring a mob from Birmingham and burn the prosecutor's house down if he did not give him money, which he did under fear of that threat; and the majority of the judges held this to be robbery.

WILDE, B. Suppose you meet a man riding, and say, "I have authority to distrain your horse," there would be no fear there and no injury to the property. Would that be robbery?

BLACKBURN, J. *Merriman* v. *The Hundred of Chippenham*,[5] shows that violence may be committed under pretense of legal and rightful proceedings. There Merriman, carrying his cheeses along the highway in a cart was stopped by one Hall, who insisted on seizing them for the want of a permit (which was found by the jury to be a mere pretense for the purpose of defrauding Merriman, no permit being necessary). In an altercation they agreed to go before a magistrate to determine the matter. In the meantime other persons riotously assembled on account of the dearness of provisions, and in confederacy with Hall for the

[1] vol. 2, p. 54, 3d ed.

[2] See 1 Hawk. P. C., ch. 33, sec. 12; 2 East, P. C., ch. 16, sec. 96, p. 660.

[3] 2 P. C. 713.

[4] 2 East's P. C. 729.

[5] 2 East's P. C. 709.

purpose, carried off the goods in Merriman's absence. That must have been considered to have amounted to robbery, otherwise the plaintiff could not have recovered against the hundred.

*Hannay.* In *Rex* v. *Knewland*,[1] it was held that to obtain money by a threat to send for a constable, and take the party to prison, is not robbery; for the threat of legal imprisonment ought not so to alarm any mind as to induce the person to part with his property.

ERLE, C. J. In *Gascoigne's Case*,[2] it was held to be robbery if a bailiff handcuff a prisoner under pretense of carrying him to prison with greater safety, and by means of this violence extort money.

*Hannay.* Section 45 comes after sections[3] relating to robbery and assaults with intent to commit robbery, and is intended to provide for cases not within the preceding sections.

ERLE, C. J. Sections 40 to 43 relate to robbery. Section 44 relates to the offense of sending letters demanding property with menaces. Then comes section 45. It would rather seem that the statute is passing from cases of robbery, and coming to cases where money is demanded with intent to steal it.

MELLOR, J. The prosecutor followed the prisoner to a gin shop, and gave them the money there. Surely he was not then under the influence of fear.

WILDE, B. It all comes to this that the prisoners say, "We have a right to distrain, and will distrain, if you do not give us money."

*Hannay.* Further, it is not less a demanding because the money is actually given;[4] It is also submitted that the transaction does not amount to an obtaining by false pretenses but to a larceny. The prosecutor did not part with the money in consequence of the false pretenses.

WILDE, B. There may be an obtaining by false pretenses, whether the victim parts with property, from a hope of benefit, or from a fear of detriment.

BLACKBURN, J. It can hardly be said that the prosecutor did not part with his property willingly, seeing that a policeman was present to whom he might have appealed for protection.

*V. Blackburn*, in reply. The cases cited on the other side are all cases of threat to do some injury to person or property. Here there was nothing more than a threat to put legal process in execution. The prosecutor followed the prisoners to another place, and paid them the money there. The menaces must be such as would avoid a deed obtained thereby. In Shephard's Touchstone,[5] it is said: "If I be

[1] 2 Leach, C. C. 721.
[2] 1 Leach, C. C. 280.
[3] secs. 42, 43.
[4] Reg *v.* Morton, 8 C. & P. 671.
[5] vol. 1, p. 61.

imprisoned at one man's suit (be the cause just or not), and being in prison I make an obligation or any other deed to a third man; this shall not be said to be by duress, but is a good deed. So if one threaten me to take away my goods, burn or break my house, enter upon my land, kill or wound my father, mother, etc., or do imprison any of them, and thereupon I seal a deed; this is good and shall bind me. So if one distrain my beasts, to compel me to seal a deed, and will not deliver them unless I do so, and threaten me that if I take the beasts again and not seal the deed he will kill me, and thereupon I seal the deed; this is a good deed and shall bind me." Again, in Comyn's Digest,[1] it is said: "So, *per minas*. And menace of life, member, mayhem, or imprisonment, is sufficient to avoid a deed. But menace of battery is not sufficient to avoid a deed; nor menace of burning his houses. Or taking or destroying his goods; for he may recover damages for them."

*Cur. adv. vult.*

The judgment of the court was delivered on the 31st of January, 1863, by

WILDE, B. The question in this case turns upon the proper construction of the 24 and 25 Victoria.[2] The section is in these words: "Whosoever shall with menaces or by force demand any property, chattel, money, valuable security, or other valuable thing of any person, with intent to steal the same, shall be guilty of felony." There are many demands for money or property accompanied by menaces or threats which are obviously not criminal nor intended to be made so. Thus, in case of disputed title to personal property, a man may threaten his opponent with personal violence if he does not relinquish the subject of dispute, and he would not be within the intention of this statute.

Other instances would offer themselves to a little consideration. Where then is a proper limit to the operation of this section? It is to be found in the words "with intent to steal." There is no other restriction expressed. Nothing is said about "violence" in conjunction with menaces, still less of violence to the person as distinct from violence to property. There is no express limit, except in the words "with intent to steal." Now, a demand of money, with intent to steal, if successful, must amount to stealing. It is impossible to imagine a demand for money with intent to steal, and the money obtained upon that demand, and yet no stealing. The question then arises what are the incidents attending the procurement of money or property by menace or threats necessary to constitute stealing. It is said in East:[3] "The taking in all cases must be against or without the consent of the owner to con-

[1] Pl. 2 W. 20.

[2] ch. 96, sec. 45.

[3] 2 P. C. ch. 16, sec. 3, p. 555.

stitute larceny or robbery." On the other hand it is said at the same place: "A colorable gift which in truth was extorted by fear, amounts to a taking and trespass." These two passages of the learned writer, when taken together, appear to define the offense of stealing in the case of menaces.

For, if a man is induced to part with property through fear or alarm, he is no longer acting as a free agent, and is no longer capable of the consent above referred to, and accordingly, in the cases cited in argument, the threatened violence, whether to person or property, was of a character to produce in a reasonable man some degree of alarm or bodily fear. The degree of such alarm may vary in different cases. The essential matter is that it be of a nature and extent to unsettle the mind of the person on whom it operates, and take away from his acts that element of free, voluntary action which alone constitutes consent. Now, to apply this principle to the present case, a threat or menace to execute a distress warrant is not necessarily of a character to excite either fear or alarm. On the other hand, the menace may be made with such gesture and demeanor, or with such unnecessarily violent acts, or under such circumstances of intimidation as to have that effect. And this should be decided by the jury. Now, in this case there was evidence very proper to be left to the jury to raise the above question. But the chairman left no such question to them, and directed them as a matter of law that the conduct of the prisoners (if believed) constituted a menace within the statute. Our judgment, that this conviction can not be sustained, is founded entirely on this ground.

*Conviction quashed*

---

## ROBBERY — LARCENY FROM THE PERSON.

## FANNING *v.* STATE.

[66 Ga. 167.]

*In the Supreme Court of Georgia, 1883.*

**Distinction Between Robbery and Larceny from Person.** — To constitute robbery as distinguished from larceny from the person, there must be force or intimidation in the act; therefore, where a thief slipped his hand into the pocket of a lady and got his finger caught therein, and she felt the hand, and, turning, saw him unconcernedly looking at the houses, and caught him by the coat, which was left with her in making his escape, *held,* that the crime is larceny from tho person, and not robbery, though the lady's pocket was torn in extracting his hand.

APPEAL from conviction before Judge SIMMONS, Fulton Superior Court.

*Frank A. Arnold*, for plaintiff in error.

*B. H. Hill*, Solicitor-General, for the State.

JACKSON, C. J. The substantial facts in this case are, that the defendant slipped his hand into a lady's pocket, and furtively took therefrom a purse of money. Before he got the purse entirely out she felt the hand and tried to seize it, but the thief had succeeded and the purse was gone. In extracting hand and purse, the pocket was torn and when the lady turned she saw the thief looking unconcernedly at the horses on Whitehall Street. She rushed upon him and caught him by the coat, which, in his struggle to escape, was left torn in her possession. Afterwards a policeman arrested him and secured him.

The sole question is, Do these facts make a case of robbery or larceny from the person under our code?

The criminal deed was consummated when the purse was taken from the lady. The subsequent struggle to recapture it by seizing the thief can not be considered to determine whether the taking itself was forcible, or private and furtive. The mere fact that the pocket was torn in the effort to get the furtive hand out with the purse when the lady felt it and tried to seize it, is not sufficient, we think, to show such force and open violence, as makes the crime of robbery.

Under the code of this State robbery is "the wrongful, fraudulent and violent taking of money, goods or chattels, from the person of another by force, or intimidation, without the consent of the owner."[1] There was no intimidation here at all, nor was there such force or violence as to constitute robbery as distinguished from larceny, under sections 4392 and 4410 of the code. That distinction is, that larceny from the person is the stealing privately or without the knowledge of the person wronged, or as the definition of robbery would make it, without violence and force, or intimidation. The attempt and intent in this case was private, and the deed was done without the knowledge of the lady, except that she felt somebody's hand, and, turning, saw the thief, and then with the knowledge came the effort, not to prevent the the capture of, but to recapture, the stolen purse.

There being no attempt on the part of the thief to use force or to intimidate the lady, but the whole facts showing that his purpose was to take the purse privately and without her knowledge, with intent to steal it, and the nature of the crime being ascertained by that intention which is always an element in it[2] as well as by the consummation, which in this case was, in the act itself, private and furtive and not forcible, we conclude that the defendant should have been found guilty, not of robbery, but of larceny from the person, and a new trial must be granted.

*Judgment reversed.*

[1] Code, sec. 4389.

[2] Code, sec. 4392.

## NOTES.

§ 589. **Robbery — Force Must be Used.** — To constitute robbery the use of force is essential.[1] Secretly picking a pocket is not robbery.[2]

§ 590. —— **Or Putting in Fear.**— Or else the prosecutor must be put in fear. Taking property from the person without violence or putting him in fear is not robbery.[3]

§ 591. —— **Force Must be Used to Overcome Resistance.** — So the force must be used to overcome the resistance of the person robbed, and not simply to get possession of the property. Therefore, merely snatching an article from another, is not robbery.[4] So force only sufficient to turn the party's pockets inside out is not enough.[5]

In *Regina* v. *Walls*,[6] A. asked B. what o'clock it was, and B. took out his watch to tell him, holding it loosely in both his hands. A. caught hold of the ribbon and key attached to the watch and snatched it from B. and made off with it. This was held no robbery.

In *Regina* v. *Gnosil*,[7] the prisoner was indicted for a highway robbery. The prosecutor proved, that as he was going along the street of Walsal, the prisoner laid hold of his watch chain, and with considerable force, jerked his watch from his pocket; a scuffle then ensued, and the prisoner was secured. GARROW, B. The mere act of taking being forcible, will not make this offense a highway robbery; to constitute the offense of highway robbery, the force must be either before or at the time of the taking, and must be such a nature as to show that it was intended to overpower the party robbed, and prevent his resisting, and not merely to get possession of the property stolen. Thus, if a man walking after a woman in the street, were by violence to pull her shawl from her shoulders, though he might use considerable force, it would not, in my opinion, be highway robbery, because the violence was not for the purpose of overpowering the party robbed, but only to get possession of the property.

*Verdict, guilty of larceny only.*

In *People* v. *McGinty*,[8] the complainant one Swallow, testified that on January 6, 1880, he went into a liquor saloon kept by Mrs. McGinty, wife of one of the plaintiffs in error; that he sold the defendant Kinsella a box of catarrh medicine; that Kinsella stood behind the bar; that when he paid for the medicine he (Swallow) took out his pocket-book and put the money in the book; that McGinty stood at the end of the bar, and knocked the pocket-book from his hands on to the bar, and that Kinsella picked it up, and McGinty grabbed him (Swallow) by the shoulders, turned him around and put him out doors and shut the door; that he demanded his pocket-book, and McGinty told him he had better go away, he would never see that pocket-book again; that there were four dollars and eighty cents in silver in the book; that he gave thirty cents for

1 Plato's Case, 2 City Hall Rec. 7 (1817).
2 Norris' Case, 6 City Hall Rec. 86 (1821).
3 Wilson *v.* State, 3 Tex. (App.) 64 (1871).
4 People *v.* Hall, 6 Park. 644 (1865); Shinn *v.* State, 64 Ind. 13; Bonsall *v.* State 35 Ind. 480 (1871); State *v.* John, 5 Jones, 163 (1857); Anderson's Case, 1 City Hall Rec. 163 (1818); McCloskey *v.* People, 5 Park. 299 (1862).
5 Brennan *v.* State, 25 Ind. 403 (1865).
6 2 C. & K. 214 (1845).
7 C. & P. 304 (1824).
8 24 Hun, 62 (1881).

the book, and that the money and wallet were his; that the defendants and Mrs. McGinty were in the bar-room.

LEARNED, P. J. The court charged: "If you come to the conclusion that the force which was used in taking this pocket-book from the hand of Guy Swallow was sufficient, under the circumstances, to deprive him of his property, and if you find that the intent was feloniously to steal the property, then I charge you, as a matter of law, that within that element of the statute the charge is made out." The prisoner excepted. Again, the court charged that the taking by violence means a taking by force which is sufficient to take the property against the owner's will. Again, the prisoner requested the court to charge that the striking of the pocket-book from the hand of the complainant, as testified to by him, does not constitute robbery. The court refused and charged that if the jury believed his testimony, that makes out the element of robbery. The prisoner excepted.

The testimony of the complainant was that he went into a saloon kept by Mrs. Ginty; that she and the prisoner, McGinty and Kinsella were present, and no one else; that he took out his pocket-book; that McGinty knocked it out of his hands upon the bar; that Kinsella picked it up; that McGinty grabbed the defendant and put him out of doors; that he demanded his pocket-book and McGinty told him he had better go away, he would never see the pocket-book again.

The point is whether the court properly submitted the question of violence to the person to the jury. Even if we assume that the forcible turning of the complainant out of doors might be properly considered as characterizing the act of the prisoner, the question still remains whether the court adopted the proper rule as to what constituted violence to the person. The court charged that if the force which was used was sufficient to deprive complainant of his property against his will, that would be sufficient to constitute the violence to the person, which is a necessary element of the crime. Here, we think that the court erred. The language used would include any larceny from the person. The pickpocket who steals a handkerchief uses sufficient force to deprive the owner of his property, and his taking is felonious and against the owner's will.

"The mere snatching of any thing from the hand of a person without any struggle or resistance by the owner, or any force or violence on the part of the thief, will not constitute robbery."[1]

The violence contemplated means more than simple assault and battery. "It must be sufficient to force the person to part with his property not only against his will, but in spite of his resistance."[2]

Now the present case was only like the snatching of a pocket-book. The complainant was not struck or held, nor was any resistance overcome on his part. The pocket-book was only knocked from his hands, just as it might have been snatched away from them. The court below drew this distinction, that if the violence was only the result of the taking, then the crime was not robbery; but if the taking was the result of the violence, then it was robbery. There is, perhaps, some force in this distinction if it were properly qualified. But we think that the error was in holding that any physical act to the person of the complainant which resulted in the taking was violence within the meaning of the statute.

[1] McCloskey *v.* People, 5 Park. 299; to the same effect, People *v.* Hall, 6 Park. 642.

[2] McCloskey *v.* People, *ut supra.*

It is not easy, nor perhaps is it best, to attempt to make an exhaustive definition of violence as used in the statute; but we may say that it generally implies the overcoming, or attempting to overcome, an actual resistance, or the preventing such resistance through fear. It may include restraint of the person, as in *Mahoney* v. *People*,[1] where the complainant was held around his neck and by his arms. And it generally implies that the acts tend to produce terror and alarm in the person on whom the violence is committed. And it ought not to be held that every assault and battery, even the most trivial, which results in the taking of property from the assaulted person, constitutes that element of violence which is mentioned in the statute. The penalty is severe; the crime arrived at is grave; and we should be careful not to magnify a less offense into one which has, and deserves so severe a punishment. In my own opinion, the facts of the present case are not sufficient to show the defendant to be guilty of this crime. The judgment and conviction must be reversed, and the cause remitted to the Court of Sessions.

BOARDMAN, J. I concur in the conclusion of the presiding justice that the charge of the judge was erroneous and was likely to mislead the jury. As this will lead to a new trial, I desire to add that the seizure of complainant, in connection with getting his pocket-book and forcibly putting him out of the house, may by possibility, upon a new trial, furnish that element of force, overcoming resistance or inspiring fear, which is necessary in robbery. In this respect I think our decision should not be deemed to be conclusive of the case, or to require the discharge of the plaintiff in error from the indictment.

BOCKES, J. I concur in the opinion of my Brother LEARNED, as regards the error in the charge of the court on the trial. I am also of the opinion that the facts proved do not make out a case of robbery under the statute on which the indictment is found. The cases cited in the fifth and sixth Parker show, as I think, very clearly the insufficiency of the proof to establish the crime charged, as regards violence to the person.

Judgment and order reversed and cause remitted to Essex County Sessions, new trial granted.

§ 592. —— **Fear Must be of Personal Violence — Threatening to Prosecute on False Charge.** — Obtaining money or property by threats of a criminal prosecution is not robbery. In *Britt* v. *State*,[2] REESE, J., delivering the opinion of the court said: "Plaintiff in error was indicted and convicted in the Circuit Court for Roane County, for the offense of robbing from the person of Robert L. Phillips, the prosecutor, by violence, and putting him in fear of his life, or great bodily harm, a sum of money and a horse. Without detailing the iniquity and crimes of the plaintiff, which the record discloses, it is sufficient to state that on the trial the prosecutor swore, that he gave up the money to the prisoner, solely on the ground of the prisoner's threat to prosecute him for having passed to prisoner a five dollar note, which prisoner alleged was counterfeit; and that he was not alarmed or afraid of violence at any time while with prisoner, or apprehended bodily danger or violence to his person.

"The court charged the jury, 'that if the prosecutor was put in fear of confinement in the penitentiary, so that he gave up the money or property to the defendant by reason of the defendant making falsely a threat to prosecute him for passing a counterfeit bank-note, the punishment for which would be con-

[1] 3 Hun, 202.

[2] 7 Humph. 45 (1846).

finement in the penitentiary, that the defendant would be guilty of robbery. But if the prosecutor actually passed to the defendant a counterfeit note it would not be a robbery, but a mere compounding a felony, and they ought to acquit the defendant. The principle of the charge in brief is that if one excites the fear of an innocent man, by falsely charging him with the commission of a felony, the punishment for which is confinement in the penitentiary and threatens a criminal prosecution, and thus induces him to surrender money or other valuable things to the person accusing and threatening, such person is guilty of robbery. This charge is erroneous. It has been settled upon much consideration, by judges of England in more than one case, that threatening to prosecute an innocent man for any crime whatever, except only the *crimen innominatum*, and by the fear arising from such threat, to compel the surrender of money or property, does not amount to robbery. The fear constituting an element of the crime is fear of present personal peril from violence offered or impending. The fear of being arraigned before those tribunals, whose function it is to protect and vindicate innocence as well as to ascertain and punish crime, should not shake a firm mind of conscious rectitude so far from its propriety, as to induce the surrender of money or other valuable thing to the base accuser; and it is not the fear, except in the single instance indicated, which connects itself with the legal idea of robbery. The reasoning on which the single admitted exception is made to rest, turns upon the overwhelming and withering character of the charge and damning infamy, so well calculated to unman and subdue the will and alarm the fears of the falsely accused. It is evident that the courts of England felt, that even this exception looked extremely anomalous, and they strive, while permitting it to stand, to place it on ground unapproachable by any other case of fear of prosecution, as if determined hereafter it should have no associate in the offense of robbery.

"Our statute creates no change in this respect. Indeed the definition of the offense therein seems to have been made studiously with a view to exclude the idea of any apprehension than that of bodily danger or impending peril to the person. The judgment must be reversed and a new trial awarded."

Obtaining money from a woman by threatening to accuse her husband of an indecent assault is not robbery — the element of fear not being present.[1]

§ 593. —— **Threat — Threat of Legal Imprisonment not a Putting in Fear.** — In *R.* v *Kneeland*,[2] it was held that to obtain money by a threat to send for a constable and take the party before a magistrate and from thence to prison is not robbery, for the threat of legal imprisonment ought not to alarm any one. "The force and terror" said ASHURST, J., "necessary in contemplation of law to perfect this species of crime being wanting. Terror is of two kinds; namely, a terror which leads the mind of the party to apprehend an injury to his person, or a terror which leads him to apprehend an injury to his character The first kind of terror is that which is commonly made use of on the commission of this offense, and is always held sufficient to support an indictment of this description. But the second species of terror has never been deemed sufficient, except in the particular case of exciting it by means of insinuations against, or threats to destroy, the character of the party pillaged, by accusing him of sodomitical practices. The fears unavoidably excited by these means, have on

[1] R. *v.* Edwards, 5 C. & P. 518 (1833).

[2] 2 Leach, 833 (1796).

several occasions, been determined by the judges to be sufficient to constitute the crime of robbery; but it is confined to these cases only. The bare idea of being thought addicted to so odious and detestable a crime as sodomy, is of itself sufficient to deprive the injured person of all the comforts and advantages of society; a punishment more terrible both in apprehension and reality than even death itself. The law, therefore, considers the fear of losing character by such an imputation as equal to the fear of losing life itself, or of sustaining other personal injury. But in the present case the threat which the prisoners made was to take the prosecutrix to Bow Street, and from thence to Newgate; a species of threat which, in the opinion of the judges, is not sufficient to raise such a degree of terror in her mind as to constitute the crime of robbery; for it was only a threat to put her into the hands of the law; an innocent person need not in such a situation be apprehensive of any danger.

"As to the circumstances of this case, as they affect the other prisoner, Nathaniel Wood, it appears that the force which he used against the prosecutrix was merely that of pushing her into the sale room, and detaining her until she gave the shilling; but as terror is, no less than force, a component part of the complex idea annexed to the term 'robbery,' the crime can not be complete without it. The judges, therefore, are of opinion, that however the prisoners may have been guilty of a conspiracy, or other misdemeanor, they can not in any way be considered to have been guilty of the crime of robbery."

§ 594. —— **Robbery — Demand Necessary.** — In *R.* v. *Parfait,*[1] it appeared by the evidence that the prosecutrix, a coachman, was driving his coach along the road leading to Pancras, and that the prisoner presented a pistol at him while he sat on his box, and called out to him to stop; but it did not appear that he had made any demand of money.

THE COURT. This is a case not within the meaning of the Act of Parliament; for a demand of money or other property must be made to constitute this offense. A demand, however, may be made by action as well as speech; as if a man who is deaf and dumb stop a carriage on the highway, and put his hat into the carriage with one hand, while he holds a pistol offensively in the other, or the like; but then the action must be plain, and unequivocally import a demand.

In the present case, no motion or offer to demand the prosecutor's money was made.

§ 595. **Robbery — Putting in Fear — Bodily Injury.** — In *Williams* v. *State,*[2] the prisoner being indicted for robbery, the jury were instructed as follows: "The taking must be fraudulent and with intent to appropriate the thing taken to the use or benefit of the person taking. It must have been taken by assault or by violence and putting in fear of life or bodily injury. The injury intended by violence may be constraint or arresting a person without authority, or a sense of shame or other disagreeable emotion of the mind. It is for you to decide in this case whether the said Calvin Johnson was put in fear or constraint by the defendant, and to determine this you are authorized to look to what capacity the defendant acted in, — if as an officer or not; if as an officer, whether as such he put the said Calvin Johnson under constraint or fear of personal injury, and thereby took the money as alleged; and all the other evi-

1 1 Leach, 23.

2 12 Tex. (App.) 240 (1882). And see Kimble *v.* State, *Id.* 420 (1882)

dence in the case; and decide under this charge whether the defendant is guilty of robbery or not guilty," etc.

At the request of the defence the court gave a further instruction to the jury, but it also authorized them to convict whether the taking was by assault or by violence and putting in fear.

HURT, J. The appellant Williams was convicted of robbing one Calvin Johnson of $5. The indictment charges that the appellant Williams did make an assault upon one Calvin Johnson, and then and there put him in fear of life and bodily injury, and $5 in silver coin money, from the said Johnson's possession and against his will, then and there unlawfully, fraudulently, violently and with force and arms did seize and take," etc.

The code defines robbery as follows: "If any person by assault, or by violence and putting in fear of life or bodily injury, shall fraudulently take from the person or possession of another any property with intent to appropriate the same to her own use, he shall be punished by confinement in the penitentiary not less than two nor more than ten years." Under the code it will readily be seen that to constitute robbery the taking of the property must either be by assault or by violence and putting in fear of life and bodily injury. (We are now treating of the other elements.) If the property is taken by assault, the person from whom taken need not be put in fear of life or bodily injury. But if by violence, the person from whom the property is taken must be put in fear of life or bodily injury. It follows, therefore, that an indictment that charges the taking by assault need not allege that the person assaulted was put in fear of life or bodily injury. On the other hand when the charge in the indictment is based upon the other clause or phase, the indictment must allege that the taking was by violence and putting in fear of life or bodily injury. We are aware that in *Wilson* v. *State*,[1] it was held that in either event, whether by assault or by violence, there must be a putting in fear of life or bodily injury. This opinion was under the statute before the change. The statute then read: "If any person by assault or by violence and putting in fear in life or bodily injury." The difference being that in the former there was no comma after assault.

The indictment in this case charges the assault and putting in fear of life and bodily injury, but does not charge violence and putting in fear. Hence, the evidence must support the charge of an assault to sustain the indictment. Do the facts support the charge? The evidence is as follows: Green McArver, witness for the State, says: "I was in Troupe, Smith County, Texas, some time in January last. I saw the defendant there, and also Calvin Johnson. The latter had sold a horse there that day, and he came along by defendant, who was sitting down on the railroad, when defendant said to him, 'Young man, you have got yourself into quite a scrape, if you only knew it, by selling that horse here this evening without license. I am town marshal here, and it is my duty to arrest you and put you in the calaboose, and then take you before the mayor and to-morrow morning take you to Tyler jail.' Defendant then figured, or pretended to figure a little on a book he had with him, and then he said: 'But, young man, if you pay me five dollars you can go and I will not bother you; otherwise, I will have to arrest you and put you in the calaboose, and take you to Tyler jail to-morrow.' Calvin Johnson then pulled out five dollars, and gave to defendant, and defendant told him to go down to the store and get his budget and come back up there, which Calvin did. When Calvin came back

[1] 3 Tex. (App.) 63.

with his bundle defendant said: 'Young man, that five didn't quite settle up what was against you. I've figured up and find it will take one dollar more to settle it up straight; so you had better pay this, or I will put you in the calaboose, and take you up to Tyler jail to-morrow.' And Calvin then paid him one dollar more. Defendant then said to Calvin: 'Now take the railroad here and go on to Jacksonville, and if anybody asks you about Troupe, tell him you don't know anything about Troupe.' Calvin then went on down the railroad in the direction of Jacksonville. All this occurred in Smith County, Texas. I did not see defendant use any violence on said Calvin, nor offer to do so, nor make any gestures like he was going to do so. The money was delivered up to him by Calvin, as I said, on his threatening to arrest Calvin and put him in the calaboose."

Calvin Johnson corroborated Green McArver in every material particular, adding: "I had sold my horse and was not used to town affairs, having been raised in Georgia and in the country. When defendant halted me and told me I had got myself into trouble (as stated by Green McArver), I became scared and very uneasy, although I was satisfied I had done nothing to be arrested for, except that it might be for selling my horse in town. I thought he was marshal of the town and would put me in the calaboose, and carry me to Tyler jail, twenty miles distant, if I did not let him have some money, — the amount he demanded, five dollars. He first got five silver dollars United States of America coin, worth five dollars, from me against my will and consent. I let him have it because I was afraid not to; I was mighty scared; thought he was going to imprison me; would have given him all I had if he had demanded it of me. After getting the money defendant told me to strike out down the railroad to Jacksonville, and not stop; never to let any body know that I had been in Troupe. I started, and on the way, at the section house, learned from some white men that defendant was not marshal of Troupe. I then turned back, and, being cited to the mayor, went to him and informed him against the defendant and had him arrested. He was not marshal as I afterwards learned, but at the time I thought so. He never hit me or in any way put his hands on me, or tried to hit me, but threatened and frightened me. I did just as he ordered me. He was a stranger to me at that time, but I have since learned his name to be John Williams, and would know him anywhere, and is the man now on trial."

This evidence fails completely to show an assault; consequently the charge in the indictment is not supported by the proof. But let us suppose that the indictment had alleged that the money was taken by "violence and putting in fear of life or bodily injury," would these averments be sustained by the above facts? There was certainly no fear of loss of life; was there of bodily injury? What is meant by bodily injury? Most evidently it means an injury to the person, to the body.

Proceeding, then, upon the supposition that the indictment contained the proper allegations to admit evidence of "fear of life or bodily injury," still we are of opinion that the evidence in this case would not support these allegations.

If what has been written be a correct solution of the code defining robbery, a discussion of the other points raised in the brief of appellant is unnecessary; for the errors in the charge of the court will very clearly appear, tested by the exposition of the law of robbery as above set forth.

The verdict of the jury not being supported by the evidence a new trial should have been granted. The judgment is reversed and the cause remanded.

*Reversed and remanded.*

§ 596. —— **Intent to Steal at Time Necessary.** — So if one attacking another snatches a pistol from the hand of the prosecutor who has drawn it against his assailant, simply to prevent the prosecutor's from using it against him, without intending at the time to appropriate it, he is not guilty of robbery though he afterwards takes it away and sells it.[1]

§ 597. —— **Subsequent Use of Violence.** — If the property is taken without violence or putting in fear, the subsequent use of violence to retain it does not make the taking robbery.[2] "The force necessary to constitute robbery must be employed before the property is stolen. If the stealing be first and the force afterwards, the offense is not robbery, but stealing from the person."[3]

§ 598. —— **Taking Must be in Prosecutor's Presence.** — The goods must be taken in the presence of the prosecutor.[4]

§ 599. **Robbery — Property Must be in Possession of Party Robbed.** — In *R.* v. *Fallows*,[5] A. and B. were walking together, B. carrying A.'s bundle, when C. and D. came up and assaulted A. B. threw down the bundle and ran to the assistance of A. when C took it up and ran off. It was held that C. and D. could not be convicted of robbery. "The bundle," said Vaughan, B., "was not in A.'s possession. If the prisoners intended to take the bundle, why did they assault A. and not the person who had it."

In *R.* v. *Rudick*,[6] a servant being sent out to receive money for his master was robbed of it as he came home. It was held that the robbers could not be convicted of the robbery of the master.

In *R.* v. *Edwards*,[7] A. was decoyed into a house and chained down to a seat and compelled to write an order for the payment of money and the delivery of deeds. The paper on which he wrote remained in his hand half an hour, but he was chained all the time. It was held that there was no robbery. On the argument the counsel for the prosecution, *Adolphus*, cited the case of *R.* v. *Phipoe*,[8] as in point, but BOSANQUET, J., said: In that case the judges distinctly decided, that obtaining valuable securities from the maker by duress was not stealing. In this case the documents were obtained by duress. The question is, whether the documents were even in Mr. Goe's possession.

*Bodkin.* We can prove that.

*C. Phillips.* Not in his peaceable possession; he was in duress at the time.

PATTESON, J. The documents are certainly such as the act contemplated. The question is as to the mode in which they were obtained.

*F. V. Lee.* The documents, when written by Mr. Goe, remained with him for half an hour or more while he wrote some letters. They were, therefore, in his peaceable possession during that time. He only resigned them on account of the menaces and threats used towards him. There is a difference between this case and that of Mrs. Phipoe, for Mr. Courtois had never the peaceable possession of the note for £2,000 which was extorted from him.

PATTESON, J. The learned counsel has put his case with great ingenuity, but I am not able to see the slightest difference between the two cases. Mrs.

1 Jordan *v.* Com. 25 Gratt. 943 (1874)

2 State *v.* Clark, 12 Mo. (App.) 593 (1882); Shinn *v.* State, 64 Ind. 13.

3 R. *v.* Smith, 1 Lewin, 301 (1830).

4 Crews *v.* State, 3 Cold. 350 (1866).

5 5 C. & P. 508 (1832).

6 8 C. & P. 237 (1838).

7 6 C. & P. 521 (1834).

8 2 Leach.

Phipoe held a knife to Mr. Courtois' throat, and compelled him to give a promissory note for £2,000. He signed the notes and it was held that it was no robbery; for he never had peaceable possession of it, but had been forcibly and and by violence compelled to sign the paper. Now, how does Mr. Goe's case staud? He was chained aud padlocked, a rope was put round his neck, and his feet were tied to the ground; he could not move hand or foot, except just to write. They bring him pens, ink and paper, and he writes the orders. He had the papers, it was true, in his hand; but chained as he was, is it possible to conceive that he had such a peaceable possession of them as to be at liberty to do what he pleased with them? For that is the meaning of peaceable possession. I can not perceive the difference between the case of Coutois and the present, except that the latter is the stronger case of the two. The ground of decision in that case must govern the decision of the court in this. A robbery can not be committed unless the person has the property in his peaceable possession, to do with it as he choses. If Mr. Goe had bronght the documents ready writteu, the case would have been different; but he does not write them until he is chained. Several nice and subtle distinctions have been taken, but I do not favor such distinctions; and therefore, I hold with the previous decision of the judges, and am bound to be governed by it.

BOSANQUET, J. I entirely concur in this view of the question. The case is not to be distinguished in principle from *Mrs. Phipoe's Case*. The decision of the judges in that case was, that it was not a robbery, because Mr. Courtois had never been in peaceable possession of the note; the circumstances are similar in this case, and, therefore, the jury must acquit the prisoner.

*Verdict, not guilty.*

§ 599*a*. —— **Receiver not Guilty of Robbery.** — One who receives money obtained by robbery, with knowledge of bow it was obtained, is not guilty of the crime of robbery.[1]

§ 600. —— **Articles Taken must be Property of Prosecutor or Third Person.** — In *Commonwealth* v. *Clifford*,[2] METCALF, J., said: "Robbery by the common law is larceny from the person, accompanied by violence or by putting in fear; and an indictment therefor must allege that the taking was from the person, and that it was by violence or by putting in fear, in addition to the averments that are necessary in indictments for other larcenies.[3] If, therefore, the present indictment were for the common-law offense of robbery, it would be fatally defective for want of the averments that the articles alleged to have been stolen and taken from Pendexter were his property or the property of some third person,[4] and that they were carried away by the defendants.[5] As the indictment is drawn, all the averments therein may be true, and yet the defendants not be guilty of robbery at common law. The wallet and the bank bills may have been the property of the defendants, and may have been unlawfully taken from them by Pendexter. If so, the forcible retaking of them from him by the defendants would not be the offense of robbery."[6]

1 People *v.* Shepardson, 48 Cal. 189 (1874).

2 8 Cush. 215 (1851).

3 King *v.* Rogard, Jebb's Crown Cas. 62; Smith's Case, 2 East's P. C. 783, 784; King *v.* Donalley, 1 Leach (3d ed.), 229; 2 Stark. Crim. Pl. (2d ed.) 474.

4 2 Hawk., ch. 23, sect 71.

5 Archb. Cr. Pl. (5th Am. ed.) 308.

6 Reg. *v.* Hall, 3 C. & P. 409.

§ 601. **Robbery — Lucri Causa Essential.** — In *United States* v. *Durkee*,[1] the prisoner and others were indicted for piracy, the act charged being that they, being engaged in a riot, robbed a vessel in the harbor of San Francisco of a lot of arms, the property of the State, which had been bought for the purpose of suppressing the riot. The court ruled that *lucri causa* was essential. It was not robbery for one of a number of rioters to break into a ship and seize arms belonging to the State which were procured to be used against the rioters, if such arms were not seized for the purpose of appropriating them, or any part of them, to the taker's own use, but simply for the purpose of preventing their being used against his associates. McAllister, J., in charging the jury, said:—

The act on which this indictment is founded declares robbery committed on the high seas and in certain places shall be deemed to be piracy. To become a pirate under this law, a man must have committed robbery. Of the meaning of the term 'robbery' we think there can be no doubt. It must be understood as it was recognized and defined to be at common law. Although the common law is not a source of jurisdiction in the courts of the United States, it is necessarily referred to for the definition and application of terms.

The only inquiry, then, is, what was robbery at common law at the time of the separation of the American colonies from the parent country?[2] In robbery, which is larceny accompanied by intimidation or force, the felonious intent in taking constitutes the offense. Blackstone tells us the taking and carrying away must be done *animo furandi*, or, as the civil law expresses it, *lucri causa*, Lord Coke, in his 'Institutes,' and Hawkins, in his 'Pleas of the Crown,' gives the same definition.[3] Archbold states that 'larceny, as far as respects the intent with which it is committed, is where a man knowingly takes and carries away the goods of another without any claim or pretense of right, with intent wholly to deprive the owner of them and to appropriate or convert them to his own use.' In *Pear's Case*,[4] Baron Eyre defines larceny to be 'the wrongful taking of goods with intent to spoil the owner of them *causa lucri*. The foregoing authorities all include in larceny, as an essential element, what is termed the *lucri causa*. A similar view is taken by the Supreme Court of Missouri in the case of *State of Missouri* v. *Conway*.[5] 'The taking [say the court] must be done *animo furandi*, or as *lucri causa*. The felonious intent is the material ingredient in the offense.' To constitute this offense, therefore, in any form, there must be a taking from the possession, a carrying away against the will of the owner, and a felonious intent to convert it to the offender's use. Again, in the State of Delaware, it was ruled that, if the party indicted for larceny, where he took a horse for the stealing of which he was indicted, intended to appropriate him to his own use by selling or retaining him to his own use, it was felony; but if he only took him to aid him in his escape as a runaway slave, it was no more than a trespass.[6] In Alabama the Supreme Court considered the doctrine at common law to be 'that the criminal intention constitutes the offense, and is the only criterion to distinguish a larceny from a trespass. That, according to the common-law writers, to constitute the offense of larceny, it was not sufficient that the goods be taken for the purpose of destroying them to injure his neighbor, and actually destroying them. Such offense would be malicious mischief; but it would want one of the essential

1 1 McAll. 176 (1856).
2 United States v. Palmer, 3 Wheat. 610.
3 1 Hawk. 93.
4 East's P. C., tit. Larceny, sec. 2.
5 18 Mo. 321.
6 2 Harr. 529.

ingredients of larceny — the *lucri causa* — the intention is to profit by the act by the conversion of the property.[1] In that case, although it was evident the prisoner had secreted the slave from her owner with a view to do the owner an injury by aiding the slave to obtain her freedom, still, as there was no intention to convert the slave to his own use, the party was held to be not guilty of larceny.

The courts, then, of Missouri, of Delaware and of Alabama, in the three cases cited, consider the doctrine of the common law to be that, to constitute larceny, there must be as an essential ingredient and a necessary element, the *animus furandi* or *lucri causa*. There are decided cases in England which sustain a similar doctrine. Thus, in *Rex* v. *Holloway*,[2] decided in 1833, the prisoner was indicted for stealing a gun from the prosecutor, who was a gamekeeper. The latter, knowing him to be a poacher, seized him. A companion of the prisoner rescued him; and the latter, getting free, wrenched the gun from the prosecutor and ran off with it. It was proved that the prisoner said he would sell the gun, and it was not afterwards found. The jury returned that they did not think that the prisoner, at the time he took the gun, had any intention of appropriating it to his own use. 'Then [said the court] you must acquit him. It is a question peculiarly for your consideration. If he did not, when he took it, intend its appropriation, it is not felony; and his resolving afterwards to dispose of it will not make it such.'

In *Rex* v. *Crump*,[3] the prisoner was indicted for stealing a horse, three bridles, two saddles and a bag; and the court left it to the jury to say whether the prisoner intended to steal the horse; for if he intended to steal the articles, and only to use the horse to convey the articles away, he would not be guilty of stealing the horse. The case of *Rex* v. *Wright* was that of a servant indicted for stealing his master's plate; and it appeared that, after the plate was missed but before complaint was made, the prisoner replaced it. It was in proof that the plate had been pawned, and the pawnbroker testified that the prisoner had, on previous occasions, pawned plate and redeemed it. The court left it to the jury to say whether the prisoner took the plate with intent to steal it, or to raise money on it and then return it; for in the latter case it was no larceny. The prisoner was acquitted.

In *Rex* v. *Van Muyen*,[4] the prisoner, who was master of a Prussian vessel captured by the British and carried into a home port, was indicted for stealing certain articles from the ship. There was no evidence to prove whether the prisoner had taken the articles for his own use or that of his owners. Chambre, J., reserved the point for the opinion of the judges; and a majority of them were of the opinion that if the prisoner had taken the articles for his own use, it was larceny; otherwise it was not. In *Regina* v. *Godfrey*,[5] it was decided that, where a person from curiosity, either personal or political, opens a letter addressed to another person, and keeps the letter (this in the absence of a statute), it is a trespass, not a larceny, even though a part of his object may be to prevent the letter from reaching its destination.

The foregoing decisions embody, in a practical form, the principle enunciated in the definitions given by the text-writers. We will now advert to three or four recent English decisions which seem to qualify the doctrine. In the year

[1] State *v.* Hawkins, 8 Port. 461.
[2] 5 C. & P. 524.
[3] 1 C. & P. 658.
[4] 1 Russ. & R. 118.
[5] 8 C. & P. 563.

1815 two decisions were made in England, which were subsequently followed by two others, without comment or discussion. The first is that of *Rex* v. *Cabbage*,[1] The principle enunciated was, 'that if the intent be to destroy the article taken, it will be sufficient to constitute the offense of larceny, if done to serve the prisoner or any other person, though not in a pecuniary way.' The case was this: the prisoner, to screen his accomplice, who was indicted for stealing a horse, broke into the prosecutor's stable and took away the horse, which he backed into a coal-pit and killed. A majority of the judges decided this was larceny. At such a decision we are not surprised to find Lord Abington exclaiming, in 1838, when that case was cited in his presence, 'I can not accede to that!'

The second English case on this point is *Rex* v. *Morfit*,[2] decided on the authority of the former. There, A. and B., servants, opened the granary of their master, by means of a false key, and took two bushels of beans to give to their master's horses, in addition to the quantity allowed; and it was held to be larceny. Some of the judges alleged that the additional quantity of beans would diminish the work of the men who had to look after the horses, and this diminution in their labor was considered a *lucri causa*. The astuteness with which the *lucri causa* was sought for and discovered in that case is strong proof of the stringency of the rule which requires it as an essential ingredient in the crime of larceny. This case is referred to by a recent writer as a 'singular case on this point.'[3] Such it undoubtedly is, as in effect it destroyed the distinction which had existed from an ancient period between larceny and trespass, unless we can, with some of the judges, detect the existence of the *lucri causa* in that case. Looking into the cases last cited, and the grounds on which they were decided, we deem the observations made in relation to them by the Supreme Court of Alabama not inappropriate. 'It appears to us [they say] that these cases can not be considered as authority in this country. The shadowy and almost imaginary distinctions upon which they rest are at war with that precision and certainty which are the boast of the criminal law of England.'[4]

These cases stand in direct opposition to the numerous authorities, English and American, above cited. They introduced a change into the common law as it existed at the time of the emigration of our ancestors to this country; and we can not recognize modifications recently made in the common law of England as controlling this court. If an authority could have been found emanating from an American court adopting these hair-breadth distinctions, it certainly could not have eluded the search of the profession.

After a careful examination of the law, we give you, gentlemen, the instructions which follow: —

1. That if you believe from the evidence that the prisoner took and carried away the arms, with the intent to appropriate them, or any portion of them, to his own use, or permanently deprive the owner of the same, then he is guilty.

2. But if you shall believe that he did not take the arms for the purpose of appropriating them, or any part thereof, to his own use, and only for the purpose of preventing their being used on himself or his associates, then the prisoner is not guilty.

*Verdict, not guilty.*

[1] 1 Russ. & R. 292.
[2] 1 Russ. & R. 307.
[3] Archb. Cr. L., ed. 1353.
[4] 8 Port. 465.

§ 602. —— **Getting One's Own by Violence.** — The owner of property, entitled to its possession, though taking it by violence and putting in fear, is not guilty of robbery.[1]

In *R.* v. *Henning*,[2] the prisoner was indicted for robbery of one Eden of a cheque and some money, with violence to the person. The prisoner was an innkeeper at Winchelsea, and Eden, the prosecutor, owed him a debt, and had promised to pay him £5 when he received money. On the 4th of August, he was at the prisoner's inn drinking, and showed that he had money. The prisouer pressed him for paymeni, and, on refusal, induced him to go with him into a private room, and there, after repeating his demand for money, declared that he would have it, knocked him down and knelt upon him, and tried to take it from him. The prosecutor said if he would let him get up he would give him a cheque for £4 he had about him, and did so. The prisoner, however, repeated his demand for money, and declared he would have it, and according to the prosecutor's evidence, knocked him down again, and held him up by the heels beating his head against the floor until he cried out, "Murder," and his money dropped out of his pockets, but what became of it was not known, as it was not found, though searched for. Upon these facts, ERLE, C. J., said he thought the jury could hardly convict the prisoner of felonious robbery. It was rather an assault by a creditor on a debtor to enforce payment of a debt, an unlawful proceeding, no doubt, but very unlike a felony. The essence of the offense now charged, was the felonious intent, and that it was impossible to find upon these facts.

*Verdict, not guilty.*

§ 603. —— **"Menaces."** — If a person with menaces demands money from another, knowing that it is not then in his possession, and intending only to obtain an order for its payment, it is not demanding property with menaces within the statute.[3]

§ 604. —— **"Public Highway."** — A railroad track is not a "public highway."[4]

§ 605. —— **Time of War.** — It is not robbery for a soldier to take, in time of war, the weapon of a captured enemy.[5]

1 Barnes *v.* State, 9 Tex. (App.) 128 (1880).
2 4 F. & F. 50 (1864).
3 R. *v.* Edwards, 6 C. & P. 515 (1834).
4 State *v.* Johnson, Phill. L. 140 (1867).
5 Hammond *v.* State, 3 Cald. 129 (1866).

# CHAPTER VIII.

## CRIMES AGAINST THE PERSONS OF INDIVIDUALS.

## PART I.

## ABDUCTION — SEDUCTION

### ABDUCTION FOR "PURPOSE OF PROSTITUTION."

### STATE *v.* STOYELL.

[54 Me. 24.]

*In the Supreme Court of Maine, 1866.*

1. **Abduction for the Purpose of Sexual Intercourse** is not abduction for the "purpose of prostitution."
2. **The Defendant, by False Representations,** persuaded a girl to go with him to a neighboring town, where he took her to a hotel and made her partly drunk, when he had intercourse with her during several days. *Held,* that he was not guilty of abducting her "for the purpose of prostitution" within the statute.

The case came before the full court on demurrer to the evidence.

It was proved that the unmarried female named in the indictment, was, on March 2, 1866, residing in her father's family, in this county; that she then went to the railroad station to meet her music teacher, where she met the defendant with whom she had a slight acquaintance; that the defendant urged her to go with him to the cars, then about starting to a neighboring town for a ride, promising her as an inducement, that he would bring her back in a carriage in two hours; that, suspecting no intention on the defendant's part, and having none herself, other than the avowed one of taking a ride, she consented to accompany him. When they arrived at the station in the neighboring town they took a carriage to a hotel, when he engaged a private room and conducted her to it, that, when they had entered the room, he locked the door and put the key in his pocket; that she at once asked to go home, and demanded a fulfillment of his promise to take her home, but that she was quieted with assurances that she should be returned in a short time; that the defendant then left the room, locking the door

behind him, and after a short absence, returned, followed by a servant bringing a bottle and glasses; that the servant immediately retired whereupon the defendant again locked the door and urged her to drink of the contents of the bottle, a glass full of which he offered her; that after assurances that it would not injure her, she finally drank what was offered; that she did not know what the liquid was, but that it produced a degree of intoxication; that he induced her to drink a second time, and then he had sexual intercourse with her; that she did not remember whether the connection was on the bed or sofa; that she asked again to be taken home, when the defendant promised to get a carriage soon; that she then told the defendant that in the morning she had no thought of ever being in her then present condition; that he replied he did, and had thought of it for a week; that after a while he took her down to supper, she being unable to walk without support; that after supper, he conducted her to the private room, gave her more drink, and again had connection with her; that, after repeated requests on her part, he through the interposition of a young man whom they together went to see, procured a horse and carriage and drove with her to her father's house; that she expressed her fears of her inability to account to her parents for her absence and he told her she could fabricate a story that would satisfy them; that they arrived at her father's late at night and found a light burning in the house; that she told the defendant she was afraid to go into the house, and he said she must return to their hotel, which she declared herself unwilling to do, but while she was talking, he turned the carriage and started back to their hotel where they arrived after midnight; that they were unable to obtain admittance to their hotel, and then went to another, obtained admittance; took a room together and occupied the same bed; that, in the night and the next morning, the defendant again had connection with her; that in the forenoon of the next day, they returned by cars; that the defendant urged her to go with him to Portland and stay a few days, saying that she might as well be hung for a sheep as a lamb, but she refused and went home.

It was also proved that on or about November following she gave birth to a living child.

It also appeared in evidence, that on the first day of March aforesaid the defendant called at her father's and inquired for her; that on being told she was out, he left word for her, that a female friend of his would pass through town on the noon train of the next day, and would like to see her at the station; that she did not go to the station, but her father went, and saw the defendant in waiting. It also appeared that no other person than the defendant had any connection with her while absent from home with him, and that no pay was given to her.

The evidence was reported to the full court, who were to determine whether the facts proved constituted the offense alleged; if they did, the case was to stand for trial; if not, a *nolle prosequi* to be entered.

*J. A. Peters*, Attorney-General, for the State.

*H. L. Whitcomb* and *Davis & Drummond*, for defendant.

APPLETON, C. J. The defendant is indicted for a violation of chapter 4, section 1, of the acts of 1861.

By Revised Statutes, 1857,[1] "if an unmarried man commits fornication with an unmarried woman, they shall each be punished by imprisonment not more than sixty days and fined not exceeding one hundred dollars."

By chapter 4, section 1, of the acts of 1861, "whoever fraudulently and deceitfully entices or takes away an unmarried female from her father's house, or wherever else she may be found, for the purpose of prostitution, at a house of ill-fame, assignation, or elsewhere, and whoever aids and assists in such abduction or secretes such female for such purpose, shall be punished by imprisonment in the State prison not less than one nor more than ten years."

These sections are for different purposes, they create different offenses and impose different punishments. A person may be guilty of one offense and not of the other. He may commit fornication with a female without intending to induce such female to become a prostitute. He may entice one away from her father's house for the purpose or prostitution, he may induce her to become a prostitute without committing fornication with her. Indeed, persons of either sex may entice away females for the purpose of supplying brothels and houses of ill-fame.

The offense set forth in the statute under which this indictment is found, is the fraudulently and deceitfully enticing a married woman from her father's house or wherever she may be found, for the purpose of prostitution, at a house of ill-fame, assignation or elsewhere, etc. Worcester defines prostitution thus: "To offer to a common, lewd use; to make a prostitute of; to corrupt; 'Do not prostitute thy daughter.' Leviticus xix: 29." A prostitute is a female given to indiscriminate lewdness for gain. In its most general sense, prostitution is the setting one's self to sale; or of devoting to infamous purposes what is in one's power. In its more restricted sense, it is the practice of a female offering her body to an indiscriminate intercourse with men; the common lewdness of a female.[2] In *Com.* v. *Cook*,[3] a statute similar in its language and its object to that of this State now under consideration, received a judicial construction and it was there held, that it did not apply to the case of a man's enticing a

[1] ch. 124, sec. 6.

[2] Carpenter *v.* People, 8 Barb. 603.

[3] 12 Metc. 93.

woman to leaving her place of abode for the sole purpose of illicit sexual intercourse with him.

It appears in proof that the defendant, by false representations, procured the complainant to go with him to Bath, and then, having induced partial intoxication, had repeated sexual intercourse with her. Sexual intercourse, the evidence showed, was the whole object he had in view. Nothing indicates a design on his part to make her a common prostitute. His only purpose was sexual gratification. However infamous the conduct of the defendant — however deserving of punishment he may be, he can not be legally convicted of, or punished for a crime he has never committed. The evidence on the part of the government fails to sustain the allegations of the indictment, while it abundantly proves him guilty of another and different offense — that is, fornication.

The facts on the part of the government are uncontradicted. No further evidence is attainable. To send the cause to a jury would only delay its decision without changing the result. By the agreement of parties the case stands as on a demurrer to the evidence — an obsolete form of procedure, though sometimes recognized, as in *State* v. *Soper*,[1] Upon the facts, as proved, the defendant can not legally be convicted of the offense for which he is indicted, and the County Attorney may very properly enter a *nolle prosequi.*

KENT, WALTON, DICKINSON, and DANFORTH, JJ., concurred.

---

## ABDUCTION FOR PROSTITUTION — PROSTITUTION — ILLICIT INTERCOURSE.

## OSBORN *v.* STATE.

[52 Ind. 526.]

*In the Supreme Court of Indiana, 1876.*

**Prostitution Means Common,** indiscriminate, illicit intercourse, and not illicit intercourse with one man only. Therefore under a statute against abduction for the purpose of prostitution one can not be convicted of abduction for the purpose of sexual intercourse only.

WORDEN, J. The appellant was tried, convicted, and sent to the State prison upon the following indictment, its sufficiency having been properly questioned, viz.: —

"The grand jurors," etc., "in the name and by the authority of the State of Indiana, upon their oaths present and charge that on or about

1 16 Me. 293.

the 15th day of January, A. D. 1875, at and in the county of Franklin, and State of Indiana, one James T. Osborn unlawfully and feloniously enticed away one Alvaretus Faurote, a female of previously chaste character, from said county of Franklin, in the State of Indiana, to the city of Jeffersonville, in the county of Clarke, in said State of Indiana, for the purpose of having illicit sexual intercourse with her, the said Alvaretus Faurote, contrary to the form of the statute," etc.

The indictment is based upon the following statutory provisions, viz: —

"If any person shall entice or take away any female of previous chaste character, from wherever she may be, to a house of ill fame, or elsewhere, for the purpose of prostitution, and every person who shall advise or assist in such abduction, shall be imprisoned in the State prison not less than two nor more than five years, or may be imprisoned in the county jail, not exceeding one year, and be fined not exceeding five hundred dollars; but in such case the testimony of such female shall not be sufficient, unless supported by other evidence, corroborating to the same extent as is required in cases of perjury as to the principal witness."[1]

It will be seen by the indictment that the appellant is charged with having abducted the female "for the purpose of having illicit sexual intercourse with her;" and not "for the purpose of prostitution," as is provided for by the statute. The question arises whether the facts charged come within the statute. We are of opinion, upon an examination of the authorities, that they do not.

The first case to which our attention has been called is that of *Commonwealth* v. *Cook*.[2] There Cook was indicted under a statute quite similar to our own. The court say, in speaking of the point here involved:[3] "The court are of opinion, that the offense made punishable by this statute is something beyond that of merely procuring a female to leave her father's house for the sole purpose of illicit sexual intercourse with the individual thus soliciting her to accompany him; that she must be enticed away with the view, and for the purpose, of placing her in a house of ill-fame, place of assignation, or elsewhere, to become a prostitute, in the more full and exact sense of that term; that she must be placed there for common and indiscriminate sexual intercourse with men; or at least, that she must be enticed away for the purpose of sexual intercourse by others than the party who thus entices her, and that a mere enticing away of a female for a personal sexual intercourse will not subject the offender to the penalties of this statute."

1 2 G. & H. 441, sec. 16.
2 12 Metc. 93.
3 p. 98.
4 8 Barb. 603.

The next case is that of *Carpenter* v. *People.*[1] In that case, Carpenter was prosecuted under a similar statute, and the court came to the same conclusion as that arrived at in Massachusetts, though the Massachusetts' case is not therein mentioned. The court say,[1] "We are entirely clear that by the expression in question" (prostitution), "as used in the statute, it was intended that in order to constitute the offense thereby created, the abduction of the female must be for the purpose of her indiscriminate commerce with men. That such must be the case to make her a prostitute, or her conduct prostitution, within the act."

Following these cases is that of *State* v. *Ruhl.*[2] The latter was also a prosecution under a similar statute, for enticing away a female for the purpose of prostitution. There was evidence of a purpose on the part of the defendant "to seduce and enjoy the body of the said Matilda" (the female), "and that he had taken her away, in order to have carnal intercourse with her, and did so enjoy her person; but there was no testimony that he purposed that she should be carnally enjoyed by others, nor that she should be devoted to promiscuous carnal intercourse, nor that he took her, or proposed taking her, to any house of prostitution." On these facts the defendant asked the following instruction, which was refused, viz.: —

"If the defendant only intended to obtain the body of said Matilda, for his own personal carnal enjoyment, and no more, then the act did not amount to her prostitution, in the sense of the law."

It was held that the charge should have been given, that the word "prostitution" means common, indiscriminate, illicit intercourse, and not sexual intercourse confined exclusively to one man. To the same effect is the still later case of *State* v. *Stoyell.*[3]

In view of these authorities, we think it clear that the indictment does not charge the abduction of the female "for the purpose of prostitution," within the meaning of the statute. The judgment below is reversed, and the cause remanded, with instructions to the court below to sustain the motion to quash the indictment.

The clerk will give the proper notice for the return of the prisoner.

[1] p. 611. [2] 8 Iowa, 447. [3] 54 Me. 24.

## ABDUCTION FOR PROSTITUTION—"CHASTE CHARACTER"—EVIDENCE.

## LYONS v. STATE.

[52 Ind. 426.]

*In the Supreme Court of Indiana, 1876.*

**A Statute Against** the abduction of females of "previous chaste character" means, of actual personal virtue in distinction from a good reputation. On the trial of an indictment founded on that statute, it is admissible to prove previous particular acts of illicit intercourse on the part of the female abducted.

DOWNEY, C. J. This was a prosecution for abduction, under section 16.[1] The defendant was convicted and sentenced to the State's prison. The refusal of the court to quash the indictment, and the overruling of the defendant's motion for a new trial, are assigned as errors. We see no valid objection to the indictment. There is a little surplusage in its allegations, but it is good, notwithstanding.

On the trial, the defendant proposed to prove acts of illicit sexual intercourse on the part of the prosecuting witness prior to the alleged abduction, but the court rejected the evidence. We think this was an error. In such a case the female must be of "previous chaste character." This has been held to mean that she shall possess actual personal virtue in distinction from a good reputation. A single act of illicit connection may, therefore, be shown on behalf of the defendant.[2]

The preceding section relating to seduction is different. It only requires that the female shall be "of good repute for chastity."

The authorities cited by the State do not bear on the exact question under consideration.

The judgment is reversed, and the cause remanded for a new trial. The clerk will certify to the warden of the State prison as required by law.

---

## ABDUCTION—PROOF—SEDUCTION.

## PEOPLE v. RODERIGAS.

[49 Cal. 9.]

*In the Supreme Court of California, 1874.*

1. **An Indictment for Enticing an Unmarried** female to a house of ill-fame for purposes of prostitution must allege and the prosecution must prove, on the trial, that such female was of previous chaste character.

[1] p. 441, 2 G. & H.

[2] Bish. Stat. Cr., sec. 639; Carpenter v. People, 8 Barb. 603; Kenyon v. People, 26 N. Y. 203; State v. Shean, 32 Iowa, 88; Andre v. State, 5 *Id.* 389; Boak v. State, *Id.* 430.

2. **Proof in such Case** that the female was of previous chaste character need not be made by evidence directly upon the point, but may be shown *prima facie*, by presumption from other facts.

3. **Seducing a Female.** — To seduce a female is not an offense within the meaning of the two-hundred and sixty-sixth section of the Penal Code, which makes it a crime to procure any female to have illicit carnal connection with any man. The act refers to one who procures the gratification of the passion of lewdness in another.

Appeal from the County Court, Santa Clara County.

The facts are stated in the opinion.

*John J. Love*, Attorney-General, and *James H. Campbell*, for the appellant cited, *Crozier* v. *People* [1] and *People* v. *Kane.* [2]

*C. U. Terry*, for the respondent.

*By the Court*, WALLACE, C. J. The indictment in this case is founded upon the act of March 1, 1872,[3] which act for the purposes of this case may be considered as identical with section two hundred and sixty-six of the Penal Code. The indictment alleges that the defendant willfully and feloniously, and by false pretenses and fraudulent representations did, on a day therein mentioned inveigle and entice a certain unmarried female, in the indictment named, under the age of eighteen years, to wit, of the age of sixteen years, from her home in the city of San Jose to the town of Santa Clara, for the purpose of prostitution, and did on said day, at a certain hotel, in the said town of Santa Clara, by and through his false pretenses and fraudulent representations procure the said female to have illicit carnal connection with himself, the said defendant, contrary to the form of the statute, etc.

The defendant interposed a demurrer, which having been sustained by the court below, and the prisoner discharged, this appeal is prosecuted by the People. The grounds of the demurrer were, that it is not alleged in the indictment that the female therein mentioned was of previous chaste character; that the facts stated do not state a public offense; and "that the complaint does not state facts sufficient to constitute a cause of action."

1. To entice a female into a house of ill-fame, or elsewhere, for the purposes of prostitution, is not an offense under the two hundred and sixty-sixth section of the Penal Code, nor under the provisions of the act of March 1, 1872,[4] unless such female was of previous chaste character. Character in this respect is a fact, and one which must be alleged in the indictment, and established by the prosecution, in order to a conviction of the accused. It need not, however, be proven by evidence given directly upon the point, but may be shown *prima facie* by presumption from other facts and circumstances attending the transaction; as, for instance that the unmarried female — the subject of the

1 1 Park. 453.

2 14 Abb. Pr. 15.

3 Stats. 1871-2, p. 184.

4 p. 380.

injury — was at the time residing with her parents, or other relatives, or her guardian, or in some respectable household, or by proof of other like circumstances consistent with, and the usual concomitants of, chaste female character. But by whatever evidence it may be proven in the case, the fact of previous chaste character must be alleged in the indictment. It is not a presumption of mere law, to be indulged against the counter presumption of the innocence of the prisoner on trial upon a charge of crime committed. We are of opinion, therefore, that the indictment in question, omitting as it does, to allege that Carlotta Lopez was a female of previous chaste character, is insufficient under the first clause of the statute.

2. Nor do we think that it can be supported under the last clause of the act referred to. The facts stated in the indictment in this respect (even assuming Carlotta Lopez to have been of previous chaste character) amount to a charge of seduction, and do not import a crime under that clause. To "procure a female to have illicit carnal connection with any man," is the offense of a procurer or procuress — of a pander. This is the natural meaning of the words — the fair import of the terms of the statute — and in our opinion this construction effects the objects had in view by the law-maker in its enactment. The argument for the People is that, as a seducer is a person who prevails upon a female, theretofore chaste, to have illicit carnal connection with himself, he is thereby brought within the mere words of the statute, and so made liable to the punishment it inflicts. But we think that this view can not be maintained by any rule of fair interpretation. The statute uses the word "procure — procures." The recognized meaning of this word in the connection in which it appears in the statute refers to the act of a person "who procures the gratification of the passion of lewdness for another." This is its distinctive signification, as uniformly understood and applied. The subsequent words "with any man" ("procures any female to have illicit carnal connection with any man"), therefore, so far from being inconsistent with this construction, lend it support.

It would be to utterly disregard the relations which these words bear to the remainder of the sentence in which they occur, and to indulge in a most latitudinarian construction, should we hold that they include and apply to the defendant in this case. He can not, under the facts stated in the indictment, be considered to have been both procurer and seducer at the same time, and in one and the same instance, without utterly confounding distinctions and definitions well established and universally recognized.

It results that the court below correctly sustained the demurrer and its judgment must be affirmed. So ordered.

Mr. Justice McKinstry did not express an opinion.

## SEDUCTION — GOOD REPUTE OF FEMALE MUST BE PROVED.

## OLIVER v. COMMONWEALTH.

[101 Pa. St. 215.]

*In the Supreme Court of Pennsylvania, 1882.*

1. **In an Indictment Under the Statute** for seducing a female of good repute under twenty-one years of age, under promise of marriage, the Commonwealth must prove affirmatively the good repute of the female. The proper practice in such case is for the Commonwealth to call witnesses to prove that the general reputation of the prosecutrix for chastity in the neighborhood in which she has lived is good.
2. **It is Error for the** court to charge the jury that they may infer good repute from the general evidence offered by the prosecution, not adduced for that purpose and having scarcely the slightest tendency in that direction.

Before SHARSWOOD, C. J., MERCUR, GORDON, PAXSON, TRUNKEY, STERRETT and GREEN, JJ.

Error to the Court of Quarter Sessions of Jefferson County; of October term 1882.

Indictment of John T. Oliver, for seduction under promise of marriage of Annie Whitmore, "a single woman, of good repute, under the age of twenty-one years." Plea, not guilty.

On the trial the Commonwealth's counsel called the prosecutrix who testified. * * * "In November, 1880, when he proposed what he did, I refused him. I says, 'no sir, not till I am your wife.' I says, 'wait till you marry me, and not till then.' He says, 'you know we will be married in a few weeks. I am just the same as a husband, and you a wife.' At last, I gave up to him." * * * Between November and March he had connection with me frequently, in consequence of which a child was born on the 30th of October, 1881.

No evidence was offered by the Commonwealth for the express purpose of proving that the girl was "of good repute" but in the course of the trial it appeared that she had always resided at home with her parents and both she and her mother testified that she "had never had any gallant or beau but the defendant."

The defendant presented the following point: —

"That as the Commonwealth has offered no evidence to show that the prosecutrix was a woman of good repute, there can be no conviction for seduction."

Answer.—We do not remember of any direct evidence going to show that this was a woman of good repute. We instruct the jury that if the Commonwealth has failed to show this good repute, or what is its equivalent, that there could be no conviction. After reflecting upon the question presented in this point and obtaining all the light we can

from the books furnished, we add this further instruction bearing upon the question presented in this point. To constitute the offense of seduction under the act of 19th of April, 1843, there must be illicit connection and the female must be drawn aside from the path of virtue which she was honestly pursuing at the time the defendant approached her. The law does not presume the previous chastity of the female, such a presumption being inconsistent with that of the prisoner's innocence; but such chastity must be proved by the government, it being essential to the offense charged. Taking the authorities therefore and the reasons upon which they seem to proceed, we think ourselves justified in stating the law and leaving you to determine under the evidence whether the prosecution has come up to the point the law requires. We believe that if it is affirmatively proved that the prosecutrix has always maintained a consistent character for chastity — if the evidence showed that she had never been approached by any other man; that she had never kept company with any other man; and if the evidence showed that the defendant was the first person who had illicit intercourse with her, and had drawn her aside from the path of virtue; if this be proven we believe that the requirements of the Act of Assembly would be met so far as the proof of good repute is concerned. And we add further that it is always necessary to the prosecutor's cause to make out the fact that the prosecutrix had always maintained a good character for chastity. One or the other of these is necessary to maintain the prosecutrix's case. And their existence may be inferred from general evidence offered by the prosecution. We think in the statement we have thus made of the law upon this branch of the case, we will be fully sustained by the reason of the thing and by the weight of the authorities. We thus answer the point put to us by the defendant.

Verdict, guilty, and the defendant was sentenced. An *allocatur* having been obtained from a judge of the Supreme Court, the defendant took this writ of error, assigning for error, *inter alia*, the answer of the court to defendant's point as above.

*White* (with him *Scott* and *Corbett*) for the plaintiff in error, cited *West* v. *State*,[1] *Commonwealth* v. *McCarty*.[2]

*Jenks* (*Clark* with him), for defendant in error. The legal presumption of fact is always in favor of "good repute," and moreover there were ample circumstances proved from which good repute could be inferred by the jury. The girl was only eighteen years old, lived with her parents and worked in the household, went to church, never before had any beau or gallant, no aspersion ever made as to her character for chastity before the defendant seduced her under promise of

[1] 1 Wis. 209; Whart. Cr. L., sec. 2673 and note.

[2] 2 Pa. L. Jour. 136.

marriage. "Good character being presumed, evidence to support it will not be received until it has been assailed."[1] "Chaste character is presumed and need not be proved."[2] In Pennsylvania it has been expressly decided that: "The rule is well settled that witnesses on part of plaintiff can not be examined as to general character of the seduced for chastity until evidence of general bad character has been adduced by defendant."[3] It is therefore not only unnecessary, but it would be improper to offer direct evidence of good repute until the presumption is rebutted by evidence offered by defendant. Even then direct evidence is not essential, if circumstantial or presumptive evidence is clear. "Chaste character in the person seduced may be inferred from the general evidence offered by the prosecution when not expressly testified to as an independent ingredient of its case."[4]

Mr. Justice STERRETT delivered the opinion of the court.

The statute under which the plaintiff in error was indicted declares "that the seduction of any female of good repute, under twenty-one years of age, with illicit connection under promise of marriage," shall be a misdemeanor.[5] The "good repute" of the female alleged to have been seduced is thus made an essential ingredient of the offense, and hence it was not only necessary that it should be specially averred in the indictment, but it was incumbent on the Commonwealth to prove the fact affirmatively by such evidence as would justify the submission of that question to the jury. The ordinary presumption of her good reputation for chastity, without more, was insufficient for that purpose.[6] This was conceded by the learned judge in his answer to defendant's request, requesting him to charge, "that as the Commonwealth has offered no evidence that the prosecutrix was a woman of good repute, there can be no conviction." It was also conceded in the same connection that there was no direct evidence on the subject of good reputation; but the point was refused, and the jury were instructed, *inter alia*, that if the Commonwealth failed to show "good repute, or what is its equivalent," there could be no conviction. It must be shown "that the prosecutrix was a person of good repute," or that she "had always maintained a good character for chastity. One or the other of these is necessary; and their existence may be inferred from general evidence offered by the prosecution." In thus instructing the jury and submitting the question to them on insufficient evidence, we think there was error. It is "the good repute" of the female seduced, and not something else that may be regarded by the jury as "equivalent" that is

1 Whart. Cr. Ev. (8th ed.), sec. 59; Snyder *v.* Commonwealth, 85 Pa. St. 519.

2 State *v.* Higdon, 32 Iowa, 262; State *v.* Wells, 48 Iowa, 671.

3 Wilson *v.* Sproul, 8 P. & W. 49, 53.

4 Whart. Cr. L. (8th ed.), sec. 1757.

5 Purd. 326, pl. 56.

6 West *v.* State, 1 Wis. 199; 1 Bish. Cr. Pr. 1106.

made an element of the offense. There is no doubt whatever as to the meaning of that expression as used in the statute, and neither court nor jury has a right to determine "what is its equivalent." The testimony introduced by the Commonwealth tended to prove other ingredients of the offense; but it was not offered for the purpose of proving reputation, nor had it scarcely the slightest tendency in that direction. There is a well recognized mode of proving general reputation and the Commonwealth should not be permitted to ignore it without cause, especially in cases like the present, wherein "good repute" is an essential element of the offense. If the general reputation of the prosecutrix for chastity in the neighborhood in which she lived was good, — and there is nothing in the case to indicate anything to the contrary, — it was the duty of the Commonwealth to call witnesses and prove the fact affirmatively, as every other ingredient of the offense was required to be proved, instead of asking the jury to infer the fact from casual expressions used by some of the witnesses in the course of their testimony on other branches of the case. Every person accused of crime is entitled to the benefit of the legal presumption in favor of innocence which, in doubtful cases, is always to turn the scales in his favor. Hence, the rule of evidence in criminal cases is that the guilt of the accused must be fully proved. Neither the mere preponderance of evidence, nor any weight of preponderant evidence is sufficient for the purpose unless it generates full belief of the fact to the exclusion of all reasonable doubt. The general evidence referred to by the learned judge was clearly insufficient for that purpose, and did not justify the submission to the jury of a material fact of which there was no direct evidence.

There was nothing in the circumstances of the case from which the general good reputation of the prosecutrix could be fairly or legitimately inferred. The several assignments of error are sustained.

*Judgment reversed.*

---

## ABDUCTION — "PREVIOUS CHASTE CHARACTER" — PURPOSE OF PROSTITUTION.

## CARPENTER v. PEOPLE.

[8 Barb. 603.]

*In the Supreme Court of New York, 1850.*

1. **"Previous Chaste Character"** in the statute against abduction means actual personal virtue and the female to sustain an indictment for seducing her must have been chaste and pure in conduct and principle, up to the time of the commission of the offense.

2. "**For the Purpose of Prostitution**" means for the purpose of her indiscriminate meretricious commerce with men; and therefore, where the female left her home voluntarily and went to cohabit with the defendant alone, the case is not within the statute.

The plaintiff in error was indicted in the Court of Sessions of Ontario County, under the act entitled "An act to punish abduction as a crime," passed March 20, 1848. The indictment charged that the defendant did, on the 20th day of August, 1849, unlawfully and feloniously inveigle, entice and take away for the purpose of prostitution at a house of ill-fame, assignation or elsewhere, one Louisa M. Sawyer, from the house of Joseph Sawyer her father, where the said Louisa then was; she the said Louisa being an unmarried female, of previous chaste character, and under the age of twenty-five years; against the peace, etc. The indictment contained six counts, all charging substantially the same offense in different forms. The defendant pleaded not guilty, and the trial came on at the term of the Court of Sessions held in May, 1850, when the defendant was convicted, and sentenced to two years' imprisonment in the State prison at Auburn.

Upon the trial evidence was given to show that the said Louisa M. Sawyer left her father's residence in Manchester, Ontario County, in June, 1849, by an arrangement between her and the defendant, and that she immediately went to live and cohabit with him, first at the house of one Aviline West, in the town of Naples, in the county of Ontario, and afterwards in the town of Hume in the county of Alleghany. It was proved that after she left home she had been living, boarding and cohabiting with the defendant; but there was no evidence that she had cohabited or had illicit intercourse with any other person than him. It appeared that the defendant had been in the habit of visiting the said Louisa for a considerable length of time before she left home as aforesaid, and that up to the time of her acquaintance and intercourse with the defendant, her reputation for chastity was good; but the witnesses testified that her reputation after that, and down to the time she left home in June, 1849, was not good. The same witnesses testified that they never knew of her reputation or character for chastity being called in question, except in connection with the defendant. At the close of the evidence on the part of the People, the counsel for the defendant moved for his discharge, upon the ground, among other things, that there was no evidence that at the time of the alleged abducting, the said Louisa was in fact a person of chaste character; but that on the contrary there was evidence that her reputation for chastity was bad at that time. Also, that the act requires proof that the female should be taken away "for the purpose of prostitution at a house of ill fame, assignation or elsewhere;" and that evidence that she went for the purpose of living and cohabiting with the defendant did not sustain the

requirement of the statute in that respect. The motion was denied, and each of the points overruled by the court, and the defendant's counsel excepted. Evidence was then given on the part of the defendant for the purpose of showing that in the year 1846, and before her acquaintance with the defendant, the said Louisa had illicit intercourse with a young man, and also that she had repeated acts of illicit intercourse with the defendant before the alleged abduction in June, 1849, and during the year 1848, and that when she left home in June, 1849, she went voluntarily, and not at the instance or request of the defendant, and that she had since lived and cohabited with him, and with no one else. The evidence showed that the said Louisa was about twenty-three years of age at the time she left home in June 1849. After the case had been summed up by the counsel for the defendant and the counsel for the People, the court charged the jury at length upon the various questions of law and fact in the cause; upon which charge the defendant's counsel took a variety of exceptions. Such parts of the charge excepted as are material to be stated appear in the following opinion.

After judgment in the Sessions, the defendant brought error to this court.

*E. G. Lapham* and *H. R. Selden*, for the plaintiff in error.

*S. V. R. Mallory* (District Attorney of Ontario County), and *A. Worden* for the People.

*By the court*, WELLES, P. J. The statute under which the defendant was indicted and convicted, declared an act to be a misdemeanor and highly penal, which was not recognized by the common law as a crime against the public. By all rules of construing statutes of that character, it should not be held to extend to cases which are not clearly within its meaning and objects.

The statute is in the following language: —

"Any person who shall inveigle, entice or take away any unmarried female of previous chaste character, under the age of twenty-five years, from her father's house or wherever she may be, for the purpose of prostitution at a house of ill-fame, assignation or elsewhere, and every person who shall aid or assist in such abduction for such purpose shall be guilty of a misdemeanor, and shall upon conviction thereof be punished by imprisonment in a State prison, not exceeding two years, or by imprisonment in a county jail not exceeding one year. Provided that no conviction shall be had under the provisions of this act on the testimony of the female so inveigled or enticed away, unsupported by other evidence, nor unless an indictment shall be found within two years after the commission of the offense." [1]

[1] Sess. Laws of 1848, ch. 105, p. 118.

Upon the conclusion of the evidence the court below charged the jury, "that the term 'take away' used in the act in question does not mean an actual manual caption, or personal assistance, or forcibly; but it must be construed in connection with the other parts of the section and with reference to the words 'inveigle' and 'entice' which immediately precede it, that a person may come within the act who in any manner aids or assists the female in going away, even if she persuades him to assist, and he does so for the purposes mentioned in the act, he is within the meaning of the term 'take away.'"

The offense described in the statute is the inveigling, enticing or taking away of an unmarried female, etc., or aiding or assisting therein. It is in the same section called "abduction." In the legal sense, that word signifies the act of taking and carrying away of a child, ward, or wife, etc., either by fraud, persuasion, or by open violence. In one view, the case would be within the statute, where the party accused aids or assists in the abduction of the female for the purpose of her prostitution, although she consents thereto, or even when she persuades him to take her away. He might in such a case, aid or assist in the abduction as really and actually, as if she should be taken away against her will; and he can not excuse himself by the plea that he was persuaded to commit the offense. These remarks, however, must be understood with this important qualification; that the aid or assistance by the person charged, is rendered to some other, who is guilty of the same offense, the very words, aid and assist, imply another actor or agent. When one person renders aid or assistance, it is to some other. He is regarded as an auxiliary, acting in subordination to a principal. Thus, if one person by inveigling or persuading, obtains the consent of the female to go away for the purpose of prostitution, and she thereupon at the request of, or by uniting with her seducer, persuades another person to take her away for the same person, such other person is guilty of aiding and assisting in her abduction. But if the female of her own accord, decides to go away for the purpose mentioned, and a person at her request and upon her persuasion furnishes her with the means of going, or carries her away, it can not, I apprehend, be said that he is guilty of aiding or assisting in her abduction, for the reason that in such case there would be no abduction within the meaning of the act.

It does not appear by the bill of exceptions, that any one besides the defendant and the female in question, was engaged in the supposed abduction in this case. It appears that evidence was given on the part of the defendant, to show that when she left her father's house in June, 1849, she went voluntarily, and not at the instance or request of the defendant. This might all be, and the defendant be guilty of her

abduction by his previous acts of inveigling and enticing. Evidence was given to show, that when she left her father's house, at the time mentioned, it was by arrangement with the defendant. If the jury so believed, and that her consent to go was procured in the manner and for the purpose mentioned, the indictment was sustained in respect to the defendant's instrumentality in her abduction. So far as the charge on this point is applicable to the proof in the case, I think it unobjectionable. If the language was unguarded, or the views of the court even erroneous upon an abstract question, it can not be a ground for reversing the judgment.

With respect to the character which the female must possess, in order to constitute the statute offense by the individual taking her away, the court below advised the jury that the term "previous chaste character," in the act, did not relate to or mean actual personal virtue; that if the female was known as a person of chaste character and reputation at the time of the abduction, though it should turn out on the trial that she had, several years previous to the alleged abduction, been guilty of a single instance of unchaste intercourse, it would constitute no defence. In this part of the charge, and particularly wherein the jury were instructed that the terms "previous chaste character" did not relate to or mean actual personal virtue, we think the court erred. Character is defined by Webster to be "the peculiar habits impressed by nature or habit on a person, which distinguish him from others;" these constitute real character, and the qualities he is supposed to possess, constitute his estimated character or reputation. Evidence has been given to show that the female in question had illicit intercourse with a young man in the year 1846, and before her acquaintance with the defendant. Under the charge given them the jury would have been justified, as far as respects this particular question, in convicting the defendant, although, they believed, from the evidence, that the female had been in the constant habit of unchaste intercourse, without the concurrence of the defendant, up to the time of the alleged abduction; provided it had not become sufficiently known to affect her reputation. We think the words referred to, do mean actual personal virtue — that the female must be actually chaste and pure in conduct and principle, up to the time of the commission of the offense. Not that this must be the case up to the moment of taking her away for the purpose mentioned, but that it must be so up to the commencement of the acts of the party accused, done with purpose indicated, and which result in such taking away. The process of inveigling and enticing may be the work of time, and when commenced, the female must be of chaste character in the sense above defined. The word "previous," in this connection, must be understood to mean immediately previous, or to refer

to a period terminating immediately previous, to the commencement of the guilty consent of the defendant. If the female has previously fallen from virtue, but has subsequently reformed and become chaste, there is no doubt but that she may be the subject of the offense declared in the statute. If the charge had been thus qualified, it would have been unobjectionable in this respect. The evidence tended to show that this female had thus fallen, and the charge made the question to turn upon the fact, not of her repentance and reformation, but of the discovery by the community of her sin. The statute uses the expression "previous chaste character," not previous chaste reputation. The charge substitutes reputation for character. Reputation may be good evidence of character, but it is not character itself. I do not see why it would not be a consistent and logical inference from the ruling of the court that a female perfectly pure in heart and life, but who, at the time of the abduction, through malice and falsehood, sustained a bad reputation, could not be the subject of the abduction punished by the statute. Indeed, this would seem to be the inevitable consequence of the doctrine of the charge.

The court below, among other things, instructed the jury that in regard to the purposes for which the female must be taken away, the statute means the same as though the words "for the purpose of prostitution" only had been used, without the addition of the words, "at a house of ill-fame, or assignation, or elsewhere," the term, "or elsewhere," neutralizing the effect of the terms "at a house of ill-fame or assignation," and leaving the effect of the law the same as though the expression, "at a house of ill-fame, assignation, or elsewhere," had not been used.

This view, as to the interpretation of that part of the statute to which it relates, may be strictly correct, and I can hardly agree with the learned court by whom it was pronounced, without some qualification and explanation. I think it will hardly do to say that the words, "or elsewhere," have the effect to neutralize entirely the previous words, "at a house of ill-fame or assignation." I think the latter expression has an important meaning, and serves as a key to the evils against which the act was intended to operate. It may be that the act should receive the same interpretation as if the indication as to where the purposed prostitution was to take place had been omitted. It is frequently the case that certain words may be left out of a statute without changing its meaning; and at the same time by retaining them, the meaning of the Legislature is more easily and certainly ascertained. Such is usually the object and use of recitals to statutes. In the present case, I think the words in question may be referred to as indicating the kind of prostitution which it was intended to prevent. By the word pros-

titution in its most general sense, it is the act of setting one's self to sale, or of devoting to infamous purposes what is in one's power, as the prostitution of talents or abilities, the prostitution of the press, etc. In a more restricted sense, the word means the act or practice of a female offering her body to an indiscriminate intercourse with men; the common lewdness of a female. The introduction of the words, "at a house of ill-fame or assignation," in the connection where they are found in the statute, leaves no doubt as to what kind of prostitution was intended. And although, as before suggested, the meaning would have been sufficiently plain without them, yet it was well to introduce them in order to prevent cavil or doubt. The statute, by declaring that in order to constitute the offense, the female must be taken away, etc., for the purpose of prostitution, at a house of ill-fame, assignation, or elsewhere, has plainly indicated that the prostitution which the Legislature had in view was that of the female to the lustful appetites of men at any place where prostitution of the character common at houses of ill-fame or assignation, is practiced.

I have bestowed more attention upon this branch of the charge than it otherwise would have demanded, for the reason that I regard it the starting point of error in the court below, which led to a misconstruction of the statute, and resulted in the conviction of the defendant. The jury were instructed that they were to judge in regard to the meaning of the term "prostitution," and that they were to give to the expression "for the purpose of prostitution," its proper signification. In this, the court casts upon the jury a responsibility which does not appertain to them. The idea which has become somewhat current in some places, that in criminal cases the jury are the judges of the law as well as the facts, is erroneous, not being founded upon principle or supported by authority. Courts of record are constituted the sole judges of the law in all cases that come before them.

The court below, so far as they intimated an opinion as to the meaning of the word "prostitution," as used in the act, gave the jury to understand that it was not necessarily the indiscriminate intercourse of the female with men, but that it might be understood as equivalent to a state of concubinage, or the condition of a kept mistress. These terms are not employed in the charge, but its language can leave no other impression upon the mind. The jury was left at liberty to understand the word in that sense. This, we think, was the great error of the court below.

All lexicographers agree substantially with Mr. Webster in his definition of the word prostitution, as heretofore stated. It is uniformly defined as being the acts or practice of a female offering her body to an indiscriminate intercourse with men. A prostitute is a female given to

indiscriminate lewdness, a strumpet. As a verb, its definition is to offer freely to a lewd use, or to indiscriminate lewdness. As an adjective it means openly devoted to lewdness; sold to wickedness or infamous practices.

We are entirely clear that by the expression in question, as used in the statute, it was intended that in order to constitute the offense thereby created, the abduction of the female must be for the purpose of her indiscriminate meretricious intercourse with men. That such must be the case to make her a prostitute, or her conduct prostitution within the act.

Other offenses against virtue and chastity have other names which are well understood. It is not every act of illicit intercourse between the sexes that amounts to prostitution. A female may live in a state of illicit carnal intercourse with a man for years, without becoming a prostitute, or her conduct prostitution, in the sense of this law, and without being amenable to any human law.

The bill of exceptions states that evidence was given to show that the female in question, when she left home in June, 1849, went voluntarily and not at the instance of the defendant, and that she had since lived and cohabited with him and no one else. If that was the object of her alleged abduction we think the case not within the statute. And yet the charge of the court left the jury at liberty to convict the defendant, although that and nothing else, was his purpose in her abduction. We think the objects of the statute under consideration were to protect females of the description which it designates, and to arrest, as far as might be, the evils connected with these dens of iniquity and pollution with which our cities and many of our large towns are infested, called houses of ill-fame and assignation, by cutting off one essential source of supply of victims; that it is a law cumulative in its nature, designed the more effectually to prevent a class of evils already within its vindictive cognizance; and not to punish a vice of a private character however great its enormity, which was not committed with a view to promote a practice previously recognized as a crime; and that its principal ultimate aim was at those acts and practices which the law had already marked, and denounced as public and indictable. We think the conviction and jndgment should be reversed, and a new trial granted.

## SEDUCTION — MEANING OF "PREVIOUSLY CHASTE CHARACTER."

## ANDRE *v.* STATE.

[5 Iowa, 389; 68 Am. Dec. 708.]

*In the Supreme Court of Iowa, 1857.*

1. "**Character" in Seduction** statute prescribing that woman be "of previously chaste character" signifies that which the person really is, in distinction from that which she may be reputed to be. To establish unchaste character of unmarried female on trial of indictment for seduction, it is not necessary to prove that she has been guilty of previous sexual intercourse, it is sufficient to show that she has been guilty of obscenity of language, indecency of conduct, and undue familiarity with men and the like.
2. "**Previous Chastity" in the Seduction** statute would signify mere actual chastity or freedom from sexual intercourse, but "previously chaste character" does not signify merely this, but also purity of mind and innocence of heart.

Indictment for seduction, under section 2586 of the Iowa Code which reads: "If an y person seduce and debauch any unmarried woman of previously chaste character he shall be punished by," etc. The defendant was convicted and now appeals. The opinion states the case.

*Cook*, *Dillon* and *Lindley*, for the appellant.

*Samuel A. Rice*, Attorney-General, for the State.

*By the Court*, WOODWARD, J. The first error assigned relates to the instruction that "unchaste character, as understood in a case of this kind means sexual intercourse." And this presents the principal question in the cause. In the cases cited by counsel and to which we shall have occasion to refer, there is considerable inaccuracy of language and a confusion of terms, which it is desirable to avoid as far as possible. Thus the words "character" and "reputation" are sometimes used as synonymous. There is a real difference of meaning between them and in a case of this kind it is important to preserve the distinction. According to Webster, "character" signifies the peculiar qualities impressed by nature or habit on a person, which distinguish him from others; these constitute real character and the qualities which he is supposed to possess constitute his estimated character or "reputation." And then he defines reputation to be good name; the credit, honor or character which is derived from a favorable public opinion or esteem, and character by report. It is very true that the word "character" is often used colloquially in the same sense as reputation; and so it sometimes is by writers not aiming at accuracy of expression, but such is not its true signification. And in so important an instrument as a statute defining a crime, it must be presumed the Legislature used the term in its true sense, unless the context renders another necessary.

In the instance of the present statute, the consequence might be too serious to allow this confusion of terms; since one who had done another one of the greatest wrongs might escape his just punishment upon the strength of a mere slander, and that, too, possibly originating with himself.

We think the statute intended to use the term "character" in its accurate sense, and as signifying that which the person really is, in distinction from that which she may be reported to be. But the question made in the first assignment of error is whether this word involves the actual commission of the unchaste act. There are difficulties on both sides of the question, and it is not easy to find a satisfactory conclusion. But, after a fair examination of the question, we are of the opinion that the court below erred in holding that the words mean "sexual intercourse" — by which the court meant that in order to acquit the defendant the jury must believe that Catherine Falloon had previously been guilty of the unchaste act itself. Besides the above expressions used to give definiteness to the words, the court said: "By previous chaste character the code means personal chastity — actual character." But for the use of the expressions "sexual intercourse" and "personal chastity" it might have been doubtful whether the court intended to carry the definition so far, for the term "actual character" does not assist the mind; and in another portion of the instructions the court says: "The general reputation of persons in the neighborhood where they reside is good evidence as to character," etc. And again: "The defendant may, however, show that the prosecutrix was not of previously chaste character, either by proving an actual want of chastity on her part, or by showing her general bad reputation for chastity;" and it would not be easy to suppose that the court means that reputation could be received to prove the criminal act itself.

The language of the statute is not, a woman of "previous chastity" but such we should suppose, should have been its language had this been the meaning intended. We suppose the word "character" was designed to have its proper force, and that according to its true signification. If the statute is understood to require actual chastity, then a woman guilty of lewd conversation and manners — guilty of lascivious acts and of indecent familiarity with men — is an object of its protection equally with one who is pure in mind and manners; and all the presumption arising from the commission of the act would attach to the defendant in the one case as strongly as in the other. We can not think that a female who delights in lewdness — who is guilty of every indecency, and lost to all sense of shame, and who may be even the mistress of a brothel — is equally the object of this statute (if she has only escaped actual sexual intercourse) with an innocent and pure

woman; and that a man is equally liable under the law as well in the one case as the other. The statute is for the protection of the pure in mind, for the innocent in heart, who may have been led astray, seduced from the path of rectitude; and the jury are the sole judges in each case who comes within this description. Under this construction of the statute obscenity of language, indecency of conduct, and undue familiarity with men, have more weight than under the other view. They serve to indicate the true character; they become exponents of it; and a defendant is not punished for an act with one whose conversation and manners may even have suggested the thought and opened the way to him, as he would be for the same act with one innocent in mind and manners.

But we desire to guard against a conceivable wrong inference. Whilst the demeanor, the acts and conduct, with the conversation of a woman, may be shown and considered in order to arrive at her character, and are the usual means where she is not shown to have committed the act of unchastity, still the jury are the sole judges of the actual character of chastity. No particular amount or degree of such manners of conversation can be set down as conclusive evidence of an unchaste character, but the jury must determine whether, under the facts shown, the real character be thus. It is not every act of impropriety, nor even indecency, that should affix this stain upon a female and deprive her of the protection of the law. Persons differ in their manners and tone of conversation, in their education, and in their manifestation of character. Some are much more free and unrestrained than others, whilst we have no more doubt of their purity in the one case than in the other. Some are quite free with their acquaintances and intimates, and at the same time are above suspicion of wrong. It becomes, therefore, one of the highest and most solemn, as well as the most delicate, duties of a jury to judge of the proofs of such acts and words with the utmost intelligence, care, and freedom from bias, that a female, innocent in truth, and of actual purity of mind, may not suffer as a guilty one, from a few light and inconsiderate words or acts which may be consistent with an invincible purity and integrity of heart. And it will not be improper to enjoin it upon the juries of our State to examine with extreme caution into questions of this nature — not to judge hastily nor lightly, but to guard with ever a jealous care the reputation of those whose reputation is their all.

Finally, it seems to me that if the Legislature intended as argued by the prosecution, it would have used the phrase "a woman previously chaste," or "of previous chastity," or the like, which are the directly natural words to express the idea of actual chastity, or chastity in fact. These words seem to us very simple and natural for the purpose and to

be free from ambiguity, and we can not avoid the conclusion that the statute intends something different by the use of the word "character." In this view we are supported as we think by the case of *Carpenter* v. *People*.[1] The case of *Crozier* v. *People*,[2] coincides with the views above expressed, insomuch as it says: "That it is a question of character, not of reputation." But it appears to make the word "character" call for actual chastity; and yet it cites *Carpenter* v. *People*,[3] as supporting the view there held. This case of *Crozier* v. *People*,[4] is at the best, ambiguous. The case of *Safford* v. *People*,[5] so confounds the meaning of terms, and is so peculiar in its reasoning that we would not venture to cite it as an authority sustaining either view. In conclusion upon this point, we are of the opinion that the District Court erred in the meaning given to the expression "chaste character."

The second error assigned is to the instruction that in the absence of proof chastity will be presumed. We think the court did not err in this, especially in view of the sense which it gave to the foregoing words. Neither do we conceive it to be error when regarded in the sense which this court attaches to the phrase, "chaste character." To determine this question of presumption it becomes necessary to choose between two rules and define which is applicable to such a case in such a state. One of the rules referred to is that one which requires the prosecution to prove all those facts, circumstances and qualities which go to make or constitute the offense. The other rule is that which calls for a presumption of innocence, rectitude and good character generally.

The defendant argues that to presume in favor of the character of the woman in this case is to presume against his innocence. But, to our minds, this is not so. He will be presumed innocent of the fact — the act charged — whilst the presumption may be in favor of the rectitude of her character. And there seems to us no inconsistency in applying these presumptions in this manner. If the prosecution were held to show such a character in the first instance, the lightest amount of evidence would be sufficient to make a *prima facie* case, and the burden would still be on the defendant; and there does not seem to be much weight in the argument which is satisfied with this merely formal compliance with the rule, whilst on the other hand, there is a substance in the presumption of innocence and uprightness, which requires a force of evidence to overcome. The above cited cases from New York are placed upon the same ground, applying the assumption to chastity in fact, and arguing that chastity is the general law of society, and a want of it the exception.[6] And the same argument applies with equ force

1 8 Barb. 603.
2 1 Park. Cr. 457.
3 *supra*.
4 *supra*.
5 1 Park. Cr. 474.
6 See Crozier *v.* People, 1 Park. Cr. 457.

to chastity of character. It does so, of course. They are the same thing in substance when regarded in relation to this rule. It is our opinion that the presumption of a "chaste character" extends to the woman in the case, and that the contrary is to be shown.

The third error alleged in the instructions "that the corroborating evidence contemplated by the statute[1] is not confined solely to the proof of the fact of illicit intercourse, but extends to proof of other material facts, such as the illegitimacy of her child, the regular and frequent visits of defendant to the female, his being alone with her at late hours of the night, and his confessions made to others on the subject," etc. This instruction is supported directly by *Crozier* v. *People*,[2] and we concur in the view taken. This point requires no enlargement. Facts showing intimacy, opportunity and inducement (if we so say) certainly tend in some degree to corroborate the witness just as truly, though it may be, not in the same degree as proving an *alibi* at the time sworn to would go to discredit her. The weight and value of such evidence is for the jury to consider, and it is for them to draw their conclusion accordingly.

The matter of the third assignment is embraced in the fourth with a possible shade of difference. The court declined giving the second instruction precisely as asked but modified it somewhat. That requested to be given related to section 2999 of the Code, and was that — "this corroborating evidence should be of a character that goes directly to the commission of the offense." The court struck out the words "to the commission of" and instead thereof inserted these: "to strengthen and corroborate the testimony of the injured person and to point out the defendant as having committed" the offense. The language of section 2999 on this point is: "unless she be corroborated by other evidence tending to connect the defendant with the commission of the offense." The aim of the defendant's counsel undoubtedly was to require the corroborating evidence to point and connect with the commission of the precise act itself — the act of debauching — whilst the view of the court seems to have been that the corroborating evidence need not point directly to the act, but might in its direct aim point to the circumstances surrounding the parties, as to the intimacy, the opportunities, and to any facts which "tended to connect the defendant with the commission of the offense;" which last is the language of the statute. We should say that in the second instruction asked the counsel looked principally to the act of debauching, whilst the court looked to the whole offense, which consists of both seducing and debauching; and the latter we think the more correct view and more consonant with the intention of the statute.

The fifth assignment of error relates to the refusal of the court to give the eighth instruction requested by the defendant which so far as

1 sec. 2999.

2 1 Park. Cr. 454.

it is needful to refer to it for the present purposes was that "no chaste and virtuous girl would allow a man to take improper liberties with her person without resenting it at once; where an unmarried female so far forgets what is due to her sex as to take improper liberties with a man such as unbuttoning his pantaloons and thrusting her hands into and upon his privates, or allow a man to feel of her breasts and legs, she ceases to be chaste and virtuous, in contemplation of the law under which this indictment is found." The instruction then proceeds to ask the court to charge the jury that the defendant is entitled to the benefit of any reasonable doubt; and therefore, if they have a fair doubt of her chastity they must acquit. There are two objections to this instruction. (1) It takes too much from the jury, and makes it matter of legal sequence; and (2) It unites several kinds of matter in one charge so that it is difficult to separate them. That part of the instruction which relates to certain supposed instances of conduct was matter belonging to the jury, and the court could not lay down, as a sequence of law, the proposition therein contained. That part of the instruction which refers to a doubt on the mind of a jury might have been given, had it not been so interwoven with other and objectionable matter.

Therefore, on account of the error contained in the first instruction, the judgment of the District Court is reversed, and a *venire de novo* awarded

---

SEDUCTION — UNDER PROMISE OF MARRIAGE — PROOF NECESSARY.

## PEOPLE *v.* ECKERT.

[2 N. Y. Cr. Rep. 470.]

*In the Supreme Court of New York, November, 1884.*

1. **The Defendant at the time of the Alleged Seduction** was about sixteen years of age, and the prosecutrix was about six years older, and a woman of very considerable experience with men of her own age, and had known defendant from his boyhood. It appeared that the illicit intercourse was not confined to one occasion, but was deliberately permitted from time to time till within two months of the birth of the child. It also appeared that prosecutrix had had confidential relations with many men to whom she had permitted unbecoming familiarities, and had conducted herself in a manner indicative of great laxity of moral obligation. *Held*, on the whole case, that as the evidence was strongly against the probability of the alleged promise to marry, and against the purity of character of the prosecutrix, a new trial must be granted.

2. **Upon the Trial of an Indictment** for seduction under promise of marriage, the defendant, who has testified in his own behalf, may be asked on cross-examination, for the purpose of affecting his credibility, if he has had sexual intercourse with a person other than the prosecutrix, and in no way connected with the action.

3. **Defendant on Cross-examination,** on the trial of an indictment for seduction, was, in substance, asked if he had not said to the father of the prosecutrix that his own father had untruthfully said that he (the defendant) would rot in jail before he would marry prosecutrix, and he denied having so said. *Held,* that evidence in contradiction of said denial was competent.

APPEAL by defendant, George Eckert, from a judgment convicting him of the crime of seducing an unmarried female of previous chaste character, under promise of marriage.

The defendant was indicted in the Court of Oyer and Terminer of Ulster County, November 24, 1882, the indictment charging the commission of said crime on May 13, 1881. The indictment was tried in the Court of Sessions of said county at the June Term, 1883, before Hon. WILLIAM LAWTON, county judge, with associates, and a jury, and defendant was found guilty and sentenced to pay a fine of $425, and to imprisonment in the county jail till said fine was paid, but for a period not to exceed one year.

The following is the substance of the testimony taken at the trial: —

Sarah Osterhoudt, the prosecutrix, sworn for the People, testified: I live in the town of Marbletown. Have known defendant fourteen years. I will be twenty-three years old the 24th of October next. Eckert, the defendant, will be nineteen this fall. He visited me at my father's house. Began to come and see me two years ago last March and came to see me until a year ago July. He asked me if I thought enough of him to marry him. I told him I thought he was too young. He said no he was not. He said he was very nearly as old as his father and and mother were at the time of their marriage. I said I would marry him if he thought enough of me. After that he asked me to have connection with him. It was in May, two years ago last May, I had connection with him. He said he did not believe he could. I said I did not want him to. He said he would. He asked me more than once to have connection with him before I did have. It was after midnight. Between the time he came to see me and the time the connection took place he was trying to overcome me. He asked me if I would have connection with him. I said I did not want to. He said he would; that he would marry me and never go back on me. That is all he said. He had connection with me that night, and after that, up to until two months before the baby was born, which was a year ago last July 24th. Told him I was pregnant and asked him to marry me. He went away. He has never married me. I never had sexual intercourse with any other man. The child I had here to-day is Eckert's child. *Cross-examined:* I was born in October, 1860. I was close to twenty-one and he to seventeen when he first came to see me. I had kept company there with gentlemen four or five years. I had beaux that paid attention to me and took me out evenings. Would spend evenings with me

a little while. Had had four or five. Have kept company a few times with John Tanner, Milliard Wilklow, Denton Wilklow; once a little while with Nat Lyons, once a little while with Elias Van Vleet. They were all older than Eckert or myself. Have kept company a few times with Victor Chambers, when Eckert was a little bit of a boy. Have known Eckert since he was four years old. Lived about a mile from him. Went in company a good while before he did. He first came to see me at Jacob Hornbeck's. I worked there. He stayed until midnight. Nothing said that night about marrying or having connection. He sat alongside of me, had his arms around me and kissed me. I asked him in. I wanted him to come in. He came again in the middle of the week. Every thing was proper, and nothing said about marrying. He stayed about two hours. He came again the next Sunday night. I sat on his lap. Had his arms around me and I had mine around him. Nothing said nor done improper that night. Then he came every week. He had come to see me four times before he began to act mean. That was in April. Put his hand on my person and under my clothes. Did that four or five nights. I let him come after he acted that way. Promised he would do better. He tried to force me different times. I did not call out. Had connection with me first in my father's house. The lamp was turned down very low, and there was a bed in the room. It was the last of May. We had talked about marrying the first of May. Along through April he had been trying to have connection with me and to use violence and force me. Only one other person tried to take liberties with me — Chambers. I have sat on some of the other boys' laps; some of them had kissed me and had their arms around me. They had never talked to me about thinking a good deal of me. He, George, asked me if I thought enough of him to marry. I told him he was too young; that his father and mother were mad about it, and he said it made no difference about them. He was the one, he would marry me; he did not try to have connection with me that night, nor did he take any liberties whatever. I did not tell him that night whether I would marry him or not. He said he would. There was no engagement between us that night. I said the Sunday night, after he had asked me if I made up my mind to marry him, that I had. He did not have connection with me that night. The night he had connection with me he tried me until he got me nearly wore out. He was struggling with me from about ten o'clock until after about midnight. I did not really consent; it was just overpowering me. I made no outcry. He stayed a couple of hours afterwards. I did not tell Hannah M. Hornbeck in June of that year that I was in family way, or that I had got rid of a child. * * * *Re-direct:* The night George first had connection with me, he said he would marry me,

and never go back on me, before he had connection with me. I believed him. Have never been married. After I became pregnant he brought me medicine to take, and I took five drops of it. *Re-cross:* I said I was afraid he would not marry me. Didn't know whether he would or not. I was afraid first and then believed he would. I did consent to have connection with him in words. George went to school a few weeks the next winter after he came to see me.

Joseph Osterhoudt, sworn for the People, testified: "Am Sarah's brother. * * * After I was informed she was pregnant George asked me about it. Told him I didn't know; hadn't seen her in quite a while. He told me if it was, he would marry her. I found out it was so, and called him one side and asked him if he was going to marry her. He said he would not, unless he had to.

It further appeared in behalf of the prosecution by the testimony of the parents and brothers of the prosecutrix, and others, that defendant had visited prosecutrix at her parents' house, and elsewhere, very often during the period referred to by her — as often as once a week — asking for her personally, and that upon such occasions he was generally alone with her. It also appeared that his visits ceased shortly before the birth of the child. Prosecutrix's father testified: "John Eckert, George's father, in October, 1881, came there (witness' house) and told the boy he would take him out of the house, dead or alive. He said it was time to break up the match; that is the first I heard him say anything about his opposition to his coming there."

A witness for the prosecution also testified that defendant, prior to his indictment, left his place of residence and went to Pennsylvania, through fear of arrest for seduction; that he returned in a few weeks. Defendant's refusal to marry the prosecutrix was also proved.

Rufus Palen, sworn for the defendant, testified: "Live in Rosendale; am a quarryman. Have known Sarah Osterhoudt about six years. Knew Victor Chambers; was with him and Sarah at McMullen's house; the girls and their brothers keep the house. I think it was in 1876; it was in the night time; we got there between nine and ten in the evening; stayed until towards morning. The fore part of the evening Chambers and Sarah sat on chairs. After that, they laid down on the bed in the same room. They lay there two hours, I should think. This was in the sitting room. The light was turned very dim. Do not know that she had any of her clothing off. Think he had his shoes off. May have had his coat off. I don't know whether he did or not. Have seen him go with her from church different times. I don't know as I ever saw them go together except on that occasion. *Cross-examined:* I was there with a young lady. She was, as I supposed, a friend of Miss Osterhoudt's. Supposed this was an ordinary case of

country courting. I don't know as it struck me that there was anything harmful about it. When I was a young man I courted that way. I saw no impropriety, more than that. The other young lady and I were in the room at that time. In that region of the country I have often turned down the light myself. The other lady and I lay on the sofa."

George Eckert, sworn in his own behalf, testified:—

"I am the defendant. My father and mother are living. I live at home with them and always have. I was eighteen years old the 30th of last December. In March, 1881, I was sixteen. Was attending the district school that year and the next. Have known Sarah since I can remember. She told me she was twenty-two when I was sixteen. Knew Victor Chambers. I knew of his paying attention to Sarah. Saw them together in bed, at my father's house. Chambers and I slept together, and Sarah came up stairs and opened the door and walked in the room, and said, "Now get up," and Chambers grabbed hold of her, and pulled her in the bed with him, and says to me, "You get out of here," and locked the door, and they were in there about an hour. She was dressed. I was eleven or twelve years old. I didn't know what it meant. I know of Millard and Denton Wilklow, John Tanner and Lucas Barley paying her attention prior to March, 1881. They would spend the evening with her. Know of Millard Wicklow spending the evening with her about March, 1881. He came and called me out of my father's house. Went with him to Hornbeck's. Sarah was there. He wanted me to call the dog and keep him by me while he got in. I did so. He went in. I never had anything to do with her before. The Hornbecks were relations of mine. I saw Sarah there a couple of weeks afterwards. I spent the evening with her. Stayed until about three o'clock. Did not sit up all the time we were there. Lay down on the bed. She said she was tired sitting up and wanted me to lie down. That was the first night I stayed with her, or had shown her any attention. We lay on the bed about four hours. When I went away she said I must come on the sly so my folks didn't know it. She said if they found it out they would think I was too young. Went to see her again in the same way; went to bed again. I never asked her in any form to marry me. I never promised or told her I would marry her, nor asked her if she thought enough of me to marry me. There was nothing mentioned about marrying. She never said she would marry me; nor was the subject of marriage ever discussed between us at all. I never asked her to have connection with me; nor did I say I would marry her, or stand by her, or words to that effect. I was at Van Leuven's about three weeks. Part of the time I was in Port Jervis. Came back to my father's and stayed there. I was advised to go; did not go of my own accord; came back of own accord.

Was never arrested on the indictment. Came down here of my own accord and gave bail. *Cross-examined:* The way Chambers came to stay at our house all night, my father had gone off; Sarah come to stay with mother and Chambers to stay with me. My father was keeper of Sing Sing prison and was away from home a good deal. Chambers was there four or five nights. Had not had breakfast when Sarah came up. She came to call us down to breakfast. I told my mother. She did not go up stairs. I ate breakfast. They were up there an hour, about. This was in 1876; I was then twelve years old. The day I held the dog for Millard Wilklow was the day my grandmother was buried. My grandmother lived at Jacob Hornbeck's. Sarah was there. They had a funeral in the afternoon, and I held the dog so that Millard Wilklow could go and court Sarah in the evening. * * * I have had sexual intercourse with Sarah. I could not tell how often; I have forgotten. I am not the father of this child. I know Emma Schoonmaker; don't know where she is. Q. You have been having sexual intercourse with Emma Schoonmaker, have you not? Defendant's counsel objected on the ground that the question was irrelevant, improper and incompetent, and the witness is not bound to answer. Objection overruled. Defendant excepted. A. Yes. My father and Simon Lyons advised me to go to Matamoras. They told me there was going to be a trap laid against me. I ceased going to school in 1882. I worked some in the garden and tend bar. My father is a tavern-keeper in this neighborhood. I can't say how many times I went to see Sarah. Thomas Osterhoudt did not say to me that my father had said to him that I would not marry Sarah, and I did not say to him that it was a damned lie. *Re-direct:* I first had sexual intercourse with Sarah the first time I stayed with her. There had not been a word said about marrying. There was no objection on her part to the intercourse, nor solicitation nor effort on mine.

Millard Wilklow, sworn for defendant, testified: Live in Marbletown. Know defendant and Sarah Osterhoudt. Live about a mile from her. Have kept company with her. Been to see her at her father's house a few times, and at Jacob Hornbeck's. Recollect George going over with me. Don't know whether he held the dog or not. Stayed with her until twelve o'clock. I never had sexual intercourse with her that I know of. That is as strong as I am willing to put it. *Cross-examined.* She has always conducted herself like a lady in my presence. I have lived in the neighborhood with her ten or twelve years, and so far as my observation has extended, she has always conducted herself like a lady. *Re-direct:* I have been on the bed with her twice at her father's house. Possibly two hours. In the night

time. No one else in the room. I don't say whether I had connection with her or not.

Witness, on being subsequently recalled by the prosecution, denied having had sexual intercourse with prosecutrix.

Denton Wilklow, sworn for defendant, testified: Live in Marbletown. Am single. Know Sarah. Have waited on her. I decline to answer whether I have ever had connection her. *Cross-examined:* I don't know whether she has always behaved like a lady in my presence. I didn't want to answer *Mr. Linson's* question because I didn't consider it a proper question for a young man to answer under any circumstances.

John Tanner, sworn for defendant, testified: Know Sarah. Have kept company with her. Chambers and I have been together at her father's. I left him there. They were each one sitting on a chair. There was no bed in the room. They remained in the room all the time I was there. I saw them no closer together. There were no more familiarities than is usual among young people. Nothing more than talking, having a jolly time. He didn't embrace her as I saw and I didn't see her sit on his lap. She and I had been alone together. I kept her company after Chambers went away. I staid until somewhere about midnight. We were alone together. I sat alongside of her. We didn't get on the bed. There was a bed in the room. Never took any liberties with her to any extent. I have never had connection with her. *Cross-examined:* She has always behaved herself like a lady, so far as I have seen. I have known her somewhere about twelve or thirteen years. We went to school together. *Re-direct:* The first night I was alone with her I fooled with her to have intercourse with her.

Hannah M. Hornbeck, sworn for defendant, testified: I am a sister of John Eckert. Sarah has worked for me at different times. Millard Wilklow was there to see her once, until after midnight. George Eckert was there sometimes. In June, 1881, Sarah told me she was in the family way. The 25th of that month she told me she had got rid of it; that she was two months gone.

Defendant rests.

Thomas Osterhoudt, re-called for the People, testified: * * *

"Q. Did you tell George that his father had said that he had told his father that he would rot in jail before he would marry Sarah, and did George say to you that his father was a damned liar?" Counsel for defendant objected on the ground that it is a collateral matter and immaterial, and the People are concluded by the answer of George. Objection overruled. Defendant excepts. "A. He did."

Witnesses were offered by the district attorney to prove the previous character and reputation for chastity of Sarah Osterhoudt, in her neighborhood, and the evidence was excluded, under exception.

Ann Osterhoudt, re-called for the People, testified: Sarah lived at home in spring 1881. She was under my eye all the while. There were no indications of pregnancy. I did her washing. There was no discoloration of underclothing that would indicate miscarriage or abortion.

*Schoonmaker & Linson*, for the prisoner, appellant. I. The conviction is an absurdity. There was plainly such prejudice as should nullify the verdict. The testimony to which attention has been called shows the character of the complainant. She had been receiving for years the attentions of men much older than the defendant, some of whom, at least, had attempted to take undue liberties with her, and three of whom refused on oath to say whether or not they had sexual intercourse with her. She had known the defendant ever since he was a baby. He was a mere boy at the time she says he committed the crime charged in the indictment. It seems impossible that any candid person can read the evidence and resist the conviction that she was the seducer. The jury convicted; but they convicted the prisoner of being a bad boy, and not of the statutory offense. The former impeachment he did not deny, and that was enough for the jury. They did not propose to sanction such irregularities within the boundaries of the virtuous county of Ulster. The fact that the sexual intercourse was not the crime, they never cared a whit for. They would have rendered the same verdict had the charge been rape or incest.

II. Both the statute in force at the time of the alleged seduction,[1] and that which obtained at the time of the trial,[2] provide that there shall be no conviction upon the testimony of the female complaining, not supported by other evidence. The Court of Appeals has held that the corroboration to which it refers, is as to the promise of marriage, and the carnal connection. It is respectfully submitted that in no case has a conviction been sustained in such testimony as was given in this case.[3]

*A. T. Clearwater*, District Attorney, for the People.

The prosecutrix was corroborated upon the questions of promise of marriage by all the testimony, and as to the intercourse by the defendant himself, who testified on his cross-examination that he had had sexual intercourse with her. This was all the corroboration required by the statute, it not being necessary that she should be corroborated

[1] L. 1848, ch. 111.

[2] Penal Code, sec. 286.

[3] Armstrong *v.* People, 70 N. Y. 44.

either as to chastity or as to being unmarried.[1] It was not necessary the corroborative testimony should be positive in its character; circumstantial evidence of corroboration was sufficient.[2]

BOCKES, J. The defendant was charged by indictment with the crime of seducing one Sarah Osterhoudt, an unmarried female of previous chaste character, under promise of marriage.[3] On the trial the prosecutrix testified to the material facts constituting the offense charged, and that she became *enceinte* because of the intercourse between herself and the defendant. The fact of the birth of the child was undisputed. Evidence was also given of opportunity and probability, such as the frequent meeting of the parties, when they would be alone together, and generally of the seeking by the defendant of private interviews, and also of the bestowal by both of personal attentions.

The defendant gave evidence in his own behalf, directly in conflict, on all material points, with that of the prosecutrix. His evidence, if credited, would establish his innocence of the offense charged. Thus his credibility became a subject of great, if not of controlling significance. On his cross-examination, and with a view to this point, he was asked the question whether he had "been having sexual intercourse with Emma Schoonmaker,"—a person in no way connected with the case. The question was objected to by the defendant's counsel, and the objection being overruled by the court, he answered "Yes."

It is urged that such ruling was erroneous. But according to the very late decision by the Court of Appeals in *People* v. *Irving*,[4] it affords no just ground of complaint.[5] The question here presented was carefully and fully considered in *Irving's Case* in the light of the previous decisions in this State, and the evidence under the circumstances then and here existing, was held to be admissible within the discretion of the trial court. We need therefore only to refer to that case as decisive of the point there urged as ground of error.

On further cross-examination the defendant was, in substance, asked if he had not said to the father of the prosecutrix, on a certain specified occasion, that his own father had untruthfully said, that he, the defendant, would rot in jail before he would marry the prosecutrix; and he denied having so said. Proof in contradiction of such denial by the defendant was offered on behalf of the prosecution, and was admitted against objection. In this, we think there was no substantial error. The evidence had a bearing upon matters in issue, in this: it bore upon

[1] Kenyon *v.* People, 26 N. Y. 203; Crozier *v.* People, 1 Park. 453; Armstrong *v.* People, 70 N. Y. 38.

[2] Kenyon *v.* People, 26 N. Y. 203; Boyce *v.* People, 55 N. Y. 644.

[3] Laws of 1884, ch. 111; Penal Code, sec. 284.

[4] 95 N. Y. 541; 2 N. Y. Crim. Rep. 171.

[5] See also People *v.* Hooghkerk, 96 N. Y 150; 2 N. Y. Crim. Rep. 204.

the question whether the defendant had made to the prosecutrix a promise of marriage. It was, it is true, somewhat remote, but not entirely remote and disconnected with the issue and irrelevant to the offense charged as to preclude its contradiction.

But the case is not, as we think, without serious difficulty on the proof submitted. It is certainly a very peculiar one in some of its leading features. The facts, taken as a whole, must, to say the least, admit of strong suspicion as to the real existence of the imputed crime. They invite well-grounded criticism. The defendant was at the time of the alleged seduction under promise of marriage, a mere lad, a stripling, a schoolboy, but little more than sixteen years of age. The prosecutrix was nearly six years his senior, a woman of comparatively mature years, and according to the proof, of very considerable experience with men of about her own age. It can but be observed that seduction of the lad might probably be quite as readily accomplished as could be the seduction of the mature, reflecting, experienced woman. She had known the young man almost, or quite from his infancy; must have known and appreciated the fact that any proposition of marriage from him or agreement with him to marry was of questionable propriety. She was not entirely untutored in the ways of the world, for, as she states, she had accepted the attentions of men while he was yet a "little bit of a boy." She was certainly qualified to give him good advice against wrong-doing, and well able in her maturity to resist vicious importunity, even under circumstances of stronger temptation. And this would be naturally expected, rather than that she should accept from one so young a proposal of marriage, and under a protestation of faithfulness to his promise to join him in the commission of crime. Nor was the illicit intercourse confined to a single occurrence under stress of circumstances, but was deliberately permitted from time to time, even continued, as she testifies, from "that night and after that, up to until two months before the baby was born."

Is the case free from well grounded suspicion as to the integrity of the charge? If a seduction, it seems to have been a seduction with *continuando* — a seduction regularly effected, in view of her maturity and of his immaturity; and most strangely continued. The line of conduct as testified to by her, beginning with the alleged promise of marriage, followed by continual intercourse for a considerable time, and indeed permitted long after pregnancy had ensued, seems inconsistent with any idea of the woman's seduction, holding in mind the provisions of the statute which makes seduction a punishable offense.[1] The crime denounced by the law is the seduction of a female of chaste character under prom-

[1] See Penal Code, sec. 284.

ise of marriage. The law contemplates infraction of purity in thought and conduct. Now in the outset we are confronted with the unusual circumstances of persons contracting marriage under an almost ludicrous disparity of age, having in mind the nature of the offense charged; the male just turning the period of pubescense, and the female a woman, as has been stated, of mature years and very considerable experience in the ways of the world, with knowledge, as we must infer, of usual moral and social observances, and of what are universally regarded as the proprieties attending a matrimonial alliance.

Besides these considerations, how stands the further and other proof bearing on the alleged contract of marriage, and purity of character, both of which are necessary to the establishment of the crime charged in the indictment? It is in proof that the prosecutrix accepted attentions from and had confidential relations with various men; not with one or two only, but with many. She permitted them unbecoming familiarities. Beyond dispute, she was free and easy with them to an extent indicative of great laxity of moral obligation. These statements as to the proof leave out of view the testimony of the defendant, and also that of the witness, Chambers, who was undoubtedly effectually impeached. But it may be noted, as it was proved by several witnesses, that the plaintiff was particularly and peculiarly intimate with this man who was shown to be lecherous and vile. The case on the reliable evidence bears hard on the probability of the alleged promise to marry, and of the purity of character of the prosecutrix. Before the defendant could be legally convicted, a case should be made against him on all material points beyond a reasonable doubt. We are of the opinion that no fair minded man can carefully and thoughtfully read the evidence here submitted without entertaining great doubt as to the defendant's guilt of the offense charged. We are dissatisfied with the verdict of the jury. We must conclude that they either misunderstood the provisions and requirements of the law applicable to the case, or that they gave the evidence undue force through inattention or misapprehension. We can not in conscience permit the conviction and judgment to stand.

Conviction and judgment reversed; new trial granted, and case remitted to the Ulster Sessions.

LEARNED and LANDON, JJ. ,concur.

## SEDUCTION — CORROBORATIVE EVIDENCE OF WOMAN'S STORY — INSUFFICIENT PROOF.

## RICE *v.* COMMONWEALTH.

[100 Pa. St. 28.]

*In the Supreme Court of Pennsylvania, 1882.*

1. **In Order to Warrant a Conviction** for seduction under a promise of marriage in accordance with the provisions of the act of March 31, 1860,[1] there must he evidence to corroborate the prosecutrix, in regard to the promise of marriage.
2. **The Fact that a Defendant** charged with seduction is now allowed to testify in his own behalf, does not alter the law, in regard to the necessity of evidence corroborative of that of the prosecutrix, as to the promise of marriage.
3. **What Circumstances do** and what do not constitute sufficient corroborative evidence to warrant a conviction in such case, considered.
4. **Where in such Case there** is some proof that the defendant admitted the promise to marry, it is not error for the court to refuse to withdraw the question of seduction from the jury.
5. **Where the Court in its Charge** to the jury states the same proposition of law twice, the first time correctly, the second time incorrectly, it will be inferred that the latter statement is likely to have made a lodgment with the jury and, in some instances, the judgment will be reversed on this ground.

Before SHARSWOOD, C. J., GORDON, PAXSON, STERRETT and GREEN, J.J., MERCUR and TRUNKEY, J. J., absent.

Error to the Quarter Sessions of Lackawanna County; of January term 1882.

Indictment against Frederick Rice, for the seduction under an alleged promise of marriage of Margaret Robertson, under twenty-one years of age.

On the trial before HANDLEY, J., Margaret Robertson testified, on behalf of the Commonwealth that she was twenty years of age and had always resided with her parents in the village of Dunmore; that she became acquainted with the defendant in 1878, and that for more than a year thereafter he "kept company," with her, generally meeting her at church on Sunday evenings and walking home, and remaining with her afterwards until after ten o'clock. That on three occasions the defendant went into the house and saw Mrs. Robertson, but they generally remained outside near the gate. That in September, 1880, defendant invited her to take a walk, about nine o'clock in the evening, which they did, and that during their absence they had sexual intercourse, and that this was repeated about four weeks later. She gave birth to a child May 28th, 1881.

Her testimony in relation to the alleged promise of marriage, prior to the seduction was that on both the occasions referred to the de-

[1] sec. 41, Pamph. L. 394.

fendant "went down upon his knees and promised to marry her if she would let him do what he did do;" and that she would not have permitted it otherwise. This testimony was not corroborated. There was however, some testimony that the defendant afterwards said to Mrs. Robertson — Margaret's mother — he was sorry for what he had done; that he couldn't marry her before two weeks; "he promised to be there and set the day and didn't come." Defendant denied such promise.

There was no evidence indicative of an intention of marriage on the part of the defendant other than the fact that he would meet her once or twice a week and walk with her, etc., with her parents' knowledge and without their objection.

The defendant testified: Q. Tell what the reputation of this girl is there, in Dunmore, from the speech of the people? A. I heard said she was a kind of a loose character; she went by the name of the "regular" in Dunmore; I don't believe I went with her over two or three times before I heard rumors.

The father of Miss Robertson (the prosecutor), on cross-examination, was asked: —

Q. Don't you know that your daughter goes by the name of the "regular" in Dunmore? A. No, sir; I never did. Yes, sir; I have heard talk, but have no certainty of it, and these are the characters that got it up.

At the close of the Commonwealth's case defendant's counsel moved the court to take from the jury the question of seduction and submit to them no other question but that of fornication and bastardy. Motion overruled; exception.

The court charged the jury, *inter alia:* "The prosecutor alleges that there was a promise of marriage made to his daughter before this illicit connection took place. * * * The defendant says that he never made a promise of marriage to this young lady, but admits that he did have illicit connection with her. This evidence of course contradicts the testimony of the daughter of the prosecutor. Now the decisions say, before there can be a conviction in a case of this nature, there must be other corroborating evidence sustaining the promise of marriage, and that corroborative evidence may be made out by positive proof or by circumstantial evidence. This is one of the essential requisites to be found by you from the evidence in this case, before there can be a conviction. * * * That therefore leaves but two questions for you to ascertain, as the case is now presented to you: first, was she a young lady of good repute; second, did the illicit connection take place because of the promise of marriage?

"It is contended that this case requires the essentials so far as the

making of presents, writing of love letters and all of such things that pass between young people, to make out this case. But we have long passed that day, so far as courtship is concerned. There is no doubt but that in the early history of these cases when the defendant was not permitted to go upon the witness stand and not allowed to testify, that there should be corroborative evidence to sustain the charge made by the young lady of the promise of marriage; but in our day and generation when a defendant may go upon the witness stand and testify equally as well as the prosecutor, then of course these essentials are not absolutely necessary, although they may yet appear in the case. The proper way to dispose of cases of this kind is to take each case as it stands on its own four legs, take the case as the parties built it up, keeping in mind their standing in society and their immediate manner of courtship.

"One man may desire to court the girl he desires to make his wife in a secluded place or he may desire to keep it quiet; another may be in the habit of keeping company with a young lady and appear upon the public highway from time to time so that all may see him; hence there is no standard, each case must stand on its own four legs as the parties built it up.

"Now, in this case it is for you to say whether the meetings of these parties, which continued for over a year, was merely for the purpose of having illicit connection, or whether it was for an honorable purpose on the part of the defendant — that is, for the purpose of making the young lady his wife.

"Now it is for you to say from all of the evidence, and the surrounding circumstances of this case, whether the original meeting was honorable, or whether, if he made a promise of marriage, it was made for an honorable purpose, and not for the purpose of deceiving the young lady, and gaining her affection, so that he might have illicit connection with her."

Verdict, guilty in manner and form, etc. The defendant was sentenced to pay the costs of prosecution, and a fine of $500, and to separate and solitary confinement in the Eastern penitentiary for one year and six months.

The defendant having obtained a special *allocatur*, took this writ, assigning for error the refusal by the court of his motion to withdraw the question of seduction from the jury and the portions of the charge above quoted.

*Cornelius Smith*, for the plaintiff in error, cited *Commonwealth* v. *Walton.*[1]

[1] 7 Brewst. 489.

*J. F. Connolly* (with him *E. W. Simrell*, district-attorney, and *H. M. Hannah*), for the defendant in error.

Mr. Justice PAXSON delivered the opinion of the court.

The plaintiff in error was convicted in the court below of the offense of seduction. The record having been brought into this court for review, several errors have been assigned to the rulings of the learned judge, the most material of which are the second and third.

It was palpable error to instruct the jury that evidence to corroborate the prosecutrix in regard to the promise of marriage is no longer necessaay. Upon this point the learned judge charged: "There is no doubt but that in the early history of these cases, when the defendant was not permitted to go upon the witness stand, and not allowed to testify, that there should be corroborative evidence to sustain the charge made by the young lady of the promise of marriage. But in our day and generation when a defendant may go upon the witness stand and testify equally as well as the prosecutor, then, of course these essentials are not absolutely necessary, although they may yet appear in the case. The proper way to dispose of cases of this kind is to take each case as it stands on its own four legs, take the case as the parties built it up, keeping in mind their standing in society, and their immediate manner of courtship."

The forty-first section of the act of the 31st of March, 1860,[1] which defines the offense of seduction, expressly provides, "that the promise of marriage shall not be deemed established, unless the testimony of the female seduced is corroborated by other evidence, either circumstatial or positive."

The fact that a defendant charged with seduction is now allowed to testify on his own behalf, does not repeal this provision of the act of 1860. It is urged, however, that this error was cured by the previous portion of the charge in which the law upon this subject was correctly ruled. If we take the charge as a whole, we find this point ruled both ways. Unfortunately the erroneous ruling was the last, and, therefore, likely to have made lodgment with the jury. We can not say it did no harm in view of the connection of the plaintiff in error, and the very feeble corroboration of the prosecutrix upon the question of the promise of marriage.

The learned judge also erred in charging: "It is contended that this case requires the essentials so far as the making of presents, writing of love letters and all of such things that pass between young people, to make out this case. But we have long passed that day so far as court-

[1] P. L. 392.

ship is concerned. * * * One man may desire to court the girl he desires to make his wife in a secluded place as he may desire to keep it quiet; another may be in the habit of keeping company with a young lady and appear upon the public highway from time to time, so that all may see him; hence there is no standard, each case must stand on its own four legs as the parties built it up."

This instruction was not calculated to aid the jury in arriving at a correct conclusion. In view of the character of the evidence it was not only inadequate, but misleading and erroneous. The attentions from which the jury were permitted to infer a promise of marriage were of an equivocal character. The plaintiff in error had been in the house of the prosecutrix but four times, according to her own statement, and that of her mother, and then only for a short time. He met her out in the evenings, sometimes at church, walked home with her and kept her at the gate. This is not the kind of intercourse that usually takes place between persons engaged to be married. It may tend to matrimony, but is quite as likely to lead to something else. Circumstantial evidence of an engagement of marriage is to be found in the proof of such facts as usually accompany that relation. Among them may be mentioned letters, presents, social attentions of various kinds, visiting together in company, preparations for housekeeping and the like. These and similar circumstances, especially when the attentions are exclusive and continued a long time, may well justify a jury in finding a promise of marriage. But the court below ignored all these matters as being no longer essential, or rather as belonging to a past age, and virtually instructed the jury that attentions paid to a woman "in a secluded place" are quite as satisfactory evidence of such promise.

We can not assent to this proposition. The circumstances which will warrant a jury in finding an intention to marry must be of those pure acts which mark an honorable purpose, and not attentions which are consistent only with the pursuit of lust.

The instruction complained of in the fourth assignment, while not positive error, was well calculated to mislead the jury in the absence of any adequate instruction upon the law of the case.

The fifth assignment does not appear to be sustained by an exception and moreover is immaterial.

We can not say it was error to refuse to withdraw the question of seduction from the jury. There was some proof that plaintiff in error admitted the promise to marry. The mere evidence of his attentions to the young woman was not sufficient to carry the case to the jury.

*Judgment reversed.*

## SEDUCTION — UNDER PROMISE OF MARRIAGE — INSUFFICIENT PROOF.

## RICE v. COMMONWEALTH.

[102 Pa. St. 408.]

*In the Supreme Court of Pennsylvania, 1883.*

1. **On a Trial for Seduction Under Promise** of marriage mere social attentions on the part of the defendant to the prosecutrix are not sufficient to corroborate her testimony of a promise of marriage.
2. **Evidence that the Defendant** confessed to the seduction and declared an intention to make amends by marrying the prosecutrix does not raise an inference of a previous promise of marriage; nor does proof that he wished to settle the case by payment of money.

Error to the Court of Quarter Sessions of Lackawanna County.

*Cornelius Smith*, for the plaintiff in error.

*H. M. Hannah*, with *J. F. Connolly*, for the defendant in error.

Mr. Justice PAXSON delivered the opinion of the court.

When this case was here upon a former writ of error, we said positively that, "the mere evidence of his (plaintiffs') attentions was not sufficient to carry the case to the jury." In other words they were not such attentions as would justify a jury in presuming a promise of marriage, or would amount to such corroboration of the prosecutrix as the act of Assembly requires in cases of seduction. Upon a state of facts in no essential features differing from those of the former, the learned judge below charged the jury (see seventh assignment): "But there is evidence of social attention of various kinds, if you believe it. If it is true that this young man did accompany this young lady from church and waited upon her home, and called at the house of her parents and then waited upon her now and then for two years, that is such social attentions, within the meaning of our Supreme Court, as would warrant you in finding that fact in the affirmative." The fact to which the learned judge referred was the promise of marriage. He has entirely mistaken our language and meaning. We repeat now what he said then, that the evidence of attentions on the part of the plaintiff to the prosecutrix was not sufficient to submit to the jury upon the question of corroboration. And the jury should be so instructed in the future if necessary upon the same or a similar state of facts.

But one other matter remains. We said before with some reluctance that we "can not say it was error to refuse to withdraw the question of seduction from the jury. There was some proof that plaintiff in error admitted the promise to marry." The evidence was exceedingly weak, but as the case had to go back for other reasons, we thought best

to allow this question to be again submitted to the jury. It has not been strengthened upon the second trial. The mother of the prosecutrix sent for the plaintiff in error, after she learned her daughter was in trouble. He came to her house and had an interview with her in the presence of her husband and her daughter. Mrs. Robertson thus relates what occurred:—

Q. What did you say to him (plaintiff); what were the words?

A. I told him this was a nice job he had done; I told him he must fulfill his promise, and not to bring the rest of the family to shame. Cross-examined: Q. I want you to tell the first thing said; who said it and the answer?

A. He bid good evening with me and said he was sorry for what he had done.

Q. Told you he was sory for what he had done; who spoke next?

A. Himself; he said he would marry if I waited two weeks, because he said he owed his sister some money; I told him to fulfill his promise and not bring my family to shame.

There is nothing here from which a jury could safely find a previous promise to marry. This view is strengthened by what followed. Upon her redirect examination the same witness related what occurred as follows:—

Q. Tell us what took place at the time Rice came to your house when you sent for him?

A. He came to talk to me.

Q. What was the first thing said?

A. We bid good evening together, and he told me he was sorry for what he had done, and if I should leave it for two weeks, he would marry her; I told him I would not leave it two days; I said I had a small family coming up and did not want to bring them to shame; he said he hadn't money enough to get married now, he owed his sister board. I said he could get married and have her home there and not to bring my little family to shame.

Cross-examined: Q. Then, if I understand it now, it was this way: Rice said he owed some money for board and could not marry short of two weeks?

A. Yes, sir.

Q. And then you went on and said he could fulfill his promise, that he would have a home there.

A. I said if he would fulfill his promise and let her come home as he promised, that her home was there for her, and not bring my family to shame, as I told you before.

As the case now stands it is our duty to express a decided opinion upon this evidence. The implication which might be gathered from the ex-

amination in chief, that the plaintiff referred to a previous promise to marry, is entirely removed by the cross-examination, which shows that the plaintiff was merely expressing a regret for what he had done and a willingness to repair the wrong by marrying the girl. And when we examine the subsequent re-examination and recross-examination there can not be a doubt upon this matter. There is nothing here upon which this verdict can stand. The evidence was almost a scintilla, and it will not do to send a man to the penitentiary upon a scintilla.

It was said, however, that the case was strengthened by the testimony of Ody Biglin, who stated that he had a conversation with the plaintiff, in which the latter said, "he would give $200 to settle it, and wouldn't give no more; that he was guilty of the crime." It would be straining the language to say that the plaintiff referred to the promise of marriage. The crime of which he admitted his guilt was evidently the illicit intercourse. That was not seriously denied; indeed, the plaintiff acknowledged it on his former trial.

There was one feature of the trial below that we can not pass without comment. It was the failure of the Commonwealth to call the father of the prosecutrix in regard to the conversation we have referred to between the mother of the prosecutrix and the plaintiff. The prosecutrix and her father were present at that interview. Neither was called. It matters little about the prosecutrix, as her evidence in regard to the promise of marriage could not be aided by placing her upon the stand again. But under the circumstances of the case, it was the plain duty of the Commonwealth to have called her father. This was the more necessary by reason of the equivocal character of Mrs. Robertson's testimony as well as that of her daughter. The Commonwealth demands justice, not victims. This belongs to a class of cases where the whole truth should be brought out, if possible. Upon so vital a question as whether at the interview referred the plaintiff admitted a promise of marriage prior to the seduction, the neglect by the Commonwealth to call the father of the girl, who was present at the interview and heard all that was said, would have justified the jury in drawing an inference seriously unfavorable to the prosecution, and the court below would have been at least justified in saying so.

If the plaintiff in error has been guilty of fornication, of which there seems little doubt, he may be convicted of that offense under this bill.

The judgment is reversed, and it is ordered that the record, with this opinion, setting forth the causes of the reversal, be remanded to the court below for further proceedings.

## SEDUCTION—WHEN WOMAN DOES NOT CONSENT, NOT SEDUCTION.

## CROGHAN v. STATE.

[22 Wis. 444.]

*In the Supreme Court of Wisconsin, 1868.*

1. **Where the Woman does not Consent** to the intercourse the crime is not seduction.
2. **The Court Charged the Jury** that "if the woman ultimately consented to the illicit intercourse the crime was seduction, though she consented partly through fear and partly because the defendant hurt her." *Held*, error.

ERROR to the Circuit Court of Marathon County.

*S. U. Pinney* and *E. R. Chase*, for plaintiff in error, cited *Wright* v. *State*,[1] *State* v. *Bierce*.[2]

*The Attorney-General* and *W. C. Silverthorn*, for the State, cited Revised Statutes,[3] Wharton's Criminal Law,[4] 3 Greenleaf's Evidence,[5] 5 Sneed,[6] 3 Zabriskie,[7] 29 Connecticut,[8] 1 Halstead,[9] *Commonwealth* v. *Parr*.[10]

COLE, J. This was an indictment under section 5,[11] for seduction. The prosecutrix in her testimony states the circumstances under which the sexual intercourse took place. It appears that she was between fifteen and sixteen years of age at the time, and was living with the defendant, who had married her aunt. The girl's parents lived in Minnesota, and the defendant in Marathon County. The girl states that one night the defendant, during the absence of his wife, came into her room after she had gone to bed and insisted upon getting into bed with her — that she resisted and he choked her — that he finally had intercourse with her, and threatened to kill her if she told of it; that at another time, in April, 1865, in his own house, he seized her — said he would have what he wanted, or he would choke her — that he threw her across the bed-rail, and had intercourse with her. The girl said that she yielded to him, partly on account of his threats, and partly because he hurt her. The court charged that there was but one offense charged in the indictment, which was that of seduction; that it was necessary he should define the difference between seduction and rape; that if they found that the woman ultimately consented to the illicit intercourse, the crime was seduction, although she consented partly through

[1] 4 Humph. 194.
[2] 27 Conn. 320.
[3] ch. 164, sec. 39.
[4] p. 1141.
[5] p. 210.
[6] p. 581.
[7] p. 30.
[8] p. 232.
[9] p. 329.
[10] 5 W. & S. 345.
[11] ch. 170, R. I.

fear and partly because the defendant hurt her; but that if she did not consent, and the offense was committed by force, it would be rape, and the defendant should be acquitted. The counsel for the defendant excepted to that part of the charge which defined the offense of seduction; and the correctness of the ruling on that point is the only question we have to consider.

The crime of seduction is not to be confounded with the higher and more atrocious crime of rape. The latter crime is defined to be the carnal knowledge of a woman by a man forcibly and unlawfully, against her will.[1] The element of force forms a material ingredient of the offense, by which the resistance of the woman violated is overcome, or her consent induced by threats of personal violence, duress or fraud. For, unless the consent of the woman to the unlawful intercourse is freely and voluntarily given, the offense of rape is complete. But the word "seduction" when applied to the conduct of a man towards a female, is generally understood to mean the use of some influence, promise, acts, or means on his part, by which he induces the woman to surrender her chastity and virtue to his embraces. But we do not suppose that it must appear that any distinct promise was made to the female, or any subtle art or device employed. It is sufficient that means were used to accomplish the seduction and induce the female to consent to the sexual intercourse. Perhaps the motive of fear on the mind of the female is not to be excluded — not the fear of personal violence and injury unless she consents to the connection, but a fear that the man may in some way injure her reputation or standing in society, unless she yields to his importunities. But the woman must be tempted, allured, and led astray from the path of virtue, through the influence of some means or persuasion employed by the man, until she freely consents to the sexual connection. But if the circumstances show that this consent was obtained by the use of force, and the woman's will was overcome by fear of personal injury, then the crime becomes one of a higher grade. Now it appears to us that the error in the charge of the court consists in holding that if the woman ultimately consented to the illicit intercourse, the crime was seduction, although such consent was obtained partly through fear, and partly because the defendant hurt her. The ultimate consent of the girl might have been gained solely because the defendant hurt her, and through threats of further personal violence. And if this were so, then it is very manifest that the crime is not seduction, but one of greater atrocity. But notwithstanding the defendant treated the girl roughly at first, and actually threatened to kill her, yet if she after-

[1] 2 Bouv. L. Dic., "Rape."

wards freely consented to the sexual intercourse, being enticed and persuaded to surrender her chastity by means employed by him, then the offense is seduction. There are circumstances attending this case, as presented upon the record, which are well calculated to excite feelings of the liveliest indignation towards the defendant; but we forbear to comment on them at this time. The case must go back for a new trial on account of the error in the charge before alluded to. For it is probably as important for the protection of female character that the true distinction between the crime of seduction and rape should be maintained, as that criminal justice should be properly administered in this case.

The judgment of the Circuit Court is reversed, and a *vinire de novo* awarded.

---

NOTES.

§ 606. **Abduction not a Crime at Common Law.** — Abduction is not a crime in the absence of a statute, *i.e.*, at common law.[1]

§ 607. **Abduction — Man not Bound to Return Girl.** — A man is not bound to return to her parent's custody a girl who without any inducement on his part has left home and come to him.[2]

§ 608. **Abduction — Girl must be in Charge of Parents.** — In *R.* v. *Miller*,[3] the prisoner was indicted for taking Sarah Ann Buckley, a girl fourteen years old, out of the possession and against the will of her father. The girl testified as follows: "I am unmarried and am fourteen years and nine months old, and am the daughter of George Buckley, who lives at Seven Oaks, Cheshire. On Sunday, October 10, 1875, I was in service at Mr. Edgesley's, Budworth. I know the prisoner. On the Thursday before the 10th October I saw him, and told him I was going to see my father on the Sunday. Prisoner used to come to see me at Edgesley's, but my mistress told him not to do so. I used, however, to see him when he came. On Sunday, the 10th, I left about half-past eight in the morning to go and see my father. I passed the prisoner's house and called in and waited for him. We went together in the direction of my father's house, eight miles off, but prisoner left me about a mile or so before we got there. I had leave to stay with my father till the next night, and prisoner knew this. I stayed at my father's till the Sunday afternoon, and then told him I was going back to Edgesley's that night — he did not know that I had leave to stay till the Monday. My father let me go, and I then went to meet the prisoner, as we had arranged before he left me in the morning. We walked about, and then went to my master's at Ebern at night, but did not go in; and prisoner said, "Don't

[1] State *v.* Sullivan, 85 N. C. 506 (1881).
[2] R. *v.* Olifier, 10 Cox, 402 (1866).
[3] 13 Cox, 179 (1876).

go in, it's too late; come with me." I therefore went with him, and we passed the night together in an out-house near his father's. Next morning he told me to go to his parents' house, and I did so. I started to go back to my master's in the afternoon, and prisoner went with me, but I did not like to go in, and prisoner again induced me to return with him, and I remained at his father and mother's till Thursday, when I accidentally met my father, and he took me back to Mr. Edgesley. I only passed the Sunday alone with the prisoner. I might have gone back to my master's any time I liked after the Monday night. Though I had leave to stay away till the Monday night, I never intended doing so. Prisoner used to come with his concertina to see me in my master's garden."

*Dunn*, for the prisoner, contended that there had been no abduction in the case — no taking the girl away from her master, as contemplated by the Act of Parliament, and that the girl had permission to be away at the time the offense (if any), was committed; and further that there was no attempt to keep her away from her service on the following day.[1]

*Williams*, further submitted that the girl might have been taken from her father's possession as she was on a visit to him, and he in effect only let her go to return to her master.

*Dunn*, on the other hand, cited *Terry* v. *Hutchinson*,[2] and *Regina* v. *Mycock*,[3] as showing that the girl was in the constructive care or charge of her master, as she had the intention of returning to him.

Lush, J., said that the present was not such a case as the statute was intended to meet, and the cases cited by the prisoner's counsel were in point. He should, therefore, direct the jury that there was no evidence of the prisoner having taken the girl out of her father's or her master's possession, and there was no abduction; that is, no taking and keeping the girl away, such as the law required to sustain a conviction under the statute.

*Verdict, not guilty.*

§ 609. **Abduction — Taking out of Possession of Father.** — In *R.* v. *Green*,[4] Green and Bates were indicted that they did take one Susannah Robinson, an unmarried girl, being under the age of sixteen years, out of the possession and against the will of her father.

The girl was under fourteen, and lived with her father, a fisherman, at Southend. On the 23d of June, the prisoners saw her in the streets of that place, by herself, and invited her to go with them, giving her drink to induce her, which made her dizzy and sick. They took her to a lonely house which was undergoing repair, and then Green had criminal intercourse with her, keeping her there all night. Next morning the child was found there crying, and this charge was preferred.

On the opening of the case, —

Martin, B., said there must be a taking out of the possession of the father. Here, the prisoners picked up the girl in the streets, and for anything that appeared, they might not have known that the girl had a father. The essence of the offense was taking the girl out of the possession of the father. The girl was not taken out of the possession of any one. The prisoners, no doubt, had done a very immoral act, but the question was whether they had committed an illegal act. The criminal law ought not to be strained to meet a case which did not

[1] Reg. *v.* Ollifer, 10 Cox, C. C. 402.

[2] 18 L. T. Rep. (N. S.) 521, 597.

[3] 12 Cox, C. C. 28.

[4] 3 F. & F. 274 (1862).

come within it. The act of the prisoners was scandalous, but it was not any legal offense. He had told the grand jury so, and advised them to throw out the bill. He should direct the jury to acquit the prisoners.

The formal verdict of not guilty was then taken, and the prisoners were discharged.

§ 609*a*. **Abduction — Intent to Marry.** — To take a girl under eighteen from the custody of her parents with the intention of marrying her is not within the California statute.[1]

§ 610. **Abduction — "Taking or Causing to be Taken" — Fraudulent Decoying not Within the Phrase.** — In *R.* v. *Meadows*,[2] M. was indicted under a statute for fraudulently "taking or causing to be taken an unmarried girl under sixteen out of the possession and against the will of her father." It appeared that a girl who was in service as she was returning from an errand was asked by M. if she would go to London as his mother wanted a servant and would give her £5 wages. The girl and M. went together to London where they were arrested. It was held that this was not within the statute.

§ 611. **Abduction — "Taking" for Purpose of "Prostitution" or "Concubinage."** — In *People* v. *Parshall*,[3] the court, in reversing the conviction, say: "The evidence of the girl fell short in several respects of being sufficient to produce a conviction under that count; and first, as to the taking away. The evidence of the girl in question does not show that she was taken away from any one according to her testimony. The first she ever saw of the defendant was on Clinton Street, in the city of Rochester; that a little girl, Mary Broch, was with her after Christmas, 1861, in the morning, eight or nine o'clock or at noon; they had no conversation. She states, 'we girls laughed at his long beard.' He turned round; the next time the said Hannah Naughton saw him was on Buffalo Street about a month after that; she was alone; defendant passed by her and then came back and said to her he thought he knew her. She told him he was mistaken in the person. He told her he had seen her before; she then said to him she had seen him in Clinton Street. Then follows a long statement of conversations and meetings between her and the defendant, and transactions between them tending to show a brutal desire on the part of the defendant to have carnal intercourse with the girl, and a gradual yielding on her part, which resulted in his attempt to consummate his design, but which, according to her account, failed of success, in all of which there was no compulsion on his part, nothing but coaxing and persuasion, to which she appears to have voluntarily yielded; she was during these transactions living with her sister, Mrs. Quine. It does not appear that the defendant was ever at Mrs. Quine's; all the meetings he had with her were in the streets. His conduct shows an attempt to seduce her, and the testimony of the girl does not tend to show that there was any taking of her in the sense of the statute, which contemplates some positive act to get the female away from the person having the legal charge of her; nothing of that kind appears.

"*Second.* There is an entire absence of evidence tending to show either of the purposes mentioned in the act to characterize the taking, if there had been one.

[1] People *v.* Marshall, 59 Cal. 386

[2] 1 C. & K. 398 (1844).

[3] 6 Park. 132 (1864).

It is impossible to believe from the testimony of the girl, that there was a purpose of her prostitution, as that term is to be understood in the statute. In *Carpenter* v. *People*,[1] we had occasion to consider carefully the sense in which the same word was used in a cognate statute, and we then held that it meant the practice of a female offering her body to the indiscriminate intercourse with men; the common lewdness of a female — we think the word was used in the same sense in the statute under which the defendant was convicted.

"Was there a purpose of concubinage? a purpose to make her his concubine? Such an inference from the girl's testimony it seems to me is preposterous. The defendant was a married man, living with his wife, and keeping house in the city of Rochester, and the girl under fourteen years of age, too young and physically too undeveloped, as her evidence shows, to be able to afford him any of that gratification which the presumed motive for such a relation implies; and, when finally, he discovered this fact, in an attempt to have sexual intercourse with her, and failed for that reason, he abandoned his pursuit, as it does not appear that he met or saw her afterwards.

"*Third* and last. Was there a purpose of marriage? This question is too plain for argument. There is not a syllable of evidence to warrant the existence of such a purpose."

§ 612. **Abduction — "Purpose of Prostitution."** — "Purpose of prostitution" does not mean intercourse with one man, but means for the purpose of common indiscriminate intercourse.[2]

This was held in *State* v. *Stoyell*,[3] following *Commonwealth* v. *Cook*. In *Commonwealth* v. *Cook*,[4] the defendant was indicted under the Massachusetts statute of 1845,[5] which enacts that "any person who shall fraudulently and deceitfully entice or take away any unmarried woman, of a chaste life and conversation, from her father's house or wherever else she may be found, for the purpose of prostitution, at a house of ill-fame, assignation or elsewhere," etc., "shall be punished," etc. The trial was in the Court of Common Pleas, before Wells, C. J., whose report thereof was in substance as follows: —

The evidence tended to prove, among other things, that from November, 1844, to September, 1845, the defendant and Emily Forest (the female whom the indictment charged the defendant with enticing away), lived in the same house, she being seventeen years old, and residing in her father's family, and the defendant occupying another part of the house; that Emily, during this period, lived sometimes in the family of the defendant, assisting in the work of the family when the defendant's wife was sick; that while she was so in his family and afterwards, he attempted to seduce her, and persuade her to go away with him; that he endeavored to make her discontented with her parents and dissatisfied with being under their charge; that she finally consented to go off and live with him under a promise that she should not live with him as his wife, and that her chastity should never be violated without her consent; that she left home voluntarily, and that the defendant never exercised over her any coercion or restraint; that they went to Philadelphia, where he hired a single room with only one bed in it, and that they remained there nine days, sleeping in the same bed; that he repeatedly solicited her chastity,

[1] 8 Barb. 603.
[2] State v. Ruhl, 8 Iowa, 447 (1859).
[3] 54 Me. 24.
[4] 12 Metc. 93 (1846).
[5] ch. 216, sec. 1.

was angry at her for not yielding, and twice pushed her out of bed, and once pinched her arm to punish her for not complying.

The counsel for the defendant contended that by the term "prostitution," in the statute 1845,[1] was meant not only illicit intercourse and cohabitation with a single individual, but an intercourse on the part of the female abducted with many individuals, or common prostitution; that the statute offense could not be committed by an individual's fraudulently and deceitfully enticing or taking away a female, for the purpose of living with him in a state of illicit intercourse; such being merely a purpose of seduction, and not the purpose contemplated by the statute. But the court ruled, among other things, "that if the design of the defendant was to take the person abducted to some place for the purpose of there living with her in a state of illicit intercourse, such conduct was a violation of the statute, although he had no purpose of causing or inducing her to have illicit intercourse with any one else." The jury found the defendant guilty, and he alleged exceptions to the ruling of the court.

Dewey, J. We are called upon to give a legal construction to the statute of 1845,[2] upon questions reserved in a case presenting painful details of grossly immoral acts, and open violations of the divine law. Such cases are not the most favorable for a dispassionate consultation of questions of law, the decision of which involves the question whether the party shall be punished, or be discharged as not guilty of any offense cognizable by our laws. But cases of gross immorality do from time to time, occur, in which the court feel constrained to say that the acts complained of are not punishable criminally by any statute law of the Commonwealth; and the inquiry which meets us in the present case, involves precisely that point. Are the acts of the defendant punishable by the statute above mentioned? Dealing with the present case in its most aggravated aspect, supposing it may be properly inferred, from the evidence, that the defendant, by any artful means enticed Emily Forest voluntarily to leave her father's dwelling, to accompany the defendant to another State, and to take up a temporary residence in such State, and the parties there to cohabit as husband and wife. Yet all these facts, however offensive to our feelings, as Christian moralists, if they had occurred prior to March 25th, 1845, the date of the act "to punish abduction" would not have subjected the defendant to a conviction in Massachusetts, for the simple reason that the jurisdiction of the offense attaches elsewhere; the crime would have been committed in the State where the parties cohabited as husband and wife, and would be punishable under the laws of such State. The question, therefore, in the present case, is not one touching the guilt of the defendant in New York or Pennsylvania, where he cohabited with the female, or whether he may not be indicted and convicted there for the crime of adultery; but simply whether his acts within the Commonwealth are of such a character as subject him to punishment here. The defendant is not charged with any acts of adultery with Emily Forest within this Commonwealth. The extent of the charge is that he fraudulently and deceitfully enticed her away from her father's house, for the purpose of illicit intercourse with her in another State; and the extent of the finding of the jury under the ruling of the court, must be taken to be, that the defendant fraudulently and deceitfully enticed her away from her father's house for the purpose of having personal sexual intercourse with her in such other State. This brings us to the great question in this case, that of the construction of the statute of

[1] ch. 216.

[2] ch 216.

1845.[1] Was it intended to embrace the offense of enticing away an unmarried female, for the sole purpose of illicit intercourse with the individual thus enticing her away; or is the offense, which is made punishable by this statute, the fraudulent enticing away of females for the more gross and aggravated crime of common prostitution, and especially the procuring of females for houses of ill-fame, or acting as agent and servant of others in enticing females to meet such other persons at houses of assignation? The cases are certainly distinguishable in the character and degree of moral turpitude. Whether the Legislature intended to embrace all these classes of offenses, including cases of mere seduction, is a question certainly not free from difficulty.

We are aware of the strong and deep feeling which has pervaded this community upon the general subject, as manifested by the numerous petitions which have, from time to time, been presented to the Legislature, praying for further legislation to punish the crime of seduction. We know from the journals of the legislative branches, that bills have been introduced, punishing with heavy penalties the offense of seduction. But such bills have not as yet been sanctioned by legislative adoption, so far as to have become statute enactments. Difficulties have suggested themselves in the attempt to legislate upon the subject of seduction, which have induced the Legislature to postpone the enactment of such bills; and the result has been, that our Legislature has gone no further than the enactment of the statute of 1845,[2] now the subject of consideration.

It hardly need be said that in construing a statute creating a new criminal offense, and enacting heavy penalties by way of punishment, a strict construction should be adopted. The court can go no further than the Legislature have gone. If, in the use of terms defining an offense, the Legislature have used language indicating a particular species of immorality, the court can only give a like effect to such words. The offense created by the statute is that of fraudulently and deceitfully enticing and taking away an unmarried woman from her father's house "for the purpose of prostitution at a house of ill-fame, assignation or elsewhere." What is the meaning of the term "prostitution!" We can not here, as in many other cases where crimes are made punishable by statute, and yet left undefined by such statute, have recourse to the well known common-law definitions of such crimes for the exposition of the character of the offense thus made punishable by a legislative act. No such legal definitions of the term "prostitution" are to be found; offenses of this nature not being the subject of punishment by the common-law tribunals. We must, therefore, resort to the definitions of lexicographers of the best authority as our guide. If we refer to Walker's Dictionary, we find prostitution defined "the act of setting to sale;" "the life of a public strumpet." A prostitute is defined "a hireling; a mercenary; one who is set to sale; a public strumpet." Johnson defines a prostitute "a public strumpet; a hireling." To prostitute "to expose upon vile terms." In Webster's Dictionary, prostitution is "the act or practice of offering the body to an indiscriminate intercourse with men." Prostitute is "a female given to indiscriminate lewdness; a strumpet." Prostituting is "offering to indiscriminate lewdness." These definitions, it will be seen, all apply to prostitution, the act of permitting illicit intercourse for hire, an indiscriminate intercourse, or what is deemed public prostitution. That such is the meaning of the term "prostitution" is strongly confirmed by the case of *Commonwealth v. Harrington*.[3] In that case an indictment was sustained against a party who

[1] ch. 216.  [2] ch. 216.  [3] 3 Pick. 26.

was alleged to have leased a house to one B., with the intent that the business of prostitution should be carried on there. The case throughout assumes that prostitution means common indiscriminate sexual intercourse in distinction from sexual intercourse confined exclusively to one individual. It is true, as stated by the counsel for the government, that the term "prostitution" has been sometimes used in a more loose and general sense, and that instances of such use of the word may be found in reports of judicial decisions.[1] But we are rather to inquire what is the appropriate and well authorized meaning of the term, and to assume that the Legislature, in using the terms in describing the offense created by the statute, intended to use the word in its proper acceptation. We can not, therefore, give to the word "prostitution" the broad and extensive application contended for on the part of the government. Such a construction of the statute would, to some considerable extent, make it applicable to cases where the real offense is seduction.

The court are of the opinion that the offense made punishable by this statute is something beyond that of merely procuring a female to leave her father's house for the sole purpose of illicit intercourse with the individual thus soliciting her to accompany him; that she must be enticed away with the view, and for the purpose, of placing her in a house of ill-fame, place of assignation, or elsewhere, to become a prostitute, in the more full and exact sense of that term; that she must be placed there for common and indiscriminate sexual intercourse with men; or, at least, that she must be enticed away for the purpose of sexual intercourse by others than the party who thus entices her; and that a mere enticing away of a female, for a personal sexual intercourse, will not subject the offender to the penalties of this statute.

This decision, while in one respect it narrows the application of the statute, and excludes cases of mere seduction, or illicit intercourse with the individual enticing, leaves a large application of it to cases of a more aggravated character, and will embrace all of either sex who shall fraudulently entice away females for the purpose of supplying brothels and houses of ill-fame, or with a view to induce them to prostitute their persons for money or hire. As the view we have taken of this statute differs from that taken at the trial, the exceptions are sustained, and the verdict set aside.

In *Osborn* v. *State*,[2] the Supreme Court of Indiana held that the offense of abduction for "the purpose of prostitution" meant for the purpose of common indiscriminate intercourse with men, and not with one man only citing the earlier cases of *Commonwealth* v. *Cook*,[3] *Carpenter* v. *People*,[4] *State* v. *Ruhl*,[5] and *State* v. *Stoyell*.[6]

§ 613. **Abduction — "Previous Chaste Character."** — The statute as to abduction of females of "previous chaste character" means of actual personal virtue as distinguished from a good reputation and a single previous act of illicit intercourse on the part of the female is a defence.[7]

§ 614. **Seduction — "Previous Chaste Character."** — "Previous chaste character" means actual personal chastity[8] as in the statutes as to abduction.

1 1 W. Bl. 519; 3 Burr. 1569; 13 S. & R. 32.

2 52 Ind. 526 (1876).

3 12 Metc. 93.

4 8 Barb. 603.

5 8 Iowa, 447.

6 54 Me. 24.

7 Lyons *v.* State, 52 Ind. 426. See People *v.* Roderigas, 49 Cal. 9 (1874).

8 Crozier *v.* People, 1 Park. C. C. 453 (1853); Safford *v.* People, 1 Park. C. C. 474 (1854); People *v.* Kenyon, 5 Park. C. C. 254 (1862); Carpenter *v.* People, 8 Barb. 603 (1850); Andre *v.* State, 5 Iowa, 389 (1857).

§ 615. **Seduction — "Purpose of Prostitution."** — And as in the statutes as to abduction "purpose of prostitution" means for the purpose of cohabiting with men generally.[1]

§ 616. **Seduction — Woman Must be Chaste to Time of Seduction.** — The woman must be of "chaste character" up to the time of the seduction — it will not do that she was chaste before the promise to marry or previous to the day on which the seduction took place.[2]

§ 617. **Seduction — Promise of Marriage Necessary.** — The promise of marriage is an essential element under the statutes.[3] And the promise must be clearly proved.[4] And it must be shown that some artifice, promise or deception was resorted to by the defendant to induce the girl to have connection with him.[5]

In *People* v. *Clark*,[6] the court, in defining and describing the statutory crime of seduction, said: "Illicit intercourse alone would not constitute the offense charged. In addition to this the complainant, relying upon some sufficient promise or inducement, and without which she would not have yielded, must have been drawn aside from the path of virtue she was honestly pursuing at the time the offense charged was committed. Now, from her own testimony it would seem that the parties had illicit intercourse as opportunity offered. 'Such is the force and ungovernable nature of this passion, and so likely is its indulgence to be continued between the same parties, when once yielded to, that the constitution of the human mind must be entirely changed before any man's judgment can resist the conclusion,' that where parties thus indulge their criminal desires, it shows a willingness upon her part that a person of chaste character would not be guilty of, and that although a promise of marriage may have been made at each time as an inducement, it would be but a mere matter of form, and could not alone safely be relied upon to establish the fact that she would not have yielded, had such a promise not been made. We do not wish to be understood as saying that, even as between the same parties, there could not be a second or even third act of seduction; but where the subsequent alleged acts follow the first so closely, they destroy the presumption of chastity which would otherwise prevail, and there should be clear and satisfactory proof that the complainant had in truth and fact reformed, otherwise there could be no seduction. The object of this statute was not to punish illicit cohabitation. Its object was to punish the seducer, who, by his arts and persuasion, prevails over the chastity of an unmarried woman, and who thus draws her aside from the path of duty and rectitude she was pursuing. If, however, she had already fallen, and was not at the time pursuing this path, but willingly submitted to his embraces as opportunity offered, the mere fact of a promise made at the time would not make the act seduction. Nor will illicit intercourse which takes place in consequence of, and in reliance upon a promise made, make the act seduction. If this were so, then the common prostitute, who is willing to sell her person to any man, might afterwards make the act seduction, by proving that she yielded relying upon the promise of compensation made her by the man, and without which she would not have submitted to his embraces.

1 Carpenter *v.* People, 8 Barb. 603 (1850).
2 State *v.* Gates, 27 Minn. 52 (1880).
3 Cole *v.* State, 40 Tex. 147 (1874).
4 Rice *v.* Com., 102 Pa. St. 408 (1883); Rice Com., 100 Pa. St. 28 (1882).
5 State *v.* Crawford, 34 Iowa, 40 (1871).
6 33 Mich. 112.

Illicit intercourse, in reliance upon a promise made, is not sufficient, therefore, to make the act seduction. The nature of the promise, and the previous character of the woman as to chastity, must be considered. And although the female may have previously left the path of virtue on account of the seductive arts and persuasions of the accused or some other person, yet if she has repented of that act and reformed, she may again be seduced. We do not say that there may not have been a reformation in this case; indeed, there may have been many, but they were unfortunately fleeting. Had a reasonable time elapsed between the different acts, a presumption in favor of a reformation might arise, but we think no such presumption could arise in this case, and that the burden of proving such would be upon the prosecution."

§ 618. **Seduction — Promise of Marriage — Married Man.** — A married man, known to be such by the woman, can not be guilty of seducing her under "promise of marriage." In *Wood* v. *State*,[1] the court say: "The statute says by persuasion and promise of marriage or other false and fraudulent means. In this is implied that the promise must also be a fraud, one calculated to deceive, one that may win the confidence and allay the suspicion of an artless and unsuspecting maiden. Can a promise of marriage made by a man having already a wife, with whom he is at the time living, and this well known to the woman receiving the pledge, have such an effect? Can a woman of ordinary sense, who has allowed such a promise to win her confidence, claim to have been seduced by acts and persuasions into the sin of fornication. Can she be said to be a victim if she has trusted to the vows of a married man that he would marry her, knowing as she does that he can not and will not marry her? We think not. The woman who listens to such a promise is either a fool or she is a bad woman already. The confidence of no good woman could be acquired by any such promise. It could not be the means of seduction. It is upon its very face a warning to beware. It is a promise so improper in itself, so contrary to all notions of delicacy, true virtue and good morals that any girl of even ordinary chastity must instead of confiding in, be shocked by it. No reasonable human being could confide in such a promise or be betrayed by it into confidence in the man who made it. The girl who listens to such a promise is not betrayed, and such an excuse as that she toys and is finally a criminal, she is not seduced, but has run, of her own lusts, into sin.

In *People* v. *Alger*,[2] it was held that where the prisoner was a married man at the time of the promise of marriage, the woman who was seduced knowing this fact he could not be indicted. The indictment contained three counts. The first count charged that the defendant under promise of marriage seduced and had illicit intercourse with the female, she being unmarried and of previously chaste character, following the language of the act, without setting out the promise or averring any mutual promise on her part. The second count alleged that the defendant promised to marry the female, and under such promise of marriage seduced, etc., as in the first count without alleging any mutual promise on her part. The third count was substantially like the first. The defendant pleaded not guilty and also a special plea, which alleged that at the time of committing the acts charged in the indictment, he was, and for five years previous had been, a married man, having a living wife and family, with which wife and family he was then living, all of which at the time of the alleged promise

[1] 48 Ga. 192 (1873).

[2] 1 Park. C. C. 1333 (1851).

and seduction was well known to the said female. To this special plea a demurrer was interposed. By request of the defendant's counsel and with the consent of the counsel for the People, the defendant's plea of not guilty was stricken out, and the law was argued upon the demurrer to the special plea.

JOHNSON, J., delivered the opinion of the court.

The special plea admits the matters alleged in the indictment to be true, as the demurrer does those set up in the special plea.

If the indictment can strictly be regarded as setting out the existence of any promise of marriage as a matter of fact, it must be held to impart an absolute unconditional one, as contradistinguished from a promise depending upon some condition or contingency.

The case presented by the pleadings therefore, is that of a married man cohabiting with a lawful wife, promising unqualifiedly and unconditionally to marry an unmarried female, she knowing and understanding his situation, and under such a promise, seducing and having illicit intercourse with her.

Is this the kind of promise of marriage contemplated by the act for the punishment of seduction as a crime?

However criminal and offensive the act may be in the light of religion and morality it is the statute alone which gives it a criminal character in the eye of the law. It is to be observed that the act is not, as its title might seem to impart, an act to punish seduction generally as a crime, but only when it is accomplished under certain circumstances, when the parties stand in a particular relation to each other.

Three facts must concur to render the seduction a crime under the act.

The female must be unmarried, she must be, or must at all times previously have been, of chaste character, and there must be a subsisting promise of marriage.

If all these concur, then the seduction, by whatever means accomplished, is a crime and punishable as such, but in no other case and under no other circumstances. It is not necessary that the promise of marriage should be made or used as the inducement to the consent of the female, it is enough if the parties are under promise.

The framing of the act seems to have assumed that under such circumstances the consent of the female might be much more readily obtained. That she, confiding in the promise of future marriage, and relying upon it, would be more liable to yield to the solicitations and temptations of the man under this obligation to her, than otherwise. Hence the statute was confined to this particular class of cases. It was to protect females really standing in such a relation to a man, and confiding in his promise, from the employment of seductive acts against them by the man, and to punish him who, under such circumstances, should be guilty of violating and betraying and disappointing that confidence to the disgrace and ruin of the female, and the injury and scandal of society, that the statute was chiefly enacted.

But must the promise of marriage be mutual to bring the case within the statute? It is clear that to constitute any valid promise of marriage the promise must be mutual. Unless the obligation be reciprocal it is a nullity. It is contended by the counsel for the People, that the statute does not require this, that if the man is under promise to the female it is immaterial whether she has ever consented or ever expects to marry him or not. The statute, it is true, taken literally, is broad enough to admit of this interpretation. And it might be carried still farther. Because, taken literally, it is not necessary that the man should be under promise of marriage to the woman he seduces. Accord-

ing to this, every man who was under promise of marriage to any woman, if he should seduce an yunmarried female, would fall within the act. But this obviously is not the spirit and meaning of the statute. It must have a reasonable construction, so as to meet the mischief it was intended to remedy if susceptible of it. The promise must not only be to the female seduced, but there must be a corresponding one from her. Until the obligation is mutual his declaration that he would marry the female, or was willing to marry her, is a mere declaration, or offer and no promise, in any legal sense.

The statute is to be taken as intending a promise in its legal signification, and not a mere declaration or offer by way of temptation or allurement. This is apparent from the language employed "under promise of marriage." That is, after having entered into and while under engagement to marry.

Again, must it be a promise of a lawful marriage to bring the case within the act? It is contended on behalf of the People that this is not necessary. It may be that in a case where a married man represented himself to the female as unmarried, and under such circumstances under promise of marriage should seduce her, the case would come within the act, although the marriage, should it be consummated, would be void. I have no doubt that it would, if the female was ignorant of the fact of his marriage, and was under a mutual engagement to him. Even a marriage under such circumstances, although it would be void, would not be criminal on her part.

But take the promise presented by the pleadings, an agreement between a married man and an unmarried female to marry forthwith, at any time, without reference to the present marriage of the man, she knowing him to be at the same time lawfully married. Is this the kind of promise the Legislature had in view! It can not be. It was an undertaking which, if carried out, would subject both parties to punishment in the State prison. The law, instead of upholding it as a marriage, would treat it as an infamous crime. To call such an engagement a promise of marriage would be a flagrant perversion of all legal sense and reasoning.

The promise, I apprehend, required by the act, if it be not a promise of a marriage in all respects legal and valid, when it shall be consummated according to the intention, must at least be such a promise as the law would presume the female, from the facts within her knowledge, to regard, and rely upon as a valid marriage. Females, as well as males, are presumed to know the law.

It is, therefore, impossible to hold or to admit from the facts here presented that this female regarded this as any promise of marriage, or could have relied upon it as such. The law presumes that every person intends the necessary and natural consequences of his or her acts and agreements.

But it is urged that this may have been a conditional promise on the part of the defendant to marry the female seduced, when he should obtain a divorce, or upon the death of his wife. That such a promise would be void as against public policy I have no doubt whatever.

But it is sufficient for the purposes of this case to remark that no such question arises here. No such promise could be proved under this indictment. The promise set out is absolute and unqualified.

The facts, therefore, set up in the special plea, and which are admitted by the demurrer to be true, in my judgment take the seduction entirely out of the statute, however much they may deepen the shades of its moral turpitude. It is not a question whether such an offense as here stands confessed ought to be punishable by law, but whether the Legislature in the act before us made it so.

Courts are to expound and administer, and not make laws. I am inclined to the opinion that a mutual promise of marriage should be alleged in the indictment, and that it should be substantially set out, so that the court can see that it is a valid promise. The promise of marriage is somewhat in the nature of a condition precedent to the existence of the offense. It is clearly matter of substance. I have preferred, however, placing the decision in this case upon the interpretation of the statute, rather than the construction of the pleadings.

And I am clearly of the opinion, upon the substantial facts admitted, that no offense under the act has been committed by the defendant.

*Judgment for the defendant on the demurrer.*

§ 619. —— **No Seduction Where Force is Used.** — Where the woman does not consent it is not seduction.[1] In *State* v. *Lewis*,[2] the court say: The complaining witness testified that the defendant had sexual intercourse with her on two occasions, once on the night of the 7th of October, 1875, and again in two weeks after that time. She stated that on both occasions she resisted the defendant all she could and he overpowered her.

The defendant asked the court to instruct the jury as follows: "If the intercourse was against the will of complainant and accomplished by force, then the offense charged is not established, and you must acquit." The instruction was refused. We think it should have been given. If the intercourse was accomplished by force and against the will of the prosecutrix, the crime was rape, and not seduction. It is true the witness, in other parts of her testimony, stated that she let defendant have connection with her because he teased her, and she loved him, and they were engaged. But her last utterance while on the witness stand upon this subject was that she resisted all she could and was overpowered. When the witness made two statements as to the manner of the criminal connection so utterly at variance, it was the right of the defendant to have the jury instructed upon the effect of that statement which was favorable to him. We find nothing in the instructions given by the court which covers this point. It is true the jury were instructed as to the necessary evidence to constitute seduction, but we think as there was evidence which showed that the act was not seduction, but rape, the instruction asked should have been given.

*Reversed.*

So a guardian is not guilty of the statutory crime of defiling his female ward where it was done by force.[3]

§ 620. —— **Marriage of Parties.** — Marriage of the prisoner and the woman is a bar to the prosecution, though the husband immediately after the ceremony desert her.[4]

§ 621. **Seduction by Guardian of Female — Who not a "Guardian."**—On an indictment under a statute punishing the defiling of a ward by a guardian, in appeared that the father telling the girl to go and help the defendant plant corn did not render the latter punishable under the statute — he having had carnal knowledge with her while she was so assisting him.[5] "Allowing the girl," said the court, "to go and work for the defendant in helping him to plant corn, was not confiding her to his care and protection, within the meaning of the statute.

1 Croghan *v.* State, 22 Wis. 444 (1868).

2 48 Iowa, 578 (1878).

3 State *v.* Woolaver, 77 Mo. 103 (1882).

4 Com. *v.* Eichar, 4 Clark (Pa.), 326.

5 State *v.* Arnold, 55 Mo. 90 (1874.)

The statute declares, that if any guardian of a female or other person, to whose care and protection she shall have been confided, shall commit the offense, he shall be punished, etc. The guardian is specifically named, and then any other person to whose care and protection the female is confided is mentioned. The statute here certainly contemplated, that the other person alluded to, should occupy a position similar to that of guardian, or stand in some attitude in which a peculiar or confidential trust was reproved. It would not be necessary that he should be the legal protector of the female, but it would be necessary that she should have been committed to his especial care, with the expectation that he should exercise a supervision over her. The defendant stood in no such attitude. The female was allowed to go and assist him in laboring for one day, but there is no evidence that she was specially confided to his protection and care, as designed by the statute. However reprehensible his conduct may have been, there was no evidence to convict him according to the provisions of the statute, under which he was indicted.

§ 622. **Seduction — Evidence held Insufficient to Convict.** — In *State* v. *Hawes*,[1] the court reversed a conviction on the ground that the evidence was insufficient, SEEVERS, C. J., delivering the following opinion: "A reversal of the judgment of the court below is sought, for the reason, as claimed, that the verdict is not supported by sufficient evidence. The defendant and the prosecutrix were both unmarried, and the latter at the time of the alleged seduction and for some time previous thereto, made her home at the house of the parents of defendant, but in what capacity does not appear. The prosecutrix is about twenty-two years old, and the defendant is presumed to have been several years older. If any false promises were made, or seductive arts or influences used amounting to seduction, it will be found in the following portion of the testimony of the prosecutrix: 'When we were returning from meeting defendant said he heard me remark that I never intended to get married, and he wanted me to promise to marry him, if anybody. I had a proposal from a widower; defendant wanted me to promise not to marry him, and I told him I did not intend to marry any way. * * * There were about three evenings we sat and talked after the family went to bed. In November, 1870, he came to my room door and said he wanted to kiss me; I told him it was no time for him to say anything to me; that it was midnight, and for him to leave my room; I got up and dressed. * * * He took me home one time from the cars, and on the way said his mother thought I would make as good a companion as Webster Haven's wife. He used to say to me I was the only one he ever met he cared anything for, and he intended some day to get married, and when he did he wanted I should be his wife. February 16th, 1871, my birthday, we had our pictures taken together, he and I and an acquaintance of ours, in one group. * * * On the night of the 7th of July, 1871, he came to my room, and as I woke up he was in bed. He grabbed me as I turned over; I said, 'O, my Lord, Norman, I am a ruined girl.' He said to keep still or I would be hurt. I said, 'O, Lord.' He said I ought to know him well enough that he would not deceive me. He put his hand on my face and kissed me, and said for me to keep quiet. I had intercourse with him that time. He was not there but a few moments. I told him to leave; he said he would hardly. * * *

[1] 43 Iowa, 181. And see People *v.* Eckert, 2 N. Y. Cr. Rep. 470 (1884).

He was in bed but a few minutes, about five or ten. I recollect his telling me I need not be uneasy, that he would not forsake me, that I ought to know him. I did not tell him I was not afraid at all; only a few words passed. It was about midnight. When he took hold of me he grabbed me in his arms; I didn't mean that he hurt me. I tried to pull away from him. The second time he was in my room about midnight. The night of July 7th he did not promise to marry me; no promise was made, because I never came out and told him I would marry him until I wrote that letter from mother's. I told him at first I didn't intend to marry anybody; afterwards I told him I should never mrrry any one but him; since this happened, but not before, I told him I would marry him.' It is perfectly natural, and to be expected, that the prosecutrix should, as far as possible, shield herself, and cast the blame, if any there was, on the defendant. There should not, therefore, be any strained construction put on her language, in order to sustain the verdict. On the contrary, as the defendant is entitled to the benefit of all reasonable doubts there may be as to his guilt, the language of the witness should receive no other construction than its fair and natural meaning should entitle it to. The material inquiry is, was there a promise of marriage existing between the prosecutrix and the defendant, or did the latter use any arts, false promises, or seductive influences, whereby or by reason whereof the prosecutrix was induced to yield herself to the embraces of the defendant? We think the fair and reasonable construction of the evidence is there was not. To make such out, a strained or unnatural construction must be placed on the language of the witness. This the jury were not warranted in doing in order to convict. The verdict is not, therefore, supported by sufficient evidence.

"*Reserved.*"

# PART II.

# ASSAULT AND BATTERY.

---

## ASSAULT—ELEMENTS OF THE CRIME.

## PEOPLE v. LILLEY.

[43 Mich. 521.]

*In the Supreme Court of Michigan, 1880.*

1. **An Assault is an Inchoate Violence** to the person of another, with the present means of carrying the intent into effect. Threats are not sufficient; there must be proof of violence actually offered, and this within such a distance as that harm might ensue if the party was not prevented.
2. **There is no such Offense** as an assault with intent to commit manslaughter. Such an offense requires a specific intent; a specific intent requires deliberation, and in manslaughter there can be no deliberation.

For the plaintiff, *Otto Kirchner*.

For the defendant, *F. J. Atwell* and *J. J. Van Riper*.

MARSTON, C. J. The respondent was tried upon an information which charged him with having made an assault upon one Horace McKenzie, with intent, then and there, etc., to kill and murder him. Under instructions the respondent was found guilty of an assault with intent to commit manslaughter. The case comes here on exceptions before judgment, and while quite a large number of exceptions were taken, and have been presented in this court, but few will be considered, as they reach the merits.

A difficulty had arisen, between the person claimed to have been assaulted and the father of respondent, as to the proper division of certain wheat, then being threshed, and which led to blows. It appears the respondent was struck on the head by McKenzie, and he thereupon "retreated" or walked toward the straw stack, some ten or twelve feet distant.

There is some conflict in the evidence as to what thereupon took place, but as respondent was entitled, as a matter of right, to have the case submitted to the jury under instructions applicable to the evidence, favorable as well as unfavorable to him, we must, for the present purpose, consider the charge as given, and the refusals, in view of the evidence, most favorable to the accused. After respondent reached the straw stack he turned around, took a knife out of his pockets, made

some threat, and advanced towards McKenzie. After he had advanced one or two steps he was caught by a bystander, and there is some question as to whether the knife, at this time, was open or not, and witnesses testified that he was then ten or fifteen feet distant from McKenzie — the person assaulted — and that respondent then put the knife in his pocket. This practically ended the matter.

The court, as requested by the prosecuting attorney, instructed the jury: "An assault is an attempt or offer with violence to do a corporal hurt to another; an offer to inflict bodily injury, by one who is rushing upon another, is an assault. Although the assailant be not near enough to reach his adversary, if the distance be such as to induce a man of ordinary firmness to believe that he is in immediate danger of receiving such threatened injury, any intent to commit violence, accompanied by acts which, if not interrupted, will be followed by bodily injury, is sufficient to constitute an assault, although the assailant may not be at any time within striking distance. And, in this case, if Lilley, being within ten, fifteen, or twenty feet of McKenzie, drew his knife from his pocket and commenced to open the same, and started towards McKenzie in a violent manner, threatening that he would do him bodily injury, and after advancing towards him a few steps, and while rushing towards McKenzie, he was stopped by Dillman, Lilley would then be guilty of an assault."

The court declined to charge —

*Sixth.* "An assault in law is an offer to strike or cut within striking distance, and if the prisoner started to strike or cut McKenzie, and before he got within striking or cutting distance stopped and voluntarily abandoned his purpose; or if, before coming within striking or cutting distance, was stopped by others and then abandoned his purpose, it would not constitute an assault in law."

*Seventh.* "In order to constitute the crime of assault with intent to murder, the attempt to strike or cut must be within striking or cutting distance; and if the prisoner started to strike or cut McKenzie, and before he got within striking or cutting distance was stopped by others, and then abandoned his purpose, it would not constitute an assault in law."

*Eighth.* "In order to constitute the crime of assault with intent to murder, the attempt to strike or cut must be within striking or cutting distance; and if the prisoner started to strike or cut McKenzie, and before he got within striking or cutting distance stopped and voluntarily abandoned his purpose, or before coming within striking or cutting distance was stopped by others, and then voluntarily abandoned his purpose, it would not at law constitute an assault with intent to murder, as charged in the first and second counts in the information."

*Ninth.* "If the jury find that the prisoner took out his knife, but did not open it, or, if opened by him, he did not attempt to cut McKenzie with it; or if they find that the prisoner, before coming within striking distance, voluntarily closed the knife, or surrendered it to Dillman, there was no assault, and the offenses charged in the information were not committed."

The instructions given, and those refused, raise the question as to what in law constitutes an assault. Beyond this it may be very questionable whether, under any authority, the instruction as given could be fully sustained, even if applied to any facts in this case; and, irrespective of what may be found to constitute an assault, it may also be a matter of some question whether the requests should not have been given.

The instruction as given would seem to lay down the general proposition, "that any attempt to commit violence, accompanied by acts which, if not interrupted, will be followed by bodily injury, is sufficient to constitute an assault, although the assailant may not be at any time within striking distance." Now, there may be an intent to commit violence, and this accompanied by acts preparatory thereto, which, if followed up, would clearly constitute an assault; yet, owing to the distance and surrounding circumstances, no possible assault would have been committed. Thus, one with a direct intent to do grievous bodily harm may purchase a deadly weapon, or having one he may, with like intent, put it in a condition to use with deadly effect. Yet, if the act stop here, it may, as a general proposition, be said that the party could not be convicted of an assault, and this irrespective of what may have caused the party to proceed no further in the attempt.

Other facts must be added, and this we shall see must be a present ability to carry out the intent. The act done must have been sufficiently proximate to the thing intended. It may be so remote, although a distinct and essential act, coupled with the intent, as to fall far short of constituting an assault. The act done must not only be criminal, but it must have proceeded far enough towards a consummation thereof, and this must necessarily be a question for the jury under proper instructions.[1] So, clearly, where the intent is formed and some act done in performance thereof, but the party voluntarily abandons his purpose, or is prevented from proceeding further, and this while at a distance too great to make an actual assault, he could not be convicted of an assault.

What, then, constitutes an assault in law? It might be somewhat difficult to reconcile all the authorities upon this subject, and we shall not attempt it. Some of the tests, as putting the person assaulted in

[1] 1 Bish. C. L., ch. 26; also sec. 323.

fear, can not be relied upon, as evidently an assault may be made upon a person, even although he had no knowledge of the fact at the time. An assault is defined to be an inchoate violence to the person of another, with the present means of carrying the intent into effect. Threats are not sufficient; there must be proof of violence actually offered, and this within such a distant as that harm might ensue if the party was not prevented.[1]

We are of opinion, therefore, that the charge of the court as to what would constitute an assault was not sufficiently guarded, and had a tendency to mislead the jury. And, in view of all the evidence in this case, we are also of opinion that the sixth, seventh and eighth requests should have been given, and this in view of the conflict as to the distance which respondent was from McKenzie, when stopped, and of the nature and character of the alleged assault. There may have been evidence in the case tending to show that when respondent was stopped, although not then within striking distance, yet he was so near as to cause immediate danger if not stopped, so that a jury would have been at liberty to have found that an assault was committed; yet there was evidence tending to show that none was committed, and in view thereof these requests should have been given.

The next important question is whether, in this State, there is such an offense known to the law as an assault with intent to commit manslaughter. If such an offense can be committed, two things are necessary to the commission thereof — an actual assault, coupled with an intent to take life, and this under such circumstances that the accused would not be guilty of murder if death should ensue. The specific intent is necessary to complete the offense, and raise it above the grade of a mere assault.[2] While the intent must be established, it need not be by direct evidence, as of threats. It may be drawn as an inference from all the facts.[3]

In a case of this character we have only to deal with voluntary manslaughter. This "often involves a direct intent to kill, but the law reduces the grade of the offense, because, looking at the frailty of human nature, it considers great provocations sufficient to excite the passions beyond the control of reason." [4] "Manslaughter, when voluntary, arises from the sudden heat of the passions; murder, from the wickedness of the heart." Manslaughter is "the unlawful killing of another without malice, either expressed or implied." [5] The offense is one that is committed without malice and without premeditation; the "result of temporary excitement, by which the control of the reason

[1] 2 Greenl. Ev., sec. 82; 3 Greenl. Ev., sec. 59; 1 Bish. C. L., sec. 419; 3 Bla. Com. 120, note 3.

[2] Wilson v. People, 24 Mich. 410.

[3] People v. Scott, 6 Mich. 296; Potter v. People, 5 Mich. 7.

[4] People v. Scott, *supra.*

[5] 4 Bla. Com. 191; 3 Greenl. Ev., sec. 119.

was disturbed, rather than of any wickedness of heart, or cruelty or recklessness of disposition." The true general rule is, "that reason should, at the time of the act, be disturbed or obscured by passion to an extent which might render ordinary men, of fair average disposition, liable to act rashly, or without due deliberation or reflection, and from passion rather than judgment."[1]

Where the provocation falls short of this; or if there was time for the passion to subside and blood to cool; or if there is evidence of actual malice; or if the provocation be resented in a brutal and ferocious manner, evincing a malignant disposition; in all such cases, if death ensue, the offense would be murder. To reduce the offense to manslaughter all these things must be wanting, and the act must be done while reason is obscured by passion, so that the party acts rashly and without reflection. As was said in *Nye* v. *People*,[2] it would be a "perversion of terms to apply the term 'deliberate' to any act which is done on a sudden impulse," under such circumstances. Is, then, an intent thus formed, without malice, deliberation or reflection, but rashly, and while the reason is obscured by passion, caused by a sufficient provocation, such as the law contemplates in cases of assault with intent to commit a felony?

An examination of our statutes will show that a punishment is provided for those who shall maim or disfigure another in a certain manner, as well as those privy to such intent.[3] Also any person who shall assault another with intent to maim or disfigure in any of the ways mentioned.[4] Attempts to commit the crime of murder and assaults with like intent are provided for.[5] Assaults made in connection with robbing, stealing and taking from the person, such robber being armed with a dangerous weapon, with intent, if resisted, to kill or maim, or being so armed shall assault another with intent to rob. So assaults with like intent, where not so armed, are provided for by sections 7524–5–7. Malicious threats, with intent to extort money, or any pecuniary advantage, or with intent to compel the person threatened to do any act against his will; assaults, with intent to commit the crime of rape; kidnapping, with intent to sell, etc.; poisoning food, with intent to kill or injure any person, or willfully placing poison in a well, etc., with like intent; enticing away a child, with intent to detain or conceal; administering medicines to any woman pregnant with a quick child, with intent thereby to destroy such child; administering stupefying drugs, with intent, while such person is under the influence thereof, to induce him to enlist — are all provided for in the same chapter — 244 of the Compiled Laws.

[1] Maher *v.* People, 10 Mich. 220.
[2] 35 Mich. 19.
[3] sec. 7520.
[4] sec. 7521.
[5] secs. 7522, 7523.

In each and any of these cases it will be seen the intent is a deliberate one. So in section 7537, under which it is claimed this case comes, "if any person shall assault another, with intent to commit any burglary, or any other felony," here the assault being with the intent to commit the burglary, the intent is a deliberate one. In none of these cases can the intent be one formed under such circumstances as would reduce a voluntary homicide to manslaughter. When, therefore, in a chapter and section devoted entirely, in so far as it speaks of offenses committed with a particular intent, such intent is a deliberate one, must not the general language, referring to assaults with intent to commit any other felony, in like manner have reference to cases of deliberate intent.[1]

Had the assault been committed in this case and death had ensued, the intent might have been inferred from all the circumstances; the homicide, if not excusable, would have furnished evidence of the intent. In cases of assault with intent to commit a felony, a specific intent must be found to exist, and it is very difficult to imagine how such a specific intent can be found to exist in the absence of reflection and deliberation. When once it appears that the assault was made with intent to take life, under circumstances where the killing would not be lawful or excusable, then, if under such circumstances death should ensue, the party would be guilty of murder. It seems like a contradiction of terms to say that a person can assault another with intent to commit manslaughter.[2]

As this case now stands the respondent may be convicted of an assault, and a new trial must therefore be ordered.

The other justices concurred.

---

ASSAULT — ELEMENTS OF THE CRIME — SHOOTING AT WINDOW OF PERSON'S HOUSE — LAW OF NATIONS — HOUSE OF FOREIGN MINISTER.

## UNITED STATES v. HAND.

[2 Wash. C. C. 435.]

*In the United States Circuit Court of Pennsylvania, 1810.*

1. **An Assault is an Offer or an Attempt** to do a corporal injury to another, as by striking him with the hand or with a stick or shaking the fist at him or presenting a weapon within such distance as that a hurt might be given or brandishing it in a menacing manner, with intent to do some corporal hurt to another.

1 McDade *v.* People, 29 Mich. 50.

2 See, also Wright *v.* People, 33 Mich. 301.

2. **Firing a Pistol at a Transparency** exhibited at a window of a person's house is no an assault on such person.

3. **By the Law of Nations** an attack on the property of a foreign minister is an assault on him. But to constitute an offense of this kind the prisoner must have known that the house was the domicil of a foreign minister.

The first count contains a charge of an assault upon the person of Mr. Daschkoff, the Russian *charge d'ffaires;* and the second, for infracting the law of nations, by offering violence to the person of the said minister. The defendant pleaded not guilty.

The evidence was, that on the night of the 26th of March, the minister, with a view to celebrate the coronation of his sovereign, invited a large party to his house; and from a desire to compliment the persons without, and to evidence the friendship between his government and this, placed at one of the windows of his drawing-room on the second floor, a transparent painting, which represented a vessel under the American flag entering a port of Russia, above which was placed a crown. The people without, misunderstanding the design of the painting, and the intention of the minister in exhibiting it, took offense at the crown, and particularly at its position over the American flag. A large crowd collected, many threats to pull it down were clamourously made, and some bricks and stones were thrown at the house. Some of the gentlemen from the house went out to explain the matter to the mob, and endeavored to pacify them, but in vain. They promised, however, that they would be satisfied if the minister would take down the crown, and agreed to give a certain number of minutes for this to be done. In the meantime, the defendant, with a Mr. Henderson, having left the theatre between 11 and 12 o'clock, attracted by the illumination, went to see what it was. Hand and Henderson soon separated in the crowd, the latter exerting himself to pacify the people. Some short time afterwards, the defendant, who lived in Fifth street between Market and Arch, was seen coming from Seventh street, in Chestnut, to the crowd opposite the minister's house, between Seventh and Eighth streets. He carried in each hand a large pistol, and, coming opposite to the house, in less than two minutes fired one pistol at the illuminated window, and immediately after, the second. At this time, the minister and one of his domestics were in the window, extinguishing the lights, in compliance with the wishes of the mob; and the bullet from the pistol first fired, passed into the room, through the window, over their heads. The company fortunately was below stairs, at supper, when the pistols were fired. The defendant was proved to have been considerably intoxicated, and was taken, by his friends, to a friend's house, where, being informed of the insult done to the Russian embassador, he declared he did not know it was his house, which he afterwaads repeated. No proof was given that he had this knowledge.

WASHINGTON, J. The indictment contains two counts, or charges, upon which the jury must pass; and I shall therefore consider them distinctly.

The first is for an insult upon the Russian minister, against the provisions of the Act of Congress. The definition of an assault,[1] is an offer or attempt by force to do a corporal injury to another; as if one person strike at another with his hands, or with a stick, and misses him; for, if the other be stricken, it is a battery, which is an offense of a higher grade. Or if he shake his fist at another, or present a gun, or other weapon, within such distance as that a hurt might be given; or drawing a sword, and brandishing it in a menacing manner. But it is essential to constitute an assault, that an intent to do some injury should be coupled with the act; and that intent should be to do a corporal hurt to another. Apply these principles to the evidence in the cause. The intention of the defendant most clearly was, to destroy, or, as he termed it, to take down the crown, which his heated mind had construed into an insult to the service of which he was a member. His whole conduct showed that his intention was not to do a personal injury to any one, and certainly no act was done in the smallest degree indicative of such intention. The outrage of which he was guilty, must be reprobated by all good men, and deserves to be punished; but it did not amount to an assault upon the Russian minister, which is the offense charged in the first count of the indictment. Upon this count, therefore, the jury ought to find him not guilty.

(2.) The second count charges him with infracting the law of nations, by offering violence to the person of the minister. Here again, the difficulty recurs, which has been noticed under the first count. How can an attack upon the house of the minister, without an intention to injure the person of the minister, be an offer of violence to his person? Upon common law principles, such evidence would seem inapplicable to such a charge. But the act of Congress refers us to the law of nations for our test; and if the act amount to the offer of personal violence, by that law, the charge is supported. That law, with respect to offenses committed against ambassadors, etc., identifies the property of the minister, attached to his person or in his use, with the person of the minister. The expressions of Vattel are very strong: "His house, carriage, equipage, family, etc., are so connected with his person, as to partake of the same fate with it. To insult them, is an attack on the minister himself, and upon his sovereign. It is an insult to both."[2] All this is a legal fiction, for the purpose of rendering the protection to which the minister is entitled full and complete, and to guard him as

[1] 1 Bac. Ab. tit. Assault, 242.

[2] Vattel, 618, 715, 719, etc.

well against insults, as real personal injury. It is not more extravagant than the fiction which considers the minister, his house and property, out of the country, for the purpose of ousting the jurisdiction of the tribunals of the country over him. Nor is it more strange than that which once prevailed in our law, though long since overruled, that provoking words alone would amount to an assault. Moreover, it seems pretty clear, that offenses of this sort were intended to be covered by the general expressions of the twenty-seventh section of the law to punish crimes. The preceding part of the section had specified four distinct offenses, the lowest of which is an assault; and it is difficult to imagine any directly against the person of the minister, which can be lower. But congress knew that there are many other injuries which might be offered to a public minister, and which the law of nations considered as being indirectly attacks upon his person, and, without attempting a further specification, covered under general expressions all such as were deemed by the law of nations to be offenses against the minister. Without such a construction, it would be difficult, if not impossible, to imagine cases of violence against the person, to satisfy the general words, which are not included in those that are specified in this and the two preceding sections.

But to constitute this an offense against the law of nations, the defendant must have known that the house upon which the violence was committed was the domicil of the minister; or otherwise, it is merely an offense against the municipal laws of Pennsylvania; and this is the only point of consequence for you to decide. Without giving any opinion upon the evidence, I shall content myself with presenting it fairly to your view.

It is always difficult, and frequently impossible, to bring home to any man the knowledge of the fact by positive proof; and therefore, it may fairly be collected from circumstances. But these circumstances should be legally proved, and should be sufficiently strong to satisfy the mind that the fact was known. In favor of the defendant, his declaration, immediately after the outrage was perpetrated, that he did not know that it was the house of the minister, made in a state of mind when caution and reflection were not to be expected, and that, at different times afterwards, confirmed by similar declarations, have been much relied upon by his counsel. The denial of the accused is certainly the lowest species of proof; but it may be sufficient to repel slight evidence to fix him with a knowledge of the fact. On the other side, the defendant lived in Philadelphia; and if he had not obtained by this means a previous knowledge of the residence of the minister, the occasion which drew him to the spot, the novelty of the sight, the appearance of a crown, the general irritation of the crowd, and the defendant in particu-

lar, at its position, were all calculated to excite inquiries, which it is proved by the witnesses could at once have been answered. It appears that some of those who went there ignorant that this was the house of the minister, sooned gained information of the fact. One of the gentlemen from the house had addressed the crowd, and explained to them the occasion of the illumination, and the impropriety of their conduct upon the occasion. If it had been proved that the defendant was one of the crowd at this time, the evidence against him would be complete. But it seems very probable that soon after his first coming to the place, and possibly before this explanation was given, he had gone away in pursuit of his pistols; and it is in proof that almost immediately upon his return he fired them. It is possible, also, from the state of intoxication in which he was, that he did not wait to make inquiries.

As to this fact, upon which the cause turns, the jury must judge. If they are satisfied, upon the evidence, that he knew this to be the residence of the minister, they ought to acquit him under the first count, and find him guilty under the second. If otherwise, find him not guilty, generally.

*Verdict not guilty.*

---

## ASSAULT AND BATTERY—ASSAULT MUST BE ON PERSON OF PROSECUTOR.

## Kirland v. State.

[43 Ind. 146; 13 Am. Rep. 387.]

*In the Supreme Court of Indiana, 1873.*

**In a Prosecution for Assault** and battery, the court instructed the jury that if under circumstances mentioned in the charge, "the defendant struck or beat the prosecuting witness while he was gathering corn in the field; or, while he was driving his team in the field, in the act of gathering corn, the defendant struck and beat the horses of the prosecuting witness in a rude and angry manner with a stick, the defendant is guilty of an assault and battery." *Held* that as there was evidence tending to prove that the defendant did strike the horses when being driven, the instruction was calculated to mislead the jury to the conviction that such striking the horses was an assault and battery upon the driver, which it was not in any legal or logical sense, the driver himself not having been touched directly or indirectly, and hence such instruction was erroneous.

From the Marion Criminal Circuit Court.

*J. W. Gordon*, *T. M. Brown*, *R. N. Lamb*, and *J. N. Kimball*, for appellant.

*J. C. Denny*, Attorney-General, for the State.

Buskirk, J. This was a prosecution for an assault and battery commenced before a justice of the peace. The affidavit charges the appel-

lant with having at Marion County, on the 28th day of February, 1873, unlawfully, and in a rude, insolent, and angry manner, touched, etc., Charles Bien.

The appellant was tried and found guilty by the justice. The case was appealed. It was tried on appeal in the Marion Criminal Court, where the State again obtained a verdict. The appellant moved for a new trial, which was overruled, and the judgment was rendered on the verdict.

The error assigned is the overruling of the motion for a new trial. A reversal of the judgment is asked mainly on the ground that the court gave an erroneous instruction to the jury.

The instruction complained of as erroneous is as follows: —

"2. To constitute a battery, the touching need not be of great force; a mere touching is sufficient if it be unlawful, and be done in a rude, or an insolent, or an angry manner. But this touching must be unlawful. A man may defend the possession of his estate and of his chattels by such reasonable force as may be necessary to that end; and if in this case you believe from the evidence that at the time of the alleged assault and battery, Charles Bien was trespassing upon the lands of the defendant, and engaged in carrying away without right the corn of the defendant, the defendant had the right, after requesting Bien to depart, and a refusal on his part to leave the property and premises, to use such reasonable force as was necessary to eject him from the premises and protect his personal property; and if the defendant, in thus protecting his property and possessions, touched Bien, or assaulted him only so much as was reasonably necessary to secure the object aforesaid, he is not guilty and you should so find. But if the jury believe from the evidence that the defendant rented the field referred to in the evidence, no certain time being fixed for the termination of the lease to Charley Bien, to be cultivated in corn, upon the shares, to be gathered by Bien, one-half to be delivered to defendant, and the other to be retained by the renter or tenant for his share. The mere fact that an agreement was made in the fall after, by which it was agreed that the tenant (Bien) take for his share of the corn the south field, and the defendant the north field as his share, except three acres in the south field, this would not terminate the lease of itself, unless it was agreed between the parties that the lease should terminate. Nor would such facts authorize the defendant to forcibly eject Bien from the field because he was gathering more corn for his own use than he was entitled to by such agreement; and if, under such circumstances, the defendant struck or beat Bien while he was gathering corn in the field, or while Bien was driving his team in the field in the act of gathering the corn, the defendant struck and beat his horses in a rude and

angry manner with a stick, the defendant is guilty of an assault and battery."

The statute says: "Every person who, in a rude, insolent, or angry manner, shall unlawfully touch another, shall be deemed guilty of an assault and battery," etc.[1]

It is quite clear, therefore, that no assault and battery can be committed unless one person touches another person unlawfully, and in a rude, or insolent, or angry manner. The affidavit charges that the appellant thus touched Charles Bien. To sustain this charge the evidence must show the unlawful touching, etc., of Charles Bien. The charge excepted to, however, instructs the jury that if the defendant struck Charles Bien's horses with a club, in a rude and angry manner, while Bien was driving his team, in the act of gathering corn, etc., the defendant is guilty of an assault and battery. In this instruction the court deems the touching of Bien wholly immaterial and unimportant; to strike Bien's horses is to strike him, that is, if they were struck with a club, and it was done while he was driving his team in the field, in the act of gathering corn. True, if the blow touched both Bien and his horse, the touching would be an assault and battery on Bien; not because of the touching of his horse, however, but for the reason that it touched him. And if the appellant struck and drove Bien's horse, or any other horse, against him, violently, unlawfully, and in a rude, etc., then he would be guilty, not because he struck the horse, but for the reason that he struck Bien by running or pushing the horse against him. If Bien was so connected with his horses when they were struck that the blow took effect on his person as well as that of the horses, then the person striking the blow would be guilty.

Bishop, in his work on Criminal Law, in section 72,[2] says: "The slightest unlawful touching of another, especially if done in anger, is sufficient to constitute a battery. For example, spitting in a man's face, or on his body, or throwing water on him, is such. And the inviolability of the person, in this respect, extends to everything attached to it."

Russell on Crimes,[3] says: "The injury need not be effected directly by the hands of the party. Thus, there may be an assault by encouraging a dog to bite. * * * And it seems that it is not necessary that the assault should be immediate, as where the defendant threw a lighted squib into the market-place, which, being tossed from hand to hand by different persons, at last hit the plaintiff in the face and put out his eye; it was adjudged that this was actionable as an assault and battery. And the same has been said where a person pushed a drunken man against another."

[1] 2 G. & H. 459.

[2] vol. 2.

[3] vol. 1, p. 751.

Greenleaf on Evidence, in discussing the question of battery, says: "A battery is the actual infliction of violence on the person. This averment will be proved by evidence of any unlawful touching of the person of the plaintiff, whether by the defendant himself, or by any substance put in motion by him. The degree of violence is not regarded in the law, it is only considered by the jury in assessing the damages in a civil action, or by the judge in passing sentence upon indictment. Thus any touching of the person in an angry, revengeful, rude or insolent manner; spitting upon the person; jostling him out of the way; pushing another against him; throwing a squib, or any missile, or water upon him; striking the horse he is riding, whereby he is thrown; taking hold of his clothes in an angry or insolent manner, to detain him is a battery. So, striking the skirt of his coat or the cane in his hand is a battery. For any thing attached to his person partakes of its inviolability."

Blackstone defines a battery as follows: "3. By battery, which is the unlawful beating of another. The least touching of another person willfully or in anger, is a battery; for the law can not draw the line between different degrees of violence, and therefore totally prohibits the first and lowest stage of it; every man's person being sacred, and no other having a right to meddle with it, in any the slightest manner." [1]

Note four, by Judge Cooley, on same page, reads as follows: "A battery is the unlawful touching the person of another by the aggressor himself, or any substance put in motion by him.[2] Taking a hat off the head of another is no battery.[3] It must be either willfully committed, or proceed from want of due care; [4] otherwise it is *damnum absque injuria*, and the party aggrieved is without remedy; [5] but the absence of intention to commit the injury constitutes no excuse, where there has been a want of due care.[6] But if a person unintentionally push against another in the street, or if, without any default in the rider, a horse runs away and goes against another, no action lies.[7] Every battery includes an assault; [8] and plaintiff may recover for the assault only, though he declares for an assault and battery." [9]

Counsel for appellee have referred us to the following adjudged cases as supporting the instruction under examination: *Respublica* v. *De Longchamps*,[10] *State* v. *Davis*,[11] *Marentille* v. *Oliver*,[12] *United States* v. *Ortega*.[13]

1 3 Cooley's Blackstone.

2 1 Saund. 29*b*, n. 1; *Ib.* 13 and 14, n. 3.

3 1 Saund. 14.

4 Stra. 596; Hob. 134; Plowd. 19.

5 3 Wils. 303; Bac. Abr. Assault & Battery B.

6 Stra. 596; Hob. 134; Plowd. 19.

7 4 Mod. 405.

8 Co. Litt. 253.

9 4 Mod. 405.

10 1 Dall. 111.

11 1 Hill (S. C.), 46.

12 2 N. J. (L.) 379.

13 4 Wash. C. C. 5ol.

The case referred to in Dallas was a prosecution under the law of nations, for an assault and battery upon the Minister of the French government, resident in this country. It was proved, upon the trial, that the defendant struck with a cane the cane of the French Minister. The court say: "As to the assault, this is, perhaps, one of the kind in which the insult is more to be considered than the actual damage; for, though no great bodily pain is suffered by a blow on the palm of the hand, or the skirt of the coat, yet these are clearly within the legal definition of an assault and battery, and, among gentlemen, too often induce dueling and terminate in murder. As, therefore, anything attached to the person partakes of its inviolability, De Longchamp's striking Monsieur Marbois' cane is a sufficient justification of that gentleman's subsequent conduct."

The case referred to in Pennington,[1] was a civil action for a trespass committed by the defendant on the property of the plaintiff, by striking with a large club the plaintiff's horse, which was before a carriage in which the plaintiff was riding. The court say: "To attack and strike with a club, with violence, the horse before a carriage in which a person is riding, strikes me as an assault upon the person; and if so, the justice had no jurisdiction of the action. But if this is to be considered as a trespass on property, unconnected with an assault on the person, I think it was incumbent on the plaintiff below to state an injury done to the horse whereby the plaintiff suffered damages; that he was in consequence of the blow, bruised or wounded, and unable to perform service; or that the plaintiff had been put to expense in curing him, or the like."

The above case, being an action of trespass for an injury to the horse of the plaintiff, and not a prosecution for an assault, or an assault and battery upon the person of the plaintiff, we think that but little importance should be attached, or weight given, to the loose remark of the judge, that the striking of a horse attached to a carriage was an assault upon the person riding in the carriage. The case of *State* v. *Davis*,[2] was a prosecution for an assault upon an officer in releasing from his custody a negro. The facts will sufficiently appear from the quotation which we make from the opinion of the court. The court say: "The general rule is that any attempt to do violence to the person of another in a rude, angry, or resentful manner, is an assault; and raising a stick or fist within striking distance, pointing a gun within the distance it will carry, spitting in one's face, and the like, are instances usually put by way of illustration. No actual violence is done to the person in any one of these instances; and I take it as very clear that that is not

[1] *supra.* [2] *supra.*

necessary to be an assault. It has, therefore, been held that beating a horse on which one is, striking violently a stick which he holds in his hand, or the horse on which he rides, is an assault, — the thing in these instances partaking of the personal inviolability.[1] What was the case here? Laying the right of property in the negro out of the question, the prosecutor was in possession, and, legally speaking, the defendant had no right to take him with force. As far as words could go, their conduct was rude and violent in the extreme. They broke the chain with which the negro was confined to the bedpost, in which the prosecutor slept, and cut the rope by which he was confined to his prison, and are clearly within the rule. The rope was as much identified with his person as the hat or coat which he wore, or the stick which he held in his hand. The conviction was, therefore, right."

We are inclined to the opinion that the chain and rope so connected the prosecutor and negro as to make identification as complete as the hat or coat on the person, or the stick in the hand. The ruling in the above case was based upon the close and intimate connection which existed between the prosecutor and the negro; but no such identity or connection between the prosecutor and his horses in the case in judgment is shown.

The case of *United States* v. *Ortega*,[2] was a prosecution instituted by the United States for the purpose of vindicating the law of nations and of the United States, offended, as was alleged, in the person of a foreign Minister, by an assault committed on him by the defendant. The proof was, that the defendant seized hold of the breast of the coat of Mr. Salmon, the prosecuting witness, and retained his hold while he communicated his cause of grievance, and until a third person came up and compelled him to release his hold.

The court said: "It was agreed by the counsel for the defendant that, to constitute an assault, it must be accompanied by some act of violence. The mere taking hold of the coat, or laying the hand gently upon the person of another, it is said, does not amount to this offense; and that nothing more is proved in this case, even by Mr. Salmon. It is very true that these acts may be done very innocently, without offending the law. If done in friendship, for a benevolent purpose, and the like, the act would certainly not amount to an assault. But these acts, if done in anger, or a rude and insolent manner, or with a view to hostility, amount not only to an assault, but to a battery. Even striking at a person, though no blow be inflicted, or raising the arm to strike, or holding up one's fist at him, if done in anger, or in a menacing manner, are considered by the law as assaults."

[1] Respublica *v.* De Longchamps, 1 Dall. 114; Wambough *v.* Shank, Pen. 229, cited in 2d part Esp. Dig. 173.

[2] *supra.*

It is very obvious that the above cases do not support the position assumed by the counsel for appellee, but are in entire accord with the elementary writers from whom we have quoted.

The most accurate and complete definition of a battery that we have met with is that given by Saunders, and which has been adopted by most subsequent writers, and that is: "A battery is an unlawful touching the person of another by the oppressor himself, or any other substance put in motion by him." By this definition it is an essential prerequisite that the person must either be touched by the aggressor himself, or any other substance put in motion by him. There must be a touching of the person. One's wearing apparel is so intimately connected with the person as in law to be regarded, in case of battery, as part of the person. So is a cane when in the hands of the person assaulted.

But in the case under consideration the court ignores all these things, and instructs the jury to convict on proof alone of the striking of the horses of the prosecuting witness. It is not even necessary, according to this charge, that the prosecuting witness should have been in the wagon, or holding the lines, or connected with, or attached to the horses in any way. That Bien was driving his team and gathering his corn does not necessarily so connect him with the horses that the touching of the horses would be an assault and battery on him. He may have been, as is frequently done, driving his horses from one pile of corn to another by words of command, without being in the wagon or having hold of the lines.

The law was correctly stated by the court in the first charge given to the jury. It was as follows: "Before you will be justified in finding the defendant guilty, the evidence must satisfy you beyond a reasonable doubt that the defendant, at, etc., * * * in a rude, or an insolent, or an angry manner touched Charles Bien."

In placing a construction upon the instruction complained of, it is our duty to look at all the instructions given on the same subject; and if the instructions taken together present the law correctly, and are not calculated to mislead the jury, we should affirm the judgment. On the other hand, if the two charges are inconsistent with each other; if they were calculated to confuse and mislead the jury; or if they must have left the jury in doubt or uncertainty as to what was the law as applicable to the facts of the case, then the judgment should be reversed.[1] The above rules have been applied by this court in civil cases. The rule laid down in criminal causes is as follows: "An erroneous instruction to the jury in a criminal case can not be corrected by another instruction which states the law accurately, unless the erroneous instruction be thereby plainly withdrawn from the jury.[2]"

1 Somers v. Pumphrey, 24 Ind. 231.

2 Bradley v. State, 31 Ind. 492.

Construing these charges together, how do they stand? The jury are first told that, to justify a finding of guilty, they must be satisfied beyond a reasonable doubt that the defendant touched Charles Bien; and then, in the second charge, the court continues, "that the defendant might lawfully employ reasonable force," etc., in defence of his possession or property but that under circumstances hypothetically put by the court, Charles Bien had the right to be on the defendant's premises gathering corn, "and if under such circumstances, etc., while Bien was driving his team in the field in the act of gathering the corn, the defendant struck and beat his horses in a rude and angry manner, with a stick, the defendant is guilty of assault aud battrery."

Plainly, then the charge is, that the evidence must show the touching of Charles Bien by the defendant, but that if Bien is driving his team, etc., and the defendant strikes his horses (that is Bien's horses) with a stick in a rude and angry manner, then such touching of the horses is, in law, a touching of Bien, and the defendant is guilty of an assault and battery. Logically the charge states the law thus: Generally, to sustain a charge of assault and battery on A., it is essential to prove a touching of A. by the defendant; but under certain circumstances, such as if A. is driving his team, etc., and the defendant touches the horses of A., then in that case, such touching of the horses is a touching of A., and if such touching of the horses is unlawfully done, and was made, etc., then the defendant may be found guilty of an assault and battery on A.

There was evidence tending to prove that the defendant struck Charles Brien. He and his two sons, Edward and Frank, so swear. The defendant swears he did not.

The following is briefly the evidence tending to prove the assault and battery upon the horses. Charles Green testified: "He hit my horses on the head with a big club about three feet long. * * * He struck my horses two or three times. * * * He was mad. * * * I was loading corn out of the piles; was loading up corn when he struck the horses."

Same witness, on cross-examination testifies: "When he struck the horses, he struck them on the head, and they stopped, etc. Don't know who held the lines. Maybe my little boy held one and me the other. * * * He struck the horse next to me. * * * The team was made to stand when defendant struck the horses. * * * I was in the wagon when he struck them."

Edward Bien testified: "Kirland hit the horses on the head and they stopped. We were just going to drive out. My father was then standing on the ground near the wagon. Defendant put his hands on the horses to unhitch them from the wagon; tried to unhitch the traces.

Just before that he struck the horses, when father was standing on the other side of the wagon."

Frank Bien testified: "At the time the horses were struck father was in the wagon." The defendant testified that he "didn't touch the horses, except that he attempted to unhitch them from the wagon."

It is apparent that there was evidence in the case to which the second instruction was applicable. The verdict being general, we are unable to determine whether he was convicted for touching the person of Bien or for striking his horses. It may be that the jury found the defendant guilty of striking the horses of Bien, for the defendant admitted that he attempted to unhitch the horses from the wagon, and, consequently must have touched them, while he positively denies that he touched the person of the prosecuting witness. Besides this, there was evidence tending to impeach the character of Bien. The jury may, therefore, have doubted, reasonably, the guilt of the defendant in the striking of Bien, and found him guilty only of having "in a rude and angry manner struck the horses of Bien with a stick," while "he was driving his team in the act of gathering corn."

The second instruction was inapplicable to the evidence, and was calculated to mislead the jury, and being erroneous, the judgment should be reversed.

The judgment is reversed; and the cause is remanded for a new trial, in accordance with this opinion.

---

## ASSAULT—ACTION EXPLAINED RY WORDS—RESISTING TRESPASS.

## COMMONWEALTH *v.* EYRE.

[1 S. & R. 347.]

*In the Supreme Court of Pennsylvania, 1815.*

1. **If a Man Raise his hand Against** another, within striking distance, and at the same time say, "If it were not for your gray hairs, etc.," it is no assault; because the words explain the action, and take away the idea of an intention to strike.
2. **A Justice of the Peace,** who has an imperfect view of persons at work on Sunday, can not forcibly enter the premises of another, for the purpose of getting a better view, in order to convict the offenders.[1]

This case, which came before the court on a motion of the defendant for a new trial, was an indictment against Franklin Eyre, containing two counts. The first charged him with an assault and battery upon Joseph Grice, Esq., as a justice of the peace, in execution of his office.

[1] See Commonwealth *v.* Gillam, 8 S. & R. 50.

The second, with an assault and battery upon Grice, without regard to his official condition. The material facts, reported by the judge before whom the indictment was tried, were as follows: —

The defendant was a shipbuilder, and some workmen in his employment were at work in his yard on Sunday. Mr. Grice, who was a justice of the peace in the Northern Liberties, in company with two other justices, went to the yard, and remonstrated with the defendant on the impropriety of his conduct. Warm language ensued between Eyre and Grice, during which Eyre raised his hand, and said, "If it were not for your gray hairs I would tear your eyes out," but did not strike. Grice, with the two justices who accompanied him, went away, intending to proceed against the defendant the next day for a breach of the Sabbath. Soon after, however, Grice returned, thinking it is his duty to interfere further, An altercation again took place between him and the defendant, whose yard he attempted to enter in opposition to the will of the owner.

The cause was tried the 23d of January, 1815, at *nisi prius* before Judge Yeates, who charged the jury that Mr. Grice, as a justice of the peace, had no right to force an entry into the defendant's yard, in pursuit of testimony; that, therefore, the opposition was lawful, and was not an assault and battery. As to what occurred when Grice first went to Eyre's yard, the evidence was contradictory, and the judge left it to the jury to decide whether an assault and battery had been proved. As the opinion of the court turned principally on the first point, a detail of the evidence in relation to the last is unnecessary. The jury convicted the defendant.

Tilghman, C. J., after briefly reviewing the facts, proceeded thus: The right of the justice to enter on the defendant's land, against his will, was the point principally contested on the trial, as it has been in the argument here. I shall, therefore, confine my opinion to that point, barely remarking, as to the rest, that if the jury founded their verdict on the circumstances of the defendant's raising his arm at the first entrance, they were wrong, because, according to the evidence as reported by the judge, the action of raising the arm was accompanied with words which showed that the defendant was determined not to strike.

It has been contended on the part of the Commonwealth, that the justice had a right to enter the defeneant's yard for two reasons: 1. Because there was a breach of the peace. 2. Because the justice had a right to convict those persons who were breaking the Sabbath on his own view. To prove that there was a breach of the peace, it is said, that by the constitution of Pennsylvania, all indictments must conclude against the peace and dignity of the commonwealth. But this is mere

matter of form. Before the revolution, the conclusion was against the peace of the king, his crown and dignity. Under a change of circumstances, it was necessary to have a change of form, but not a change of substance. There was no necessity for enlarging the circle of cases, in which it is lawful to break the doors of a man's house; for where there is a breach of the peace, doors may be broken. At first view, it may seem extraordinary, that a man should be protected in his own house against legal process of any kind. But long habit has attributed a sanctity to this domestic asylum, which ought not to be violated without good cause. It is a privilege which is dear to the people, perhaps it tends to make them more attached to their homes, and if so, it is a feeling which deserves to be cherished, because it is in the narrow circle of home, that the foundation of morals is laid. The violation of the Sabbath is a crime which deserves punishment. But when the violation consists of work, without noise or disorder, there is nothing in it like an actual breach of the peace, nothing of so pressing a nature as to require an immediate and forcible remedy. The serving of legal process on Sunday, tends to disturb the quiet of that day, which it is the object of the law on which this proclamation is founded to protect.[1] Therefore, it is that the serving of all legal process, is forbidden by another act,[2] except in cases of treason, felony, or breach of the peace. And there is as much reason to apprehend disturbance from an entry for the purpose of making a conviction, as from the serving of process.

It is on the ground of a conviction, on the view of a justice, that the attorney-general rests one of his arguments. The act of Assembly, says he, authorizes a conviction on view, and therefore, it authorizes all the means of conviction, one of which is, an entry into the place where the breach of the law is committed. If the premises be true, the conclusion is fairly drawn. But I do not perceive, that where the justice views the offense, an entrance is necessary. What he sees, he may record, and convict the offender on the evidence of his own senses. But the argument for the Commonwealth goes to prove that what he does not see with sufficient certainty, he may remedy by an entry for the purpose of getting a better sight; but that is outrunning the act of Assembly which provides for two modes of conviction, one on view of the justice, the other in the usual way by proof of witnesses. The justice may take his choice; if his view afford sufficient evidence to satisfy his conscience, he may convict without further proof, but if not, he must prove the fact by witnesses. In the present instance, his view was in his own opinion, not sufficient, and therefore he wished to enter. In that he was wrong; he should have summoned the offenders next

[1] Act of 22d April, 1794, 3 Sun. Laws, 177. [2] 1 Sun. L. 25, Act of 1705.

day, and proceeded against them in the usual manner. But it is said, he did not know them. If he did not know them himself he should have resorted to those who did know them. Not many offenders will escape for want of being known. It is possible that a few may, and if it should so happen, it will be better than that an important privilege should be broken down in order to get at them. I am of opinion, that the verdict was against law, and therefore there should be a new trial.

YEATES, J. The question which was agitated upon the trial of this indictment, before me, is of great importance to the community. It was strenuously contended on the part of the Commonwealth, that the prosecutor, Joseph Grice, Esq., as a justice of the peace, had a legal right to force his entry into the defendants premises against his will, under the circumstances of the case as disclosed in the evidence. Two men were seen working on shore, in the defendant's ship-yard upon Sunday. Nine or ten others were seen working on board a vessel, which was then building. In order to ascertain who the persons were who were guilty of a breach of the Sabbath, Mr. Grice deemed it his duty to enter the ship-yard, which was enclosed by a fence, although opposed therein by the defendant. Independently of the defendant's resisting the force attempted by Grice, at that time, the great bulk of the testimony did not show any breach of the peace committed by the defendant. So that the question on this part of the case was narrowed to a single point, whether the forcible entry of Grice was justifiable or not? I gave it in charge to the jury, that a justice of the peace had no right to force himself into the possessions of another in quest of testimony against the will of the owner; that in certain specified cases, as treason, felony, pending an affray, where a dangerous wound had been given, for breaches of the peace, or for surety of the peace, a house might be broke open, with or without a warrant, but I knew of no principle of the common law, or any injunction by act of assembly, extending this power. Although Sabbath breaking was the violation of a divine as well as a human law, I did not consider it as an actual breach of the peace. If such compulsory domiciliary visits, to search for offenders, or testimony to convict them, might be made, a man's house would soon cease to be his castle of defence, and the greatest disorders must arise therefrom. I, therefore instructed the jury, that the entry of Mr. Grice, was not justifiable, and that it was of no moment, whether the yard gate was open or shut, if the defendant opposed his entry. I see no reason whatever, for changing the opinion I delivered to the jury.

But it has been urged, that the defendant might well be convicted of an assault on Grice in the execution of his office, from what passed at the first interview, when the two other justices were present. That

matter was not much urged at the trial, nor do I think the evidence warranted the verdict, and more particularly when it is considered, that though the words of the defendant were rude and improper at the time, yet they were accompanied by expressions explanatory of his intentions, which, although Grice complained of, he did not suggest to the other justices, that an assault had been committed on him. I concur in setting aside the verdict and awarding a new trial.

BRACKENRIDGE, J., delivered an opinion to the same effect, which the reporter has not been able to procure.

*New trial granted.*

---

### ASSAULT—TAKING HOLD OF PERSON WITHOUT INTENT TO INJURE NOT.

## PEOPLE *v.* HALE.

[1 N. Y. Crim. Rep. 533.]

*In the Supreme Court of New York, 1883.*

1. **The Taking hold of a Person's arm in the Confidence** of existing friendship, trusting to a license acquired by a supposed mutual kind feeling, doing no injury, and with no wrongful intent, is not a criminal act.

2. **Upon the Trial of a Charge of Assault and Battery,** it appeared that the defendant and the prosecutrix, who were acquaintances and on friendly relations, were walking together upon the street, when the defendant took hold of prosecutrix's arm, the testimony for the prosecution being that this was done with violence, and for the defense, that it was done without violence, and with no intent to injure or insult prosecutrix. The act remained uncomplained of for four months. The jury retnrned as their verdict, "that while we find the prisoner guilty of an assault, we do not deem him guilty of a criminal assault or intent to injure." The court refused to entertain the verdict, and the jury thereupon found a verdict of gnilty with a recommendation to mercy; whereupon the defendant was sentenced. *Held,* error; that the first verdict was, in legal effect, an acquittal, and should have been entertained.

Appeal from judgment of the Court of Sessions of Rensselaer County, Hon. J. Forsyth, County Judge, presiding, affirming the judgment of the Police Court of the city of Troy, wherein the defendant was convicted of the crime of assault and battery, and sentenced to pay a fine of $30, or in default thereof, to be confined at hard labor in the Rensselaer county jail, for the period of sixty days.

The alleged offense was committed on June 24, 1882; the complaint was made, and the trial had, four months thereafter. The trial was by jury, and on the rendition of the verdict, the following proceedings were had: "The jury retired and after deliberating, returned into court with the following verdict: 'That while we find the prisoner guilty of assault, we do not deem him guilty of a criminal assault, or

intent to injure.' The court refused to entertain the verdict, and directed the jury to again retire. The jury again returned into court, and rendered a verdict of guilty, and recommended the prisoner to the mercy of the court." Thereupon the court pronounced judgment as above stated.

Further facts appear in the opinion.

*William H. Hale*, defendant and appellant in person.

*L. W. Rhodes*, District Attorney, and *Lewis E. Griffith* (assistant), for the People, respondent. The magistrate did not err in refusing to entertain the verdict as first presented by the jury.

There are only two forms of verdict known to criminal practice: a general verdict, which must be either guilty or not guilty, or a special verdict by which the jury finds the facts alone and leaves the judgment to the court.[1]

The magistrate did not err in directing the jury to reconsider their verdict, as it was neither a general or special one.[2]

BOCKES, J. The point is taken that the first verdict was, in legal effect, a verdict of acquittal, and this, whether it be deemed to be a general or a special verdict; that in either case, there was an express finding against the commission of a crime, which in assault and battery, necessarily involves a criminal intent, an intent to commit an act of violence upon another, by way of injury and insult, one or both, productive of a breach of the peace. The act complained of was the taking hold of the arm of a young woman, Miss Dewar, when walking in the street with others, her associates, male and female. The defendant and Miss Dewar were acquaintances, and to the time of the occurence, held friendly relations with each other. Miss Dewar and Mr. Crutchley, with whom she was walking, and who it seems was not on friendly terms with the defendant, testified that the defendant violently seized hold of her arm; whereas two others, disinterested witnesses, who were present, put the act more mildly, saying that they saw him take hold of Miss Dewar's arm; and the defendant, not denying that he took hold of Miss Dewar's arm, testified that "it was not with the intent to assault or insult her," on this proof, the jury rendered their verdict; and it was for the jury to say which version of the transaction should be adopted as the true one. The jury had the right to conclude, especially in view of the former friendly relations which had existed between the defendant and Miss Dewar, undisturbed until Mr. Crutchley came between them, that the defendant simply took hold of Miss Dewar's arm, with no "intent to insult her;" and the jury did sc find that the taking hold of Miss

1 Code Cr. Pr., secs. 437, 438.

2 *Ib.*, sec. 448; People *v.* Bush, 3 Park. 552; People *v.* Graves, 5 *Ib.* 134; Nelson *v.* People, 5 *Ib.* 39.

Dewar's arm was not a "criminal assault" or with "intent to injure." Was not this verdict a perfect acquittal? If the assault was not criminal, there was no crime. The jury found the defendant not guilty of a criminal assault; that is they found that the defendant took hold of Miss Dewar's arm, but with no criminal intent. This was good as a special verdict, which need not be in any particular form, if it presents intelligently the facts found by the jury.[1] It was a finding of the facts. It presented the conclusions of fact as established by the evidence, as construed by the jury.[2] It was not an imperfect or defective verdict, but covered the entire case; nor did it contain any suggestion of mistake, so *People* v. *Bush*,[3] *Nelson* v. *People*,[4] and *People* v. *Graves*,[5] have no application. The defendant was charged with a criminal act. The jury found that the act on which crime was predicated, was not criminal; and they might so find, if they found the facts to be as claimed and proved on the part of the defendant. What are the constituents of the crime of assault and battery? It has been tersely laid down as follows: "An act done, with criminal intent and injury to the public or disturbance of the public peace." It should be held in mind that we are considering the case of an alleged crime, not the right of private action for damages because of a trespass upon the person, in which case intention is not material except on the question of damages. Here we are treating with the subject of crime; so to make the act criminal, it must be committed with criminal intent; an act — an assault— without such intent, does not constitute a crime. Greenleaf says, the intention to do harm is of the essence of an assault; and again, in the case of a mere assault, the *quo animo* is material; and again, it is said, the law judges not only of the act done, but of the intent with which it is done; thus, to make an act criminal, there must be vicious intention and criminal design. Infants, idiots, and persons of unsound mind, are held to be irresponsible for their acts, otherwise criminal, because incapable of felonious or criminal intent. Lord KENYON, speaking upon this subject, says the intention and the act must both concur to constitute the crime. In *Hays* v. *People*,[6] the intent was looked upon as necessary to the offense; so it is said in Russell on Crimes, that whether the act shall amount to an assault, must in every case be collected from the intention, citing the remark approvingly that it is the *quo animo* which constituted an assault, which was a matter to be left to the jury, as above suggested. We are here considering the subject in its criminal aspect, not as in personal actions of trespass *vi et armis*. Then has a crime been committed? Was there culpability, vicious

1 Code Crim. Proc., sec. 440
2 Code Crim. Pro., sec. 438.
3 3 Park. 552.
4 5 *Ib.* 39.
5 5 *Ib.* 134.
6 1 Hill, 351.

intention, criminal design, designed disturbance of the public peace? The jury found, and so rendered their verdict, that the defendant was not guilty in this regard — that the act complained of was not a criminal act, did not involved any element essential to crime. They had the right to find, if they deemed the facts proved to justify the finding, that the taking hold a person's arm, in the confidence of existing friendship, trusting to a license acquired by a supposed mutual kind feeling, doing no injury, with no intent to do a wrong, by insult or otherwise, is not a criminal act. Such an act is an innocent one, in the sense that it does not constitute a crime. It is, too, of some significance, as bearing on the legal views above expressed, that the act remained uncomplained of for four months, and, as counsel stated on the argument — and this was not disputed, — until after trouble had arisen between the defendant and Crutchley, with whom Miss Dewar was walking at the time of the occurrence.

Again, the record, as it now stands, presents a strange anomaly. It contains two verdicts, one not guilty; the other, guilty. The first verdict was not taken back by the jury; nor was the second one an amendment of the first. Each was perfect of itself, not defective or suggestive of mistake; the first, being complete of itself, and declaring that the act complained of was not criminal, that the defendant was not guilty of crime in doing it, — should have been accepted as final. It follows that the judgment pronounced by the Police Court was erroneous. This conclusion renders it unnecessary to examine other questions raised on the appeal.

The judgment of the Rensselaer Sessions and of the Police Court should be reversed, and the defendant discharged.

Learned, J. [concurring]. Simply to find the prisoner guilty of assault, was to find him guilty of a criminal intent, simply to find him not guilty of a criminal assault was to acquit him. The difficulty is to say what the jury meant by their verdict, inconsistent on its face. If they meant to acquit, then it was error not to entertain the verdict, and to direct the jury again to retire. If it had been explained to them that, on this criminal prosecution, there could be no assault without an intent to injure, then they might have stated what they intended; [1] but this was not done, so far as appears, as they distinctly found that there was no criminal assault and no intent to injure. I am, on the whole, of the opinion that by the words "guilty of assault," they must have meant simply that the defendant, as he himself stated, took hold of the prosecutrix. I think that they must have believed that any such taking hold of another person, without regard to the intent, was an

[1] 3 Greenl. Ev. 361.

assault. There is much in this case which renders this view tenable, as is shown in the preceding opinion of my brother BOCKES. The evidence fully justified the conclusion that there was no assault; and if the jury so found, their verdict appears to be just and proper.

Although the matter is not free from doubt, I conclude that the verdict first rendered was practically a verdict of acquittal, and I concur in the foregoing opinion.

BOARDMAN, J., concurred in the result.

---

## ASSAULT—NEGLIGENT DRIVING IN VIOLATION OF CITY ORDINANCE.

## COMMONWEALTH v. ADAMS.

[114 Mass. 323; 19 Am. Rep. 362.]

*In the Supreme Judicial Court of Massachusetts, November Term, 1873.*

**One who Negligently** drives over another is not guilty of a criminal assault and battery, although he does it while violating a city ordinance against fast driving.

Action for assault. At the trial in the Supreme Court before Bacon, J., it appeared that the defendant was driving in a sleigh, down Beacon Street, and was approaching the intersection of Charles Street, when a team o ccupied the crossing. The defendant endeavored to pass the team while driving at a rate prohibited by an ordinance of the city of Boston. In so doing he ran against and knocked down a boy who was crossing Beacon Street. No special intent on the part of the defendant to injure the boy was shown. The defendant had pleaded guilty to a complaint for fast driving, in violation of the city ordinance. The Commonwealth asked for a verdict upon the ground that the intent to violate the city ordinance supplied the intent necessary to sustain the charge of assuault and battery. The court so ruled and thereupon the defendant submitted to a verdict of guilty and the judge at the defendant's request, reported the case for the determination of this court.

*A. Russ*, for defendant.

*C. R. Train*, Attorney-General, for Commonwealth.

ENDICOTT, J. We are of opinion that the ruling in this case can not be sustained. It is true that one in the pursuitof an unlawful act may sometimes be punished for another act done without design and by mistake, if the act done was one for which he could have been punished if done willfully. But the act to be unlawful in this sense must be an act bad in itself and done with an evil intent; and the law has

always made this distinction; that if the act the party was doing was merely *malum prohibitum*, he shall not be punished for the act arising from misfortune or mistake, but if *malum in se*, it is otherwise.[1] Acts *mala in se* include, in addition to felonies, all breaches of public order, injuries to persons or property, outrages upon public decency or good morals, and breaches of official duty when done willfully or corruptly. Acts *mala prohibita* include any matter forbidden or commanded by statute, but not otherwise wrong.[2] It is within the last class that the city ordinance of Boston falls, prohibiting driving more than six miles an hour in the streets.

Besides, to prove the violation of such an ordinance it is not necessary to show that it was done willfully or corruptly. The ordinance declares a certain thing to be illegal; it therefore becomes illegal to do it, without a wrong motive charged or necessary to be proved; and the court is bound to administer the penalty, although there is an entire want of design.[3] It was held in *Commonwealth* v. *Worcester*,[4] that proof only of the fact that the party was driving faster than the ordinance allowed was sufficient for a conviction.[5] It is therefore immaterial whether a party violates the ordinance willfully or not, the offense consists not in the intent with which the act is done, but in doing the act prohibited, but not otherwise wrong. It is obvious, therefore, that the violation of the ordinance does not in itself supply the intent to do another act which requires a criminal intent to be proved. The learned judge erred in ruling that the intent to violate the ordinance in itself supplied the intent to sustain the charge of assault and battery. The verdict must, therefore, be set aside and a

*New trial granted.*

---

## ASSAULT — ARREST BY OFFICER WITHOUT WARRANT — WHEN NOTICE NOT ESSENTIAL.

## Shovlin v. Commonwealth.

[106 Pa. St. 369.]

*In the Supreme Court of Pennsylvania, 1884.*

1. **Where an Officer is** empowered by law to arrest without warrant, he is not in every case bound before making the arrest to give the party to be arrested clear and distinct notice of his purpose to make the arrest, and also of the fact that he is legally qualified to make it.

[1] 7 Hale's P. C. 39; Foster's C. L. 259.

[2] 3 Greenl. Ev. sect. 1.

[3] King v. Sainsbury, 7 T. R. 451, 457.

[4] 3 Pick. 462.

[5] See Com. v. Lairen, 9 Allen, 589; Com. v. Waite, 11 *Id.* 204.

2. **Where the Offender in** question is openly and notoriously engaged in breaking the law, as for example, where he is maintaining a gambling table in a public place, it is sufficient for the officer to announce his official position and demand a surrender. If this is refused the officer is not liable to indictment for assault by reason of the fact that he used force to secure his prisoner.

April 17, 1884. Before Mercur, C. J., Gordon, Paxson, Trunkey, Sterrett, Green and Clark, JJ.

Error to the Court of Quarter Sessions of Luzerne County. Of January Term, 1884.

Indictment against Charles Shovlin, Charles W. Tammany, and Hiram Rhodes, containing two counts, viz.: (1) aggravated assault and battery; (2) assault and battery on one T. E. Bowser.

On the trial, before Woodward, J., the following facts appeared: At a meeting of the Lee Park Trotting Association, held in June, 1883, one Bowser secured the privilege of putting up a gambling apparatus in the park. Complaint of this fact was made to some of the constables of Wilkesbarre, among others to C. W. Tammany, who requested the officers of the park to have the gambling stopped, and subsequently upon learning that nothing had been done, applied to an alderman for a warrant for the arrest of Bowser, and was informed by said alderman, that the statute authorized his arrest without a warrant. He then secured the assistance of two other constables, Shovlin and Rhoades, and they went to the gambling tables, and Tammany announced himself as a constable, showed his star, and told Bowser to surrender his machinery, and consider himself a prisoner. Bowser refused, and upon Tammany's attempting to put handcuffs upon him, a fight ensued, in which Bowser was severely bruised by a billy, and the butt of a revolver in the hands of one of the constables, and some of the money from the tables was taken by constables. Bowser escaped.

The constables were arrested upon information of one W. J. Harvey, the superintendent of the park, charged with an aggravated assault and battery, and the prosecutor further alleged that the only purpose of the constables in making the raid was to secure gain for themselves.

The court charged the jury, *inter alia*, as follows: [If you believe the witnesses for the Commonwealth, there was here an attack made upon this injured man which would seem to have been unnecessarily violent, although made by officers of the law, and the defendants may be convicted.] (First assignment of error). If, on the contrary, you believe the evidence of the defendants and their witnesses, that they exercised no more force than was necessary to vindicate the law and protect themselves from injury, they should be acquitted. Or if after a calm, conscientious and full review of all the evidence on both sides, you still feel a reasonable doubt in regard to the subject, the defendants are entitled to the benefit of that and should be acquitted. * * *

[If an officer proceeds to make an arrest for an offense committed under his eye, without a warrant, he is bound to give to the party arrested, clear and distinct notice of his purpose of making the arrest, and also of the fact that he is legally qualified to make it, or is an officer of the law; and failure to do this on the part of the officer, may make him guilty of an assault upon the person arrested, while under other circumstances — if proper notice had been given — he would not be guilty of an assault, and in this connection we may say to you further, that something more is necessary than merely to show a star, or badge, insignia of office.] (Second assignment of error.)

Verdict, guilty on the second count. The court sentenced Shovlin to pay $50 and costs, and Tammany and Rhoades each to pay $100 and costs. The defendants took this writ, assigning for error the portions of the charge above inclosed in brackets.

*T. R. Martin*, *John T. Lenahan* and *Q. A. Gates*, for plaintiff in error. Bowser was engaged in the commission of an offense which rendered him liable to arrest on view of an officer, and hence, no notice was necessary.[1] But conceding that a criminal detected by a constable in the actual and flagrant violation of our laws against certain kinds of gambling, can not be legally arrested without having clear and distinct notice from the officer of his intention to arrest him, it is not necessary, as stated by the learned judge, that something more in the way of giving notice to the party to be arrested should be done, than by showing a badge or star, insignia of offices.[2]

*John McGahren*, District Attorney (*Henry W. Palmer* with him), for the Commonwealth, defendant in error. The authorities relied on by the plaintiff in error only affirm the principle that a known officer of the law, acting in his own district, need not show his authority.

A party has the right to resist, unless the officer and cause of arrest are known to the offender.[3] But an officer, if resisted, is not bound to exhibit his warrant. If not resisted, and there is no well grounded reason to expect resistance or escape, he should, on request, exhibit the warrant.[4]

Mr. Justice STERRETT, delivered the opinion of the court.

After prohibiting various forms of gambling, prescribing penalties therefor, etc., our crimes act of March 31st, 1860, declares: "It shall or may be lawful for any sheriff, constable, or other officer of justice, with or without warrant, to seize upon, secure, and remove any

1 People v. Pool, 27 Cal. 573; 3 Whar. Cr. L., sec. 2924; Rex v. Davis, 7 C. & P. 787; Act March 3, 1860, sec. 60; Com. v. Cooley, 6 Gray, 350; State v. Townsend, 5 Har. (Del.) 487, 488; Arnold v. Steeves, 10 Wend. 514.

2 1 Bish. Cr. Pr., sec. 192; 3 Whar. Cr. L., sec. 2924.

3 Wolf v. State, 19 Ohio St. 248; Com. v. Hewes, 1 Brews. 348.

4 Com. v. Hewes, 1 Brews. 348.

device or machinery of any kind, character or description whatsoever, used and employed for the purpose of unlawful gaming as aforesaid, and to arrest, with or without warrant, any person setting up the same."

It is not seriously questioned that Bowser, the person on whom the alleged assault and battery was committed, was openly engaged in violating both the letter and spirit of the act; indeed, it is very evident from the testimony that plaintiffs in error were as fully authorized, by the section above quoted, to seize the gambling apparatus and arrest the proprietor thereof, as if they had been armed with a warrant for that purpose. The question, therefore, was not whether they were guilty of an assault and battery in making the arrest, but whether they were guilty of the offense for which they were indicted by reason of their having used more force than was reasonably necessary under the circumstances; and, in the main, that question was fairly submitted to the jury.

The first assignment of error is not sustained. In charging, as therein specified, the learned judge expressed a decided opinion, as to the effect of the Commonwealth's testimony; but, the jury could not have been unduly influenced thereby, for the reason that in the very next sentence he said to them: "If, on the other hand, you believe the evidence of the defendants and their witnesses, that they exercised no more force than was necessary to vindicate the law and protect themselves from injury, they should be acquitted." The question of fact was thus left to the jury without anything more than a mere expression of opinion as to the effect of the testimony if believed.

One of the questions involved in the second specification is, whether an officer, authorized to arrest without warrant, is bound, before doing so, "to give the party to be arrested clear and distinct notice of his purpose to make the arrest, and also of the fact that he is legally qualified to make it;" in other words, may the officer be convicted of assault and battery, for making the arrest, without first giving such notice? While in most cases it may be prudent for the officer to give the notice before making the arrest, it is going too far to say, in effect, that he is required to do so; and, therefore, we think that the learned judge erred in charging the jury as he did on that subject. In considering the question, as presented by the undisputed facts of this case, it is fair to assume the constable and his assistants, plaintiffs in error, were authorized to make the arrest; that the authority with which the constable was expressly clothed by the act, was at least equivalent to a warrant. It is doubtless the duty of an officer, who executes a warrant of arrest, to state the nature and substance of the process, which gives him the authority he professes to exercise, and if it is demanded, to exhibit his warrant, that the party arrested may have no excuse for

resistance.[1] On the other hand, as is said in *Commonwealth* v. *Cooley et al.*,[2] "the accused is required to submit to the arrest, to yield himself immediately and peaceably into the custody of the officer, who can have no opportunity, until he has brought his prisoner into safe custody, to make him acquainted with the cause of his arrest, and the nature, substance and contents of the warrant under which it is made. There are obviously successive steps. They can not all occur at the same instant of time. The explanation must follow the arrest; and the exhibition and perusal of the warrant must come after the authority of the officer has been acknowledged, and his power over his prisoner has been acquiesced in." The general principle, thus stated, is equally applicable to arrests, without warrant, under authority of the statute. The second assignment of error is sustained.

Judgment reversed, and it is ordered that the record, with copy of the foregoing opinion, setting forth the cause of reversal, be remitted to the Court of Quarter Sessions, of Luzerne County, for further proceeding.

---

ASSAULT AND BATTERY — COMMON CARRIER — EJECTING PASSENGER.

## People v. Caryl.

[3 Park. C. C. 326.]

*In the Supreme Court of New York, 1857.*

1. **A Conductor on a Railroad** is justified in ejecting a passenger from a car who uses grossly profane and indecent language on the car.
2. **So also on the Refusal** of the passenger to obey the reasonable regulations of the company.

*Certiorari* to the Court of Sessions of Westchester County.

The defendant was indicted for an assault and battery, alleged to have been committed on one Thomas Elliott, and pleaded not guilty. The indictment was tried at the Westchester Sessions, where the defendant was convicted.

On the trial Thomas Elliott was called as a witness, and proved that he took passage on the New York and Harlem Railroad at the city of New York, for Tuckahoe, Westchester County, and purchased a ticket for that place; and that he was violently ejected from the cars at

[1] 1 Chit. Cr. L. 51.

[2] 6 Gray, 350, 356

Hunt's Bridge, before reaching Tuckahoe, and nearly four miles distant therefrom; that just after leaving William's Bridge, a station three miles from Hunt's Bridge, the conductor called on Elliott for his ticket, which he refused to surrender up to him.

The defendant's counsel offered to show that Elliott's conduct throughout the whole trip was noisy, disgraceful and disorderly, and such as to annoy the passengers in the cars, and to interfere with their repose and comfort.

This testimony was objected to by the district attorney, and excluded by the court so far as it tended to show disorderly conduct before the arrival at Williams' Bridge, on the ground that conduct below that point could furnish no pretense to defendant to put Elloitt out of the cars at Hunt's Bridge; to this decision the defendant excepted.

James Dusenbury, a witness for the prosecution, was asked by the district attorney what was Elliott's general character for sobriety. This was objected to by the defendant's counsel; but the objection was overruled, and an exception taken. The witness then testified that Elliott was a sober, quiet and inoffensive man.

The defendant offered to prove that the regulation and custom of the New York and Harlem Railroad had always been for the conductors to collect tickets for all stations up to Tuckahoe, immediately after leaving Williams' Bridge. This was objected to by the district attorney, who claimed that such usage, if it existed, did not affect the complainant, nor deprive passengers, who insist on their legal right to a ticket, from retaining it until they reach the station next before leaving the cars. The court sustained the objection and excluded the evidence, and the defendant excepted.

The court, among other things, charged the jury that a conductor on a railroad had no authority to eject a passenger from the car for misconduct, except when the conduct of the passenger was such as to disturb the peace and safety of the other passengers in the car, to which the defendant also excepted.

The defendant made a bill of exceptions on which the writ of *certiorari* was issued.

*Robert Cochran*, for the defendant, cited 6 Cowen,[1] 1 Starkie on Evidence,[2] 5 Cowen,[3] Angell on Carriers,[4] *Jenks* v. *Coleman*,[5] *Commonwealth* v. *Power*,[6] 1 American Railroad Cases,[7] Statutes of 1850,[8] *Willets* v. *Buffalo and Niagra Railway Company.*[9]

*Edward Wills*, District Attorney, for the People, cited *Hollister* v.

[1] p. 670.
[2] p. 186.
[3] p. 320.
[4] secs. 525, 530 b
[5] 2 Sumn. 22.
[6] 7 Metc. 601.
[7] p. 389.
[8] ch. 140, sec. 35.
[9] 14 Barb. 585.

*Nowlen*,[1] *Cole* v. *Goodwin*,[2] Roscoe's Criminal Evidence,[3] General Railroad Act,[4] Wharton's Criminal Law.[5]

*By the Court*, S. B. STRONG, P. J. Whatever may be our opinion, from the evidence, as to the guilt or innocence of the defendant, we are bound to award him a new trial, if improper evidence was admitted against him, or competent evidence offered by him was rejected, or the court incorrectly ruled any question of law against him, at any rate in a matter material to his defence. The defendant based his defence for forcibly ejecting the witness Elliott from the car upon two allegations: First, that he had conducted himself during the passage, and up to the time of his removal, in a violent and disorderly manner, so as to seriously disquiet the other passengers; and, secondly, that he improperly refused to surrender his ticket when reasonably requested to do so.

As to the first ground of defence, the defendant's counsel offered to show that Elliott's conduct throughout the whole trip, was noisy, disgraceful and disorderly, and such as to annoy the passengers in the cars, and to interfere with their repose and comfort. The court refused to receive evidence of such misconduct antecedently to the arrival at Williams' Bridge, distant about three miles from Hunt's Station, where Elliott was ejected. Why this place was assumed as the limit does not appear. At any rate, it was improperly adopted. It was competent for the defendant to give evidence of misconduct during the entire passage, as it was a short one, if it was apparent that the disposition and feeling which prompted it continued and influenced Elliott's conduct up to the time of his removal. A slight ebullition of passion, or a trivial irregularity at the moment, might not have justified the expulsion. But if it was indicative of a continuance of previously outrageous conduct, justice to the other passengers, as well as to the railroad company, might have called for such a remedial measure.

The charge of the court, upon this point, was also too strong. It was that the conductor had no authority to eject a passenger from the car for misconduct, except when it is such as to disturb the peace and safety of the other passengers. According to this, a passenger can not be removed for profane or indecent language, however gross it may be, or however it may offend the delicacy or sense of propriety of the other, and especially female passengers. That is not reasonable nor can it be law.

The court improperly rejected evidence to prove that the regulation and custom of the company had always been for the conductor to collect tickets, for all stations up to Tuckahoe (which was to be the ter-

[1] 9 Wend. 537.
[2] *Id.* 254.
[3] 96, ed. of 1846.
[4] sec. 34.
[5] pp. 311, 312.

mination of Elliott's passage), immediately after leaving Williams' Bridge. That would have shown that the defendant was not influenced by any hostile motives when the ticket was demanded, and would, unless undue violence had been used, have justified his conduct, if the regulation had been a reasonable one; and whether it was or was not would have been a proper consideration for the jury.

If the regulation for the collection of the tickets is a reasonable one, and essential for the interests of the company, and a passenger refuses to comply with it, he may, I think be required to leave the car, and if he refuses to go, be ejected without unnecessary violence. He has no right to a seat in the cars, while refusing a compliance with a reasonable regulation of the proprietors. The charge of the court to the contrary was, I think, erroneous. It was wrong, too, for the court to receive evidence of the general temperance and sobriety of the witness. His conduct on the pasage in question was alone in issue.

The conviction should be set aside and a new trial granted.

---

ASSAULT AND BATTERY — SUPERINTENDENT OF POOR-HOUSE.

## STATE v. NEFF.

[58 Ind. 516.]

*In the Supreme Court of Indiana, 1877.*

**The Superintendent of a County Poor-House** has a right to use gentle and moderate physical coercion toward the inmates so far as may be necessary for the purpose of preserving quiet and subordination among the inmates, and is not guilty of assault and battery in so doing.

NIBLACK, J. This was an indictment for an assault and battery.

The substantial part of the indictment says: —

"The grand jurors for Boone County, in the State of Indiana, * * * present, that John Neff, on the 1st day of January, A. D. 1877, at the county and State aforesaid, did then and there in a rude, insolent and angry manner, unlawfully touch, strike, beat, bruise and wound one Elizabeth Wyatt."

The defendant pleaded specially to the indictment, as follows: —

"Comes now the defendant, and for special plea herein says *actio non*, because, he says, that at the time and place of the alleged assault and battery mentioned in the indictment, he was the legally appointed custodian and superintendent of the county asylum for the indigent and

poor of said county of Boone, and that the said Elizabeth Wyatt, the person upon whom said pretended assault and battery is charged to have been perpetrated, was, at the time and place mentioned, a pauper and an inmate of the aforesaid county asylum, duly and legally admitted therein, and under the care and custody of the defendant, and as such custodian and superintendent of said county asylum; that the said Elizabeth Wyatt, at the time of the alleged perpetration of the assault and battery charged in the indictment, was cross, stubborn, ill, disobedient and ungovernable, and was fighting and scolding other paupers and inmates of said asylum, and that the beating and striking alleged in the complaint was simply moderate and gentle coercion, administered to and upon her by the defendant, as the custodian and superintendent of the county asylum aforesaid, without anger, insolence or rudeness upon the part of the defendant, but for the purpose of preserving quiet and subordination among the inmates of said asylum, as he lawfully had the right to do, and no more." The prosecuting attorney demurred to this plea for want of sufficient facts to constitute a defence. The court overruled the demurrer, and rendered judgment discharging the defendant. The State brings the cause into this court by appeal on the question of law involved in the overruling of the demurrer to the plea. Bicknell, in his Criminal Practice,[1] in summing up well established defences to charges of assault and battery, says: "It is a good defence that the battery was merely the chastisement of a child by its parent, the correcting of an apprentice or scholar by the master, or the punishment of a criminal by the proper officer; provided the chastisement be moderate in the manner, the instrument, and the quantity of it; or that the criminal be punished in the manner appointed by law.[2] The same rule applies, substantially, to keepers of alms-houses and asylums for the poor, so far as necessary to preserve order and to enforce proper discipline in their establishments.[3] The facts set up in the plea, we think, were sufficient as a defence to the indictment. The prosecuting attorney, by demurring to the plea instead of taking issue upon it, admitted the truth of the facts thus set up. We see no error in the ruling of the court on the demurrer. The judgment is affirmed.

[1] p. 296.

[2] Butler's N. P. 12. See, also, Pomeroy's Notes to 1 Archb. Cr. L. (8th ed.), p. 923; Whart. Cr. L., sec. 1259.

[3] State *v.* Hull, 34 Conn. 132; Forde *v.* Skinner, 4 C. & P. 494; Regina *v.* Mercer, 6 Jur. 243.

## ASSAULT AND BATTERY — DANGEROUS WEAPON — ARREST.

## DOERING v. STATE.

[49 Ind. 60.]

*In the Supreme Court of Indiana, 1874.*

1. **What is a Dangerous Weapon is a Question** of fact and not of law, and it is error for the court to instruct that a policeman's mace is a dangerous weapon.
2. **A Policeman may Arrest Without** a warrant one whom he has reasonable cause to suspect of a felony, and may justify an assault on one endeavoring to assist such person to escape.

BUSKIRK, C. J. This was an indictment against the defendant for an assault and battery upon the body of one Thomas Green. There was a trial by jury, a verdict of guilty, assessing a fine of one cent. There was a motion for a new trial, which was overruled, a motion in arrest of judgment, which was also overruled, and the court rendered judgment on the verdict.

The defendant was a policeman, of the city of Evansville, and as such, was informed that a brother of the prosecuting witness, Jim Green by name, had stolen a box of cigars. Upon that information, he arrested said Green. He was taking the prisoner to the city prison, and on his way there, passed the house of the prosecuting witness. The prisoner expressed a desire to see his brother, the prosecuting witness and was told by the defendant that he could see him outside the house.

All the persons present agree in their testimony, that the prisoner attempted to either go into the house or escape, and that the appellant knocked him down twice with his mace. In the scuffle that ensued, the appellant and the prisoner got around the corner of the house of the prosecuting witness, about ten feet from the corner. At this point of time, the prosecuting witness heard the noise and went out and placed his hand upon the shoulder of the appellant, and turned him around to the gas-light. The theory of the State is, that the prosecuting witness heard the noise and went out to stop it, without knowing who the parties were, and that he gently laid his hand upon the appellant and turned around to the gas-light to see who he was. On the other hand, it is contended that the prosecuting witness knew who the parties were, and went out to aid his brother in escaping. All the witnesses agree, that he laid his hand on the officer before he was struck. The appellant struck him over his head with a mace. It is further argued that it can make no difference what the real purpose of the prosecuting witness was, if the appellant had reason to believe, and did believe,

that his purpose was to aid in the escape of his brother. The prisoner did, in fact, make his escape.

Counsel for appellant contend that the second instruction was erroneous, because the court told the jury that the weapon used was a dangerous one, when the question should have been submitted to the jury to determine, as a question of fact. The instruction was in these words: "In coming to a conclusion in this case, it is important that you should consider the character of the weapon used. Custom seems to sanction the use by police establishments of pistols, maces, and other dangerous and deadly weapons, but they ought to use such weapons prudently. There can be no doubt, and as to this the jury and counsel for the State and defendant will fully agree with me, that the weapon used by the defendant in this case was a dangerous weapon. Did he use it recklessly or cruelly, or did he use it prudently?"

It is the duty of the court to charge the jury as to all matters of law applicable to the facts proved. It is the province of the jury to ascertain the facts. The question of whether a particular weapon was or was not dangerous, was a question of fact, and not of law, and hence should have been submitted to the jury for ascertainment.[1]

It is also claimed that the court erred in giving the following instruction: "If the defendant made the arrest of James Green for a felony, on information and not on view, he made it at his own peril; and in order for him to justify the assault upon Thomas Green, the prosecuting witness, when it becomes a matter of inquiry, it devolves upon the defendant to show that the party under arrest was guilty of the crime for which he was arrested."

In our opinion, the instruction was clearly erroneous.

It never was necessary, under the law, for a peace officer to "show that the party under arrest was guilty of a crime for which he was arrested." A peace officer has a right to arrest without a warrant, when he is present and sees the offense committed. He has a right to arrest without a warrant on information, when he has reasonable or probable cause to believe that a felony has been committed; and herein there is a distinction as to the extent of his authority. In cases of misdemeanor, the officer must arrest on view or under a warrant; in cases of felony he may arrest without a warrant, upon information, where he has reasonable cause. And the reasonable or probable cause is an absolute protection to him, "when it becomes a matter of inquiry," and in no case is he bound to establish the guilt of the party arrested.[2]

In *Holley* v. *Mix*,[3] the court held: "If an innocent person is arrested

[1] Barker *v.* State, 48 Ind. 163.

[1] 1 Hilliard Torts; 49 Ind. (2d ed.) 233, 234, 235, and notes.

[2] 3 Wend. 350.

upon suspicion by a private individual, such individual is excused if a felony was in fact committed and there was reasonable ground to suspect the person arrested. But if no felony was oommitted by any one, and a private individual arrest without a warrant, such arrest is illegal, though an officer would be justified if he acted upon information from another which he had reason to rely upon."

In *Samuel* v. *Paine*,[1] Lord Mansfield held that if any person charge another with felony, and desire an officer to take him in custody, such charge will justify the officer, though no felony was committed.

In a MS. note of a case of *Williams* v. *Dawson*, referred to by counsel in *Hobbs* v. *Branscomb*,[2] Mr. Justice Buller laid down the law, that "if a peace officer of his own head takes a person into custody on suspicion, he must prove that there was such a crime committed; but that if he receives a person into custody, on a charge preferred by another of felony or breach of the peace, then he is to be considered as a mere conduit, and if no felony or breach of the peace was committed, the person who preferred the charge alone is answerable."

In *Hobbs* v. *Branscomb*,[3] Lord Ellenborough, in speaking of the rule laid down by Judge Buller, said: "This rule appeared to be reasonable, and that very injurious consequences might follow to the public, if peace officers, who ought to receive into custody a person charged with a felony, were personally answerable, should it turn out that in point of law no felony had been committed."

In 1 Chitty's Criminal Law,[4] the law is stated thus: "Constables are bound, upon a direct charge of felony, and reasonable grounds of suspicion laid before them, to apprehend the party accused, and if upon a charge of burglary, or other felony, he be required to apprehend the offender, or to make hue and cry, and neglect so to do, he may be indicted. And a peace officer, upon a reasonable charge of felony, may justify an arrest without a warrant, although no felony has been committed, because, as observed by Lord Hale, the constable can not judge whether the party be guilty or not, till he come to his trial, which can not be till after his arrest; and, as observed by Lord Mansfield in *Samuel* v. *Paine*, if a man charges another with a felony, and requires another to take him into custody, and carry him before a magistrate, it would be most mischievous that the officer should be bound first to try, and, at his peril, exercise his judgment in the truth of the charge; he that makes the charge should alone be answerable; the officer does his duty in conveying the accused before a magistrate, who is authorized to examine and commit, or discharge."

1 1 Doug. 359.

2 3 Camp. 420.

3 *supra*.

4 p. 22.

The law applicable to arrests by a private person is stated with great precision and clearness by Tilghman, C. J., in *Wakely* v. *Hart*,[1] where, after quoting a provision of the State Constitution and commenting thereon, it is said: "But it is nowhere said that there shall be no arrest without warrant. To have said so would have endangered the safety of society. The felon, who is seen to commit murder or robbery, must be arrested on the spot or suffered to escape. So although not seen, yet if known to have committed a felony, and pursued with or without a warrant, he may be arrested by any person. And even when there is only probable cause of suspicion, a private person may without warrant, at his peril, make an arrest. I say at his peril, for nothing short of proving the felony will justify the arrest. These are principles of the common law, essential to the welfare of society, and not intended to be altered or impaired by the constitution."

We think the instruction under examination, when applied to arrests by a private person, expresses the law correctly, but when applied to arrests by peace officers, is clearly erroneous.

It is, however, insisted by the Attorney-General that there is nothing in the record showing that the appellant possessed the powers of an ordinary peace officer. The city of Evansville is governed by a special charter, which does not define the powers of the police force. The charter confers on the common council power "to establish, organize and maintain a city watch, and prescribe the duties thereof," and "to regulate the general police of the city."

The ordinances of the city, defining the duties and prescribing the powers of the police force, were not read in evidence. It is earnestly claimed that we can not, under these circumstances, indulge the presumption that the appellant possessed the powers of a conservator of the peace. We take notice of the existence of, and the powers conferred by, the city charter, and that Evansville has a city government. It was proved that the appellant was acting as a policeman in such city. We think we should indulge the presumption that the police force of such a city possessed the ordinary powers of peace officers at common law, but we do not think the presumption should be carried beyond the powers possessed by conservators of the peace at common law.

A full and accurate statement of the powers and duties of the police force, under the general act of incorporation of cities, will be found in *Boaz* v. *Tate*.[2]

The judgment is reversed, with costs; and the cause is remanded for a new trial, in accordance with this opinion.

*Judgment reversed.*

[1] 6 Binn. 316.

[1] 43 Ind. 60.

## ASSAULT — LAWFUL USE OF VIOLENCE — SCHOOLMASTER.

## DOWLEN v. STATE.

[14 Tex. (App.) 61.]

*In the Court of Appeals of Texas, 1883.*

1. **The Court Charged the Jury as Follows:** 1. When an injury is caused by violence to the person, the intent to injure is presumed, and it rests upon the person inflicting the injury to show accident or innocent intention. The injury intended may be either bodily pain, constraint, a sense of shame or other disagreeable emotion of the mind. 2. When violence is permitted to effect a lawful purpose, only that degree of force must be used which is necessary to effect such purpose. *Held,* erroneous applied to the present case.
2. **See this Case for Special Instructions** requested which, embodying correctly the law applicable to the facts, were improperly refused on the trial of a teacher for chastising his pupil.

Appeal from the County Court of Collin. Tried below before the Hon. T. C. GOODNER, County Judge.

The county attorney of Collin County, Texas, presented an information in the County Court of said county, on the twenty-seventh day of February, 1883, under article 496, Revised Criminal Code, based upon the written affidavit of one Lafayette Wisdom, charging that appellant did, on the thirteenth day of February, 1882, unlawfully commit an aggravated assault and battery upon the person of D. H. Wisdom, with intent to injure him; that said D. H. Wisdom was then and there a child, and appellant was an adult male person. The trial resulted in the conviction of the appellant, and his punishment was assessed at a fine of ten dollars.

D. H. Wisdom was the first witness for the State. He testified in substance that he was thirteen years old. He attended a school taught in the Farmersville Academy by the defendant, in January, 1883. Witness and Edgar Clifton got into a fight on a Monday in January, 1883, and on the next day, Tuesday, the defendant whipped the witness with a bois d'arc switch about five feet long and as large around at the butt as the witness' third finger. The defendant said that he disliked very much to whip the witness, but felt constrained to do so as a matter of duty. He struck the witness twenty-two licks over the shoulders, back, hips and thighs, cutting the blood from the thigh and two holes in the witness' pants. Witness was sore on the shoulders, hips and thighs for two weeks thereafter — so sore that it was painful for him to turn in bed. The defendant did not appear angry at the time, but on the contrary talked kindly to the witness, and even shed tears, and said that he hated to do the whipping. He whipped Edgar Clifton at the same time. Witness called Edgar a liar, and Edgar

called witness a d—d son of a b—h. Witness thereupon struck Edgar with a ball of mud, and they went to fighting. Witness knew that it was against the rules of the school to swear or use profane language on the play ground, or to scuffle and wrestle, but did not know that it was against the rules to fight.

Witness told his father of the whipping when he went home, and his father examined his person. Jim Church examined witness on Wednesday. Doctor Nethery, John Utt and Joe Binkley examined the witness one day that week. John Rike, Frank Rike and Mr. Grimes also examined the witness. The witness remained at school all day the Tuesday of the whipping, and was there next day and on Thursday, and would have attended school on Friday but for the rain.

Lafayette Wisdom, father of the injured boy, testified, for the State, that on being told by his son that the defendant had whipped him, he examined his person, and found sixteen scarlet, red and dark marks on his person. These marks were all long except two places on his right thigh, where there were two holes as large as the end of the witness' finger, and looked as though they might have been made by gunshots. The scarlet marks were black by morning. The witness found blood on his son's drawers. His son complained of soreness for some time, and said that it pained him to turn in bed. Witness took the boy to 'Squire Rike on Thursday morning. Bickley, Nethery and Utt, trustees of the school, examined the boy on Wednesday after the whipping.

Bickley and Church testified, for the State, that they examined the boy, the first at noon and the other at night of the Wednesday after the whipping. They described the marks and abrasions of the skin on the boy's person as severe. Church counted as many as thirteen stripes extending from the boy's shoulders to a point down on his legs. Bickley was a trustee and patron of the school.

Dr. A. H. Nethery testified, for the defence, that he was a trustee and patron of the school. He, with Bickley and Utt, examined the boy at noon on Wednesday. He found five or six marks on the boy's rump and legs. He saw two small circular marks, about the eighth of an inch in diameter, on his hips. These were the severest wounds. *Serum*, the watery element of blood, had exuded and formed such a scab as forms over a slight scratch. The defendant's general character in the community is good, and he sustained the reputation of a kind, humane teacher.

The testimony of Trustee Utt was substantially the same as that of Dr. Nethery.

The third special instruction asked by the defendant, and which was refused, reads as follows: —

"If you find from the evidence that the defendant did chastise D.

H. Wisdom, but that at the time the defendant was a school teacher, and said Wisdom was his pupil, and that the chastisement was administered to him by defendant because said Wisdom had engaged in a fight at school with another pupil, or had used improper and unbecoming language, or had in any other way violated the rules and regulations of the school; and that such chastisement was inflicted by the defendant upon said Wisdom for the purpose of correcting him, and in good faith and without any intention on the part of the defendant to injure said Wisdom, and without any passion, spite or ill-will towards said Wisdom, then you will find the defendant not guilty, even though you should find from the evidence that the chastisement administered was more severe than was actually necessary."

The fourth refused special instruction reads as follows: —

"In order to constitute an assault and battery, it is necessary that the violence used should have been done with the purpose and intention of inflicting an injury; but when an injury is caused the law presumes that it was inflicted with the intent to injure, which presumption of law may be rebutted or contradicted, by the person inflicting the injury showing that his intention was innocent, and that his purpose was not unlawful, which innocent intention and purpose may be shown by the acts, conduct, manner and declarations of the person inflicting the injury, made at the time when such injury was inflicted."

The motion for new trial raised the question involved in the opinion, and denounced the verdict as unsupported by the evidence.

*J. A. L. Wolfe* and *Garnett & Muse* filed an able and exhaustive brief for the appellant.

*J. H. Burts*, Assistant Attorney-General, for the State.

White, P. J. This prosecution was by an information which charged appellant with an aggravated assault, he being an adult male, committed upon the person of one D. H. Wisdom, a child. Appellant was a school teacher and D. H. Wisdom one of his pupils; and it appears by the evidence that the castigation was inflicted on account of a violation of the rules of the school by the pupil.

By the first bill of exceptions it is shown that the prosecution was allowed to prove, over objections, that, two or three nights after the whipping, the injured party told his father that he could not rest or sleep because his hips were so sore that it hurt him to turn over in bed. The evidence was inadmissible, because the statements were made too long after the infliction of the injury. Mr. Wharton has discussed this subject in one of his standard works. He says: "The character of an injury may be explained by exclamations of pain and terror at the time the injury is received, and by declarations as to its cause. When, also, the nature of a party's sickness or hurt is in litigation, his instinctive

declarations to his physician or other attendant during such sickness may be received. Immediate groans and gestures are, in like manner, admissible. But declarations made after convalescence, or when there has been an opportunity to think over the matter in reference to projected litigation, are inadmissible. * * * But where such subsequent declarations are part of the case, on which the opinion of the physician as an expert is based, they have been received."[1] Not coming within any of the exceptions pointed out, it was error in the court to admit the testimony.

Complaint is made, in the second bill of exceptions, of the charges given by the court at the request of the county attorney, in the following terms, viz: "1. When an injury is caused by violence to the person, the intent to injure is presumed, and it rests with the person inflicting the injury to show the accident or innocent intention. The injury intended may be either bodily pain, constraint, a sense of shame, or other disagreeable emotion of the mind. 2. When violence is permitted to effect a lawful purpose, only that degree of force must be used which is necessary to effect such purpose."

The proposition announced in the first paragraph, though unquestionably correct in the abstract and declared as law in terms by our statute[2] is not applicable, without further explanation, to cases such as the one under consideration. It has direct application only to acts of "unlawful violence," in the first instance, such as are essential to constitute the assaults and batteries defined in article 484, Penal Code.

But "violence used to person" is not unlawful, and does not amount to an assault and battery in the exercise of moderate restraint or correction given by law to the parent over the child, the guardian over the ward, the master over his apprentice, the teacher over the scholar."[3] In all such cases the law presumes, from the relation of the parties, an entire absence of any criminal or unlawful intent to injure; and in order to effect lawful purposes, permits the parent, guardian, master, or teacher to restrain and correct the child, ward, apprentice and scholar. When the teacher corrects his scholar the presumption is that it is in the exercise and within the bounds of his lawful authority, and it does not "devolve upon him to show accident or his intention." Neither is it any criterion of his act or intention that "bodily pain, constraint, a sense of shame or other disagreeable emotion of the mind" is produced. He has the right, under the law, to inflict moderate corporal punishment for the purpose of restraining or correcting the refractory pupil. But "where violence is permitted

[1] Whar. Cr. Ev. (8th ed.), sec. 271.

[2] Penal Code, art. 485.

[3] Penal Code, art. 490.

to effect a lawful purpose, only that degree of force must be used which is necessary to effect such purpose." [1]

established that appellant was an adult male — that Wisdom, the party alleged to have been injured was a child — that the former was a teacher and the latter his scholar — that the whipping took place at the time charged in the information, the main question to be determined was, "was the correction or whipping moderate or excessive?" If it be shown that the force is excessive, then, indeed, the rule as to presumed intention may apply; but this presumption of the law is not conclusive even then. Upon this supposed state of the case, the third and fourth requested instructions of the defendant, which were refused, presented the law most aptly and fully, and the court erred in not giving them. "If the correction was moderate defendant was not guilty of an assault and battery at all. If it was not moderate, but excessive, he was guilty of an aggravated assault and battery, by having exceeded the boundary of his legal right as teacher, and placed himself in the attitude of a stranger. It is true the law has not laid down any fixed measure of moderation in the lawful correction of a scholar, nor is it practicable to do so. Whether it is moderate or excessive must necessarily depend upon the age, sex, condition and disposition of the scholar, with all the attending and surrounding circumstances to be judged of by the jury, under the direction of the court as to the law of the case." [2]

It was error to give the instruction we have discussed and to refuse the third and fourth special instructions; and the charge as given, which was also excepted to, did not properly and sufficiently present the issues and law of the case.

For the errors pointed out, the judgment is reversed and the cause remanded.

*Reversed and remanded.*

---

## MAYHEM — INTENT MUST BE FOUND BY JURY.

## STATE *v.* BLOEDOW.

[45 Wis. 279.]

*In the Supreme Court of Wisconsin, 1878.*

1. **When a Special Intent, Beyond the Natural** consequences of the thing done, is essential to the crime charged, such special intent must be pleaded, proved and found.

[1] Penal Code, arts. 490, 491.

[2] Stanfield *v.* State, 43 Tex. 167.

2. **Where Defendant had Destroyed the eye of a Person** by throwing a stone at him, the information for mayhem charged the malicious intent in the words of the statute. Verdict that defendant was "guilty as charged in tho information, with the malicious intent as implied by law." *Held*, that this does not find the malicious intent as a fact with sufficient certainty to sustain a judgment for mayhem.

3. **But the Information** charging an assault and battery, the verdict will sustain a judgment for that offense.

Reported by the judge of the Municipal Court of Milwaukee County.

Defendant was tried upon an information, the third count of which charged that, "on," etc., said defendant, "contriving and intending the said John Mennier to maim and disfigure, in and upon the said John Mennier, unlawfully, willfully and maliciously did make an assault, and that he, the said Charles Bloedow, with malicious intent, then and there to maim and disfigure the said John Mennier, the left eye of him, the said John Mennier, unlawfully, willfully and maliciously then and then did put out and destroy." The verdict found defendant "guilty as charged in the third count of the information, with the malicious intent as implied by law."

The judge of the Municipal Court reported the case to this court, under the statute, for a determination of the question, whether, upon the verdict, any punishment could lawfully be inflicted on the defendant.

*James Hickox*, for the defendant.

*F. W. Cotzhausen*, of counsel for the State.

Ryan, C. J. The defendant was charged with mayhem. The statute defining the crime requires the assault to be made with malicious intent to maim or disfigure. Maiming, without intent to maim, is not within the statute. The information charged the malicious intent in the words of the statute. The verdict found the defendant guilty, as charged in the information, with the malicious intent as implied by law. And the question certified here by the court below is, whether the defendant can be punished upon the verdict.

Generally, the law will imply an intent to do the thing done. But, in criminal law, when a special intent, beyond the natural consequences of the thing done, is essential to a crime charged, the special intent must be pleaded, proved and found. The intent may be proved in various ways.

Surrounding circumstances generally go far to show it. Sometimes the very act itself does. Thus, if one shoot another with a rifle in a vital part of the body, the act raises a presumption of intent to kill, unless the circumstances under which it is done go to repel the presumption.

So, if one throw a stone at another, the act raises the presumption

of intent to injure generally, unless repelled by the circumstances under which it is done. But the law will not presume a special intent beyond the natural consequence of the act done. The special malice or intent is a fact which the jury must find, to warrant judgment on their verdict.

The difficulty with the verdict in this case is, that the jury, in effect, find the act, but leave the special intent or malice to implication of law; that is to say, they find the defendant guilty of the act charged, but leave the intent of the act to the judgment of the court. The verdict is very vague, but this appears to be its true construction. And even if this be not, the verdict is too uncertain to support a judgment for mayhem.

The facts in this case go far to illustrate the rule as it has been stated. The defendant threw a stone at another. The stone destroyed an eye. But the mere throwing of the stone, itself, indicates no intent to inflict the natural injury, or any special injury. Such an injury is not a natural consequence of the assault committed. If as has happened to the disgrace of humanity, one engaged in a fight gouge out his adversary's eye, the act — unexplained by circumstances — may be sufficient proof of the malicious intent to maim. But the mere throwing of a stone is generally not sufficient evidence of an intent to maim, merely because it does maim; for that result, though possible, must be rare, and may happen without the intent or with it. Generally, such a result would be merely accidental.

The information charges an assault and batttery. The verdict clearly convicts the defendant of that, and for that the defendant may be punished.[1]

The answer of this court, therefore, to the question certified by the court below is, that the defendant may be punished upon the verdict for assault and battery, and for that only.

---

## ASSAULT WITH INTENT TO MURDER.

## Hairston *v.* State.

[54 Miss. 689.]

*In the Supreme Court of Mississippi, 1877.*

1. **One who Points a Pistol at Another,** who is attempting unlawfully to stop his team, and threatens to shoot him unless he desists from his attempt, may properly be con-

1 Sullivan *v.* State, 44 Wis. 595.

victed of an assault, but such evidence will not sustain a conviction for assault with intent to commit murder. To constitute the latter offense there must exist an actual and absolute intent to kill, which the conditional threat does not tend to prove, but which, on the contrary, it negatives.

2. **Persons Engaged in Assisting Another** in a lawful act, can not be held guilty of an assault committed by him, unless there is evidence tending to show a previous conspiracy or present participation in that act, or some other evidence tending to show that they were present to aid and assist in any unlawful act he might do.

Chalmers, J., delivered the opinion of the court.

Wilson Hairston, in company with others, attempted to remove the personal effects of a laborer from the plantation of his employer, Richards, in defiance of the latter's orders. Richards, having made advances of money or provisions to the laborer, forbade the removal of his household furniture until he was repaid. In disregard of these orders, Wilson Hairston was driving the wagon containing the furniture, from Richards' plantation, when the latter attempted to stop the wagon, saying to Hairston that the laborer, Charles Johnston, must not move until he had settled the debt, at the same time reaching out his hand, as if to take hold of the mules. Hairston drew a pistol, and pointing it at Richards, said: "I came here to move Charles Johnston, and by G—d I am going to do it, and I will shoot any G—d d—d man who attempts to stop my mules," urging his mules forward as he spoke. His manner was threatening and angry, and his voice loud and boisterous. The persons accompanying him, some of whom were armed with guns, pressed towards and around Richards, as if to aid Hairston. Deterred by the apparent danger, Richards forebore to stop the mules, and the wagon moved on.

Upon proof of these facts, Wilson Hairston and two of the men accompanying him, James Hairston and Edward Prowell, were convicted of an assault with intent to commit murder, and sentenced to two year's imprisonment in the penitentiary. Is this conviction sustained by the proof? It is insisted by counsel for the plaintiff in error that there was no assault, because the threats were conditional; and reliance is had upon the old familiar cases, in one of which the assailant, laying his hand upon his sword, said: "If it were not assize time I would not take such language from you;" and, in another, the defendant raised his whip, and said: "Were you not an old man I would knock you down;" and other like cases, in all of which it was held that there was no assault. These were not conditional threats, properly so-called, but rather declarations that the speaker did not intend to strike, because of an existing fact over which neither party had any control.

They were expressions of a wish to strike, but a statement that he would not do so, by reason of existing facts. The case at bar is an offer to shoot, with something done towards accomplishing it, accom-

panied by a threat to shoot, unless the opposite party complies with a certain demand, or forbears to do a certain thing. It therefore presents a case of an intentional offer to commit violence, with an overt act towards its accomplishment, based upon a conditional threat. Does this constitute an assault? Hairston had a right to forbid Richards touching his mules. Richards had no right to retain the furniture of his laborer in order to compel payment of the debt due.

The laborer had the right to remove, and Hairston had the right to assist him. When the latter forbade Richards touching his mules, he simply forbade the commission of a trespass on his property. A man has the legal right to protect his property against trespass, opposing force to force.

If, therefore, the offer had simply been to commit a common assault, as by declaring he would strike with his hand, or with some implement or weapon not dangerous, Hairston would have been guilty of no offense. If a man takes my hat, or offers to do so against my will, and I, drawing back my hand, declare that I will strike if he does not forbear, I only meet the trespass by an offer to use such force as may be appropriate and necessary. But I can not at once leap to an assault, with deadly weapons, and a threat to kill. If I were to kill under such circumstances, the killing would be murder; and hence I have made an assault which, if I carried into a battery with fatal results, would constitute the gravest crime.

As no trespass upon property will primarily justify the taking of life, so an offer to commit a trespass can not justify an assault with a deadly weapon, accompanied by a threat to kill, unless the party desists. The means adopted are disproportioned to and not sanctioned by the end sought. We think, therefore, that Hairston might well have been convicted of an assault.[1]

But he was indicted for and convicted of an assault with intent to commit murder. Does the evidence warrant such conviction?

The intent in this class of cases in the gist of the offense. It is the intent, rather than the act, which raises it from a misdemeanor to a felony. It was held in *Jeff's Case*,[1] that the intent might be inferred from the act; but that the facts were wholly different from those presented by this case.

In *Jeff's Case* there was an actual and well-nigh fatal stabbing with a weapon proved to be dangerous. Here there was only a conditional offer to shoot, based upon a demand which the party had a right to make. While the law will not excuse the assault actually committed in leveling

1 Morgan's Case, 3 Ired. 186; Meyerfield's Case, Phil. (N. C.) 108; Smith's Case, 39 Miss. 521.

1 39 Miss. 321.

the pistol within shooting distance, it can not, from this fact alone, infer an intent to murder. The intent must be actual, not conditional, and especially not conditioned upon non-compliance with a proper demand. The law punishes the assault because it was committed. It can not punish the intent, because that did not exist; and, as shown by the declaration of the party, would not arise, except upon the happening of a certain event, to wit, the commission of a trespass by the other party. So far from the jury being allowed to infer an intent to murder, we think that the existence of such intent was, by the evidence, clearly negatived.

In a somewhat extensive examination of the books, we have found no case of a conviction of assault with intent to kill or murder, upon proof only of the leveling of a gun or pistol.

It follows, from these views, that while Wilson Hairston might properly have been convicted of an assault, the higher grade of crime was not made out against him.

Whether James Hairston and Prowell were guilty participants in Wilson Hairston's unlawful act, we think doubtful under the testimony, especially so as to Prowell. If present only for the purpose of assisting in the removal of Johnston, they were guilty of no offense. If, in doing this, they were riotous, disorderly and threatening violence, they were guilty of a riot; but they can be held guilty of the assault committed by Wilson Hairston only upon testimony tending to show previous conspiracy or present participation in that act, or upon testimony from which the jury could rightfully infer that they were present to aid and assist him in any unlawful act he might do.

*Judgment reversed and new trial awarded.*

---

## ASSAULT WITH INTENT TO MURDER — INTENT ESSENTIAL.

## PEOPLE v. KEEFER.

[18 Cal. 637.]

*In the Supreme Court of California, 1861.*

**K. was Indicted for an Assault** with intent to murder E. The court charged the jury that if "a loaded gun was presented within shooting range at W. or E. or at the dog, under circumstances not justified by law, and under circumstances showing an abandoned and malignant heart, and the gun was fired off and inflicted a dangerous wound upon E., then the crime of an assault with a deadly weapon with intent to inflict a bodily injury upon E. has been proved; and it would only remain for them to inquire whether defendant was guilty of the crime." There was evidence tending to show that K. fired

a gun in the direction of W. and E., and of a dog near them, there being some dispute as to whether the intent was to kill or wound the dog or these men, or one of them: *Held*, that the charge was wrong.

Appeal from the Sixth District. The facts are sufficiently stated in the opinion. Defendant appeals.

*Humphrey Griffith* and *N. Greene Curtis*, for appellant.

*Thos. H. Williams*, Attorney-General, for respondent.

BALDWIN, J., delivered the opinion of the court. COPE, J., concurring.

The defendant was indicted for an assault with intent to murder one John R. Evans, and convicted of the crime of an assault with a deadly weapon, with intent to do great bodily harm. The court instructed the jury that if a loaded gun was presented within shoooting range at Wilson or Evans, or at the dog, under circumstances not justified by law, and under circumstances showing an abandoned and malignant heart, and that the gun was fired off, and inflicted a dangerous wound upon the witness Evans, then the crime of an assault with a deadly weapon, with intent to inflict a bodily injury upon the witness Evans, has been proved, and it would only remain for them to inquire whether or not the defendant was guilty of the crime. The pertinency of this charge, as we gather from the case, was shown by proofs which conduced to prove that Keefer fired a gun in the direction of Wilson and Evans and of a dog near them, there being some dispute as to whether the intent was to kill or wound the dog, or these men, or one of them. It is true, that a person may be convicted of murder or of an assault, though no specific intent may have existed to commit the crime of murder or assault upon the person charged. The familiar illustration is that of a man shooting at one person and killing another. In these cases, the general malice and the unlawful act, are enough to constitute the offense. No doubt exists that a man may be guilty of manslaughter under some circumstances by his mere carelessness. But this rule has no application to a statutory offense like that of which the defendant was convicted. This is an assault with a deadly weapon, with intent to do great bodily harm to another person. The offense is not constituted in any part by the battery or wounding, but is complete by the assault, the weapon and the intent, — as if A. snaps a loaded pistol at B. within striking distance, the offense would be no more under the clause of the statute if the shot took effect. It could scarcely be contended, if a man shot at another's dog or chicken, when such shooting would be a trespass and wholly illegal, that the trespasser was guilty of this crime of assault upon a man with intent, etc., merely from the fact that the owner of the animal was near by and within range of the shot, or the shot went through his hat or clothes; and yet the reason of holding thus in that case is as great as in this. So, if a man carelessly

handling bricks on the roof of a house, should throw them into the street below, though he might be liable, civilly and criminally, for injury done to persons thereby, he could not be guilty of the statutory offense of assault with intent to kill. The words of the statute, "with intent to do great bodily harm to a person,"[1] are not merely formal, but they are substantial, they constitute the very gravamen of the offense; and the statute, like all other penal laws, must be strictly construed. It is nothing in this view, that the defendant is guilty of some crime; he must be guilty of the very crime charged, which can not be unless the elements of the crime, as defined by the Legislature, appear. This is the universal rule applicable to criminal proceedings, and it is as plainly supported by common sense as by technical law. We can not make the proposition plainer by illustration. If the defendant is convicted under this charge of the court, it would seem that he might be convicted of an assault upon a dog with a deadly weapon, with intent to do a great bodily injury to a man; or of the offense of assaulting a man with a deadly weapon, with intent to do that man great bodily harm, when he had no such intention.

We know nothing of the facts of the case, and intimate no opinion as to the merits of the controversy.

*Judgment reversed, and cause remanded for a new trial.*

---

## ASSAULT WITH INTENT TO MURDER—SETTING SPRING-GUNS.

## SIMPSON v. STATE.

[59 Ala. 1; 31 Am. Rep. 1.]

*In the Supreme Court of Alabama, 1877.*

**It is Unlawful for the** occupant of lands to set spring-guns or other mischievous weapons on his premises and if the same cause death to any trespasser it is a criminal homicide. But to authorize a conviction of assault with intent to commit a murder, a specific felonious intent must be proved; and so when one plants such weapons with the general intent to kill trespassers and wounds a particular person, he can not be convicted of assault with intent to commit murder. The intent to kill that particular person alone must be shown and can not be implied from the general conduct.

Conviction of assault with intent to commit murder. The evidence tended to show that the complainant, who occupied lands adjoining the defendant's, was wounded by a spring gun, which the defendant had long been in the habit of maintaining against trespassers who had in-

[1] Cr. Pr. Act, sec. 50.

jured his property. There was also evidence of enmity between the complainant and defendant. The substance of the instructions complained of is sufficiently set forth in the eighth paragraph of the opinion

*Arrington & Graham* and *Rice*, *Jones & Wiley*, for appellants.

Setting a spring gun under the circumstances disclosed by the bill of exceptions is lawful.[1] The language of the statute 7 and 8 of George IV., "whereas, it is expedient to prohibit the setting of spring guns," etc., shows it was lawful at common law. There is no statute on the subject in Alabama. If anything more was needed, it is sufficient to say that while the practice of setting spring guns, has prevailed since guns came into use in the fourteenth century, not a case can be found n the reports of England or America, where any one has been prosecuted for shooting another with a spring gun.

*Bragg* and *Thorington*, for the Attorney-General, *contra*.

Brickell, C. J. The indictment contains a single count, charging in the prescribed form, the defendant with an assault with intent to murder one Michael Lord. It is founded on the statute,[2] which reads as follows: "Any person who commits an assault on another with intent to murder, maim, rob, ravish, or commit the crime against nature, or who attempts to poison any human being, or to commit murder by any means not amounting to an assault, must on conviction, be punished by imprisonment in the penitentiary, or by hard labor for the county for not less than two or more than twenty years." It is apparent the statute was intended for the punishment of several distinct offenses, the elements of each being an act done, which of itself, though it may be an indictable offense, is aggravated by the intent attending it, and the higher offense contemplated. Each was an offense known to the common law, indictable and punishable as a misdemeanor. We do not mean, of course, that each was at common law recognized as a separate, distinct, technical offense. An assault was a misdemeanor; if attended with a felonious intent the intent was a matter of aggravation, justifying the imposition of severe punishment — not other or additional punishment — than that inflicted on misdemeanoas, but severer in degree.[3] And so at common law an attempt to poison or by any means to commit murder, or to commit any felony, in itself is a misdemeanor.[4] We repeat, the statute provides for the punishment of several distinct offenses known to the common law. It does not declare the constituents of either offense; it is silent as to the facts which must concur, to con-

1 3 Stew. 481; 7 Marsh. (Ky.) 478; 1 Esp. 203; 3 Barn. & Ald. 304; Sher. & Redf. on Neg. 509.

2 Rev. Code, sec. 3670.

3 Beasley *v.* State, 18 Ala. 534; Meredith *v.* State, in manuscript; 2 Whart. Cr. L., sec. 1287; 2 Arch. Cr. Pl. 285, note.

4 3 Whart. Cr. L., sec. 2096.

stitute the felonious assault, or the felonious attempt. These must be ascertained from the common law, and if the statute had not prescribed the forms of indictment, or declared the averments it is necessary to make, the offense must have been described as at common law — the facts constituting the assault or attempt must have been stated and connected with an averment of the felonious intent or design.[1] Though indictments are abridged in form and reduced to a statement rather of legal conclusions than of the facts which support or from which the conclusions may be drawn, the nature of offenses is not changed, and the conclusion stated must be sustained by the same measure of evidence which would be necessary if the facts on which it depends were stated. It is the assertion of a mere truism to say that if an indictment charges one of these offenses, it can not be supported by evidence of another. As in the present case, the charge of an assault with intent to murder is not supported by evidence of an assault with intent to maim, or to commit either of the other designated felonies. Nor yet would it be supported by evidence of an attempt to poison or commit murder, by means not amounting to an assault. The offense charged must be proved, and an essential element of the present offense is not only an assault with intent to murder, but the specific intent to murder Ford, the person named in the indictment If the intent was to murder another, or if there was not the specific intent to murder Ford, there can not be a conviction of the aggravated offense charged, though there may be of the minor offense of assault, or of assault and battery.[2]

The intent can not be implied as matter of law; it must be proved as matter of fact, and its existence the jury must determine from all the facts and circumstances in evidence. It is true the aggravated offense with which the defendant is charged can not exist unless if death had resulted, the completed offense would have been murder. From this it does not necessarily follow that every assault from which if death ensued, the offense would be murder, is an assault with intent to murder, within the purview of the statute or that the specific intent, the essential characteristic of the offense, exists. Therefore in *Moore* v. *State*[3] an affirmative instruction "that the same facts and circumstances which would make the offense murder, if death ensued, furnish sufficient evidence of the intention" was declared erroneous. The court say: "There are a number of cases where a killing would amount to murder, and yet the party did not intend to kill. As if one from a housetop recklessly throw down a billet of wood upon the side-

1 Beasley *v.* State, *supra.*

2 Barnes *v.* State. 49 Miss. 17; Jones *v.* State. 11 S. & M. 315; Ogletree *v.* State, 28 Ala. 693; Morgan *v.* State, 33 *Id.* 413; State *v.* Abraham, 10 *Id.* 928.

3 18 Ala. 533.

walk where persons are constantly passing, and it fall upon a person passing by and kill him, this would be by the common law murder; but if instead of killing him it inflicts only a slight injury, that party could not be convicted of an assault with intent to murder." Other illustrations may be drawn from our statutes; murder in the first degree may be committed in the attempt to perpetrate arson, rape, robbery or burglary and yet an assault committed in such attempt is not an assault with intent to murder. If the intent is to ravish or to rob it is under the statute a distinct offense from an assault with intent to murder though punished with the same severity. And at common law if death results in the prosecution of a felonious intent, from an act *malum in se*, the killing is murder. As if A. shot at the poultry of B. intending to shoot them and by accident kills a human being he is guilty of murder.[1] Yet if death did not ensue, if there was a mere battery or a wounding, it is not under the statute an assault with intent to murder. The statute is directed against an act done, with the particular intent specified. The intent in fact is the intent to murder the person named in the indictment, and the doctrine of an intent in law different from the intent in fact, has no just application; and if the real intent shown by the evidence is not that charged, there can not be a conviction for the offense that intent aggravates, and in contemplation of the statute, merits punishment as a felony.[2] As is said by Mr. Bishop the reason is obvious, the charge against the defendant is that in consequence of a particular intent beyond the act done, he has incurred a guilt beyond what is deducible merely from the act wrongfully performed; and therefore to extract by legal fiction from this act such further intent and then add it back to the act to increase its severity is bad in law.[3]

An application of these general principles will show that several of the instructions given by the Civil Court were erroneous and some of them misleading or invasive of the province of the jury. The sixth asserts the familiar principle of the law of evidence, that a man must be presumed to intend the natural and probable consequences of his acts and from it draws the conclusions "that if a man shoots another with a deadly weapon the law presumes that by such shooting he intended to take the life of the person shot." Whether this instruction would or would not be correct if death had ensued from the shooting, and the defendant was on trial for the homicide, it is not now important to consider. In a case of this character the instruction is essentially erroneous, for if it has any force it converts the material element of

[1] 1 Russ. Cr. 540.

[2] Ogletree *v.* State, *supra;* Morgan *v.* State, *supra.*

[3] 1 Bish. Cr. L., sec. 514.

the offense, the intent to murder a particular person, into a presumption of law drawn from the nature of the weapon and the act done with it; while the intent is a fact which must be found by the jury and the character of the weapon, and the act done are only facts from which it may or may not be inferred. The weapon used and the act done may in the light of other facts and circumstances, impute an intent to maim or merely to wound, distinct offenses from that imputed to the defendant; and maiming or wounding is a probable, natural consequence of the act done with such weapon. In *Morgan* v. *State*,[1] the court, at the request of the defendant, charged the jury "that they must be convinced beyond all reasonable doubt that the prisoner intended to shoot Schrimpshire" (the prosecutor) "before they can convict the prisoner of an assault with intent to murder," but added, referring to the particular facts of the case, "that the presenting of a pistol loaded and cocked, within carrying distance by one man at another, with his finger on the trigger in an angry manner, is of itself, an assault with intent to murder." This court said: "The explanatory charge given by the court in this case can not be supported. It ignores one of the material facts which constitutes the offense for which the prisoner was on trial. The defendant was not guilty as charged unless he committed the assault and this act was done with a special intent to kill and murder the person assaulted." It was said the facts were proper for the consideration of the jury and (quoting from *Ogletree* v. *State*,[2]) that it was competent for them in their deliberations "to act upon the presumptions which are recognized by law, so far as they are applicable and their own judgment and experience as applied to all the circumstances in evidence. It does not, however, result as a conclusive presumption at law from the facts supposed in the charge, that the accused had the intent to take the life of Schrimpshire; the surrounding circumstances should have been considered by the jury and unless the jury were convinced that the prisoner entertained the particular intent to take the life of his adversary then the prisoner could not be convicted of the higher crime. The particular intent reaches beyond the act done and is a fact to be found preliminary to conviction as necessary to the other fact itself, viz., that the assault was committed. In other words while the law permits and commands juries to indulge all reasonable inferences from the facts in proof it does *proprio vigore*, infer the one fact from another." In *Scitz* v. *State*,[3] a similar question was considered. In an indictment for an assault with intent to murder, the jury returned a special verdict finding the defendant "guilty of striking with a loaded whip, calculated to produce death, without any excuse or

[1] 33 Ala. 414. [2] *supra*. [3] 23 Ala. 42.

provocation," on which judgment of conviction was pronounced, which was reversed because it was not a legal conclusion from the facts stated that defendant had the particular intent to murder the person assailed. "An assault simply with intent to frighten," say the court, "maim or wound, without producing death, or for the purpose of inflicting punishment or disgrace, is equally consistent with the finding of the jury, as that it was an assault with intent to murder." The true principle is that the particular intent, the intent to murder the person, assailed, is matter of fact about which the law raises no presumptions and indulges no inferences.[1] The jury must find the fact; and in ascertaining its existence they may and will draw inferences from the character of the assault, the want or the use of a deadly weapon and the presence or the absence of excusing or palliating circumstances.[2] What are the presumptions or inferences in view of all the facts, they must be left free to determine; and the court misleads them and invades their province, if a part only of the facts is singled out and they are instructed from them, the felonious intent must be inferred.

The particular facts of the case in one phase in which the evidence presents it are so interwoven with the remaining instructions, that a determination of the primary question they involve is necessary to a correct understanding of them. This question is the right of a land owner to plant spring guns on the premises, by which trespassers may be wounded, and what is his liability, if thereby a trespasser receives grievous bodily harm. Whether he was civilly liable at common law, was agitated in *Deane* v. *Clayton*,[3] but not decided, the judges being equally divided in opinion. In *Ilott* v. *Wilkes*,[4] the Court of Kings Bench unanimously decided that "a trespasser having knowledge that there are spring-guns in a wood, although he may be ignorant of the particular spots where they are placed, can not maintain an action for an injury received in consequence of his accidently treading on the latent wire communicating with the gun, and thereby letting it off." Statutes followed soon after this decision, rendering the setting or placing spring guns, and other like agencies calculated to destroy human life, or to inflict grievous bodily harm on trespassers, or others coming in contact with them, a misdemeanor.[5] It is not our province to deny that the decision in *Ilott* v. *Wilkes* is a correct exposition of the common law of England as it then existed. The common law of England is not in all respects the common law of this country.[6] This court has frequently said that in this State, only its general principles which are adapted to our situation and not inconsistent with our policy, legis-

1 State *v.* Stewart, 29 Mo. 419.
2 Meredith *v.* State, in manuscript.
3 7 Taunt. 518.
4 3 B. & A. 304.
5 1 Russ. Cr. 783.
6 Vanness *v.* Packard, 2 Pet. 144.

lation and institutions are of force and prevail.[1] We concur in the conclusions reached by the Supreme Court of Connecticut in *Johnson* v. *Patterson*[2] and *State* v. *Moore*,[3] after a careful examination, that the principle announced in *Ilott* v. *Wilkes*, is not in harmony with our condition or our institutions, and that it had its origin in a state of society not existing here, and the necessity for protection to a species of property not here recognized, or if recognized, of less importance and value than the legislation of Great Britain, and the common law there prevailing attached to it.

It is a settled principle of our law that every one has the right to defend his person and property against unlawful violence, and may employ as much force as is necessary to prevent its invasion. Property would be of little value if the owner was bound to stand with folded arms and suffer it taken by him who is bold and unscrupulous enough to seize it. But when it is said a man may rightfully use as much force as is necessary for the protection of his person and property, it must be recollected the principle is subject to this most important qualification, that he shall not, except in extreme cases, inflict great bodily harm, or endanger human life.[4] The preservation of human life and of limb and member from grievous harm, is of more importance to society than the protection of property. Compensation may be made for injuries to or the destruction of property; but for the deprivation of life there is no recompense; and for grievous bodily harm at most but a poor equivalent. It is an inflexible principle of the criminal law of this State, and we believe of all the States, as it is of the common law, that for the prevention of a bare trespass upon property, not the dwelling-house, human life can not be taken, nor grievous bodily harm inflicted. If in the defense of property, not the dwelling-house, life is taken with a deadly weapon, it is murder, though the killing may be actually necessary to prevent the trespass. The character of the weapon fixes the degree of the offense. But if the killing is not with a deadly weapon — if it is with an instrument suited rather for the purpose of alarm or of chastisement, and there is not an intent to kill, it is manslaughter.[5] However true this may be of violence the owner directly in person inflicts for a trespass or in defence, or prevention of a trespass or in defense, or prevention of a trespass, committed in his presence, the argument now made by the counsel for the appellant is that of the court in *Ilott* v. *Wilkes*, that for the prevention of secret trespasses com-

1 State *v.* Canwood, 2 Stew. 360; N. & C. R. R. Co. *v.* Peacock, 25 Ala. 229; Barlow *v.* Lambert, 28 *Id.* 704.

2 14 Conn. 1.

3 31 *Id.* 479.

4 State *v.* Morgan, 3 Ired. 186.

5 Carroll *v.* State, 23 Ala. 28; Harrison *v.* State, 24 *Id.* 21; State *v.* Morgan, 3 Ired. 186; Com. *v.* Drew, 4 Mass. 391; McDaniel *v.* State, 8 S. & M. 401; State *v.* Vance, 17 Iowa, 138; Whart. Hom., secs. 414-417.

mitted in the absence of the owner, he may employ means of defence and protection to which he could not resort if present, offering personal resistance. The instructions requested, place the proposition in its most imposing form, of protection against repeated acts of aggression committed in the night time by unknown trespassers. For the prevention of such trespassers, he may, it is said, employ any agency or instrumentality adequate to the end, even though it involves of necessity, grievous bodily harm or death to the trespasser. The proposition itself subordinates human life and the preservation of the body in its organized state to the protection of property. It subjects the man to loss of limb or member, or to the depredation of life, for a mere trespass capable of compensation in money. How else can the owner protect himself? it is asked. The answer may well be he is not entitled to protection at the expense of the life or limb or member of the trespasser. All that the latter forfeits by the wrong is the penalty the law pronounces. At common law he would be compelled to compensation, for particular trespasses and of the nature in one respect, the defendant intended to guard against — the severance from the freehold of its products — not only is he compelled to compensation, but under our statutes, indictable for a misdemeanor. It may well be asked in return, if the owner has the right to visit on the trespasser a higher penalty than the law would visit? Has he a right to punish a mere trespass as the law will punish the most aggravated felonies, which not only shock the moral sense, evince an abandoned, malignant, depraved spirit, but offend the whole social organization? There are but few offenses the law suffers to be punished with death. Whether this extreme penalty shall be visited the law submits to the discretion and to the mercy of the jury, — they may consign the offender to imprisonment for life in the penitentiary. There is no offense which is punished by the laceration of the body, or by the loss of limb or member. Shall the owner for the prevention of a trespass inflict absolutely the penalty of death, a jury could not inflict nor a court sanction. Inflict it without the opportunity the jury has when they may lawfully inflict it, of lessening it in their mercy and discretion to imprisonment? Shall he in protection of his property lacerate the body, a punishment so revolting that it has long been excluded from our criminal code? If the owner is vexed by secret trespasses and their repetition, his own vigilance must, within the limits of the law, find means of protection. Stronger enclosures and a more constant watch must be resorted to and a stricter enforcement of the remedies the law provides will furnish adequate protection. If these fail it is within legislative competency to adopt remedies to the urgencies and necessities of the owner.

It is said the spring gun or like engine is harmless, if of his own

wrong the trespasser does not come in contact with it. Admit it, and the controlling, underlying consideration is not met. If it was conceded thereby he lost his right to recover compensation for the injury sustained, the State does not lose the right, nor is its duty lessened, to demand retribution for its broken laws, and the unlawful death or wounding of one of its citizens. With certainty the measure of protection to property is declared, and the force which may be employed in its defense is defined. The secrecy of the trespass, or the frequency of its repetition, does not enlarge the one or the other. Life must not be taken nor grievous bodily harm inflicted. The trespasser is always in fault, — it is his own wrong, which justifies force, to the extent it may be lawfully used or to the extent it may be provoked and exerted. The secrecy and frequency of the trespass would not justify the owner in concealing himself and with a deadly weapon, taking the life, or grievously wounding the trespasser, as he crept steadily to do the wrong intended. What difference is there in his concealing his person and weapon and inflicting unlawful violence and contriving and setting a mute, concealed agency or instrumentality which will inflict the same, or it may be greater violence? In each case the intention is the same, and it is to exceed the degree of force the law allows to be exerted. In the one case if the trespasser came not with an unlawful intent — if his trespass was merely technical — if it was a child, a madman, or an idiot, carelessly, thoughtlessly entering and wandering on the premises, the owner would withhold all violence. Or he could exercise a discretion, and graduate his violence to the character of the trespass. The mechanical agency is sensitive only to the touch; it is without mercy or discretion, its violence falls on whatever comes in contact with it. Whatever may not be done directly can not be done by circuity and indirection. If an owner by means of spring guns or other mischievous engines planted on his premises, capable of causing death or of inflicting bodily harm on ordinary trespassers, does cause death, he is guilty of criminal homicide.[1]

The degree of the homicide depends on the facts already stated. If the engine is of the character of a deadly weapon, the killing is murder. It could not be employed without the intent to injure, and without indifference whether the injury would be death, or great bodily harm. But if not deadly in its character, if it is intended only for alarm, and for inflicting slight chastisement or mere detention of the trespasser until he shall be freed from it, there may be no offense, or at most but manslaughter. The character of the instrument and its probable capacity for injury may repel all presumption to do more than merely alarm, or without inflicting any corporal harm, merely to detain the

[1] Whart. Cr. L., secs. 418, 553.

trespasser and stay him in his efforts to wrong, and if death should ensue, it would be beyond the intention of the owner, and an unforseen and not a natural or probable consequence of an act in itself not unlawful. For it is lawful to frighten away the trespasser or by detaining him and staying the wrong he contemplates, to involve him in disgrace; to detect him and to deter him from future trespasses. If the instrument is adapted only to the purposes of punishment, and it should inflict a punishment from which death ensued, the offense is manslaughter, as it would have been if the owner in person had inflicted the violence. The instructions requested by the appellant were inconsistent with these views and were properly refused.

The instructions given by the City Court are, some of them, based on the theory, that if death had ensued from the wounding of the prosecutor by the spring gun, it would have been murder, it is a legal sequence that the defendant is guilty of an assault with intent to murder. Others proceed on the theory that he is guilty of an assault with intent to murder, if the spring gun was set with the specific intent to kill the prosecutor whom he suspected as the trespasser, and against whom he bore malice, although there was also a general intent to kill whoever was the trespasser, coming in contact with it. We regard each class of instructions as erroneous.

An error pervading the first is that a general felonious intent is made the equivalent of the specific felonious intent, which we have said is the indispensable element of the offense, with which the prisoner stands charged. A general felonious intention by implication of law will convert the killing of a human being into murder, though his death or injury was not within the intention of the slayer. So also if there is the felonious intention to kill one, and the fatal blow falls on another, causing death, it is murder. The act is referred to the felonious intent existing in the mind of the actor, and by implication of law supplies the place of malice to the person slain.[1] The doctrine of an intent implied by law, different from the intent in fact, can have no application to the offenses the statute punishes. It is excluded by the terms of the statute, which include only direct assaults on the person of the party it is averred there was the intent to murder. If in fact there was not the intent to murder him, whether there was a general felonious intent, or an intent to do harm to some other individual, is not important — there can be no conviction of the aggravated offense.[2]

An assault is defined as an intentional attempt by violence, to do a corporal injury to another. In *Johnson* v. *State*,[3] it is defined as "an

1 Whart. Hom., sec. 183; 4 Black, 261; Bratton *v.* State, 10 Humph. 103.

2 Morgan *v.* State, 13 S. & M. 242; Jones *v.* State, 11 *Id.* 315; Norman *v.* State, 24 Miss. 54.

3 35 Ala. 363.

attempt to offer to do another personal violence, without actually accomplishing it. A menace is not an assault, neither is a conditional offer of violence. There must be a present intention to strike." In *Lawson* v. *State*,[1] it is said: "To constitute an assault, there must be the commencement of an act, which if not prevented, would produce a battery;" the drawing of a pistol, without cocking or presenting it, is not an assault. In *State* v. *Davis*,[2] it is said by Gaston, J.: "It is difficult in practice to draw the precise line which separates violence menaced from violence begun to be executed, for until the execution of it is begun, there can be no assault. We think, however, that where an unequivocal purpose of violence is accompanied by an act, which if not stopped or diverted, will be followed by personal injury, the execution of the purpose is then begun, and the battery is attempted." Constructive assaults are not within the statute. The ulterior offense; the principal felony intended and the intent to accomplish which is the aggravating quality of the offense, consists in actual violence and wrong done to the person. The assault must therefore consist of an act begun, which if not stopped or diverted will result, or may result in the ulterior offense, and the act when begun must be directed against the person who is to be injured.[3] It must also be an act which when begun, the person against whom it is directed has the right to resist by force.[4]

The setting a spring gun on his premises by the owner, is culpable only, because of the intent with which it is done. Unless the public safety is thereby endangered, it is not indictable.[5] If dangerous to the public it is indictable as a nuisance. Resistance by force to the setting of it, by an individual (if not dangerous to the public), the law would not sanction, though he may apprehend injury to him is intended if he trespass on the premises. The injury exists only in menace — it is conditional and his own act must intervene and put in motion the force from which injury will proceed. While because of the unlawful intention with which the gun is set, the owner is made criminally liable for the consequences he contemplates, it is not his violence, except by implication of law, which produces the injury. It is not, consequently, an assault, which, connected with an intent to murder, is punishable under the statute. If the gun is set with the intent to kill a particular person who is injured by it, whether it is not an attempt to murder committed by means, not amounting to an assault, indictable under

[1] 30 Ala. 14.

[2] 1 Ired. 125.

[3] Evans *v.* State, 1 Humph. 394; State *v.* Freels, 3 *Id.* 228.

[4] 2 Archb. Cr. Pl. 224, 2 note.

[5] State *v.* Moore, 31 Conn. 479.

another clause of the statute, is a question this record does not present.

The result is that the judgment of the City Court is reversed and the cause remanded. The prisoner will remain in custody unti ischarged by due course of law.

---

## AGGRAVATED ASSAULT—MEANING OF "CHILD."

## McGregor *v.* State.

[4 Tex. (App.) 599.]

*In the Court of Appeals of Texas, 1878.*

1. **Under the Texas Statute** making an assault on a "child" an aggravated assault the word "child" is not synonymous with minor.
2. **Charge of the Court.**—An information charged an adult with aggravated assault on a child, and alleged no other circumstance of aggravation. *Held*, error to instruct the jury to convict in case they found that the assault was made under other circumstances of aggravation than the one alleged.

Appeal from the County Court of Lamar. Tried below before the Hon. S. C. Bryson.

Winkler, J. The appellant and another were prosecuted, by information, for an aggravated assault and battery alleged to have been committed upon one William Edmonson, the assailants being averred to be adult males and the assaulted party a child. On the trial it was shown in evidence that the assaulted party was of the age of fourteen years and upwards.

The court charged the jury, among other things, to the effect following: —

"If you should find that he did commit an assault upon him, he, the defendant, being an adult male person, and the party a child under the age of twenty-one years, or that the assault was made in a manner or with an instrument calculated to inflict disgrace, or that he did him some serious bodily injury, you will find him guilty of an aggravated assault."

This charge, as well as other portions of the charge given, and also an instruction asked by the defendant and refused by the court — to the effect that a child, under the statute, is a person of tender years, one who has not arrived at the strength and age of manhood — indicate that the trial proceeded on the idea that the term child was synonymous with minor.

One of the circumstances under which an assault or battery becomes aggravated, under the provisions of the code, is "when committed by an adult male upon the person of a female, or child. or by an adult female upon the person of a child."

An assault may become aggravated under other circumstances, but from the prominence given to the idea that the assaulted party came within the description mentioned in the statute under the denomination of child, we are led to conclude that this idea preponderated in the mind of the court, and necessarily had a controlling influence upon the finding of the jury; or that it, at any rate, was so intimately connected with other portions of the charge that we are unable to separate it so as to determine its precise effect. And it may be well to note, in this connection, that the information does not charge, as one of the circumstances of aggravation, that the assault was made by means such as inflicts disgrace; and for this reason the charge was incorrect.

In the absence of any such guide, we are of opinion that that portion of the law set out must have been enacted for the purpose of protecting the weak, and the weaker sex, against the strong, and this object becomes the more evident by that portion which renders an assault aggravated when committed by an adult female upon a child. Ordinarily, the object would not be attained by construing the word child, in either case mentioned, to extend to and include any and all persons under twenty-one years of age; as, on the one hand, there would not ordinarily be any such disparity between the strength of a person twenty years and six months old and one twenty-one years and three months old, or between one at the age of twenty and an adult female, as that the law could take hold of and act upon it. Hence we conclude that the term child must be construed to have the meaning affixed to it which it has in common parlance, or as understood in common language, and that the charge which held it to mean any one who had not attained the full age of twenty-one years was erroneous; and having been excepted to at the time, and an effort having been made to correct it by an additional instruction, and the action having been assigned as error, we are not at liberty to pass it unnoticed, although we might deem the charge amply sustained by the evidence.

"Except when a word, term, or phrase is specially defined, all words used in this code are to be taken and construed in the sense in which they are understood in common language, taking into consideration the context and subject-matter relative to which they are employed."[1] The word "child" is mentioned in the code, and is not specially defined therein; and, therefore, there must be affixed to it the sense and meaning in which it is understood in common language.

[1] Penal Code, art. 28 (Pasc. Dig., art. 1630).

The court also erred in permitting the prosecuting witness to testify to what the other boys said when he told them of his conversation, as shown by bill of exceptions taken as the time.

For these errors the judgment is reversed and the cause remanded.

*Reversed and remanded.*

---

## AGGRAVATED ASSAULT—MADE UPON DECREPIT PERSON—OR IN PRIVATE HOUSE.

## HALL *v.* STATE.

[16 Tex. (App.) 6.]

*In the Court of Appeals of Texas, 1884.*

1. **A Decrepit Person Within the Texas Statute** is one who is disabled, incapable or incompetent from physical or mental defects produced by age or otherwise, to such an extent as to render him helpless against one of ordinary health.
2. **H. was Indicted for an** assault on another in his house. The evidence dislosed that the assault occurred in the house of the defendant's father, of whose family the defendant was a member, and of which house he was an occupant. *Held*, that the evidence was insufficient.

APPEAL from the County Court of Grayson. Tried below before the Hon. S. D. STEEDMAN, County Judge.

The appellant was convicted in the County Court of Grayson County, Texas, under an indictment charging in substance in the first count that defendant committed an aggravated assault and battery upon the person of Jennie Hall, a female, the defendant then and there being an adult male person; the second count charging in substance that the defendant was a person of robust health and strength, and the said Jennie then and there being decrepit; and the third count charging, in substance, that defendant went into the house of a private family and there committed an assault and battery upon the said Jennie Hall.

The jury returned a verdict of guilty of aggravated assault against the defendant, and as punishment assessed against him a fine of twenty-five dollars.

Mrs. Jennie Hall was the first witness for the State. She testified that she was thirty-seven years old; that she was step-mother to the defendant, having been seven years married to his father. The defendant struck the witness twice, on the ninth day of September, 1883, in her family sitting room, in the house of her husband, situated in Grayson County, Texas. Witness did not know whether or not she struck the defendant. She struck at him with a chair because he was pushing

her. Witness could not remember what the defendant said as he advanced into the room, except that he cursed her. Defendant, with his fist, struck the witness in the left eye, and then knocked her down. The witness' face swelled up and became discolored, and remained so for two or three weeks. The witness thought the defendant had reached the age of twenty-one years, and was a strong man. Witness had been in bed all day at the time, and had been sick off and on all summer.

Cross-examined, the witness stated that the room in which the difficulty took place was no more the defendant's room than it was the room of the other hired hands. The defendant's second blow knocked the witness flat on the floor. The blow did not break the chair. Witness never curses at any time. She had never threatened the defendant, and had never called him a son of a b—h. The sitting room in which the difficulty occurred opened into a hallway, and the stair ran down opposite the sitting room door. Witness' husband, E. C. Hall, had just come into the hall, and was standing inside of the door when the witness first saw him. This was before E. C. Hall interfered. The witness' daughter, Alice Stobin, was present and saw the whole of the difficulty, but did not strike the defendant. Witness assisted in placing supper on the table, but told Mr. Hall that she would not get a warm meal.

Alice Stobin testified, for the State, that she was the thirteen-year-old daughter of the prosecutrix, Jennie Hall, and was present when the difficulty occurred. While Mrs. Hall was in the sitting room, the defendant came down stairs, stopped at the sitting room door, and cursed Mrs. Hall. He then stepped into the room and struck Mrs. Hall twice, knocking her down with the first blow. Mrs. Hall first struck the defendant with a chair. Witness' step-father, E. C. Hall, then interfered and separated the parties.

Cross-examined, the witness stated that, during the fight between her mother and the defendant, she, the witness, struck the defendant. Witness' mother struck the first blow, with the chair, and then received two blows from the defendant, the first of which felled her to the floor. At the time that the difficulty commenced the belligerent parties were standing just inside the sitting room door. E. C. Hall rushed in to separate the combatants as soon as he could after Mrs. Hall struck the first blow. Mrs. Hall's face was discolored for two weeks after the difficulty. The witness went off to school two days after the difficulty and did not return home for three weeks. As soon as the difficulty was over, witness and the prosecutrix went to the house of Mr. Hughes, a neighbor. Mrs. Hall called the defendant a "trifling puppy," but nothing else. She did not curse him.

The defendant introduced his father, E. C. Hall, who testified in substance that he was seventy years of age, and had been married to the

prosecutrix about six years. The defendant, at the time of this trial, was not quite twenty-one years old, and still lived at home with the witness. Witness was present at the time of the difficulty between his son, the defendant, and his wife. The witness, accompanied by the defendant, had been after medicine for his wife, who had been complaining during the day. They reached home about seven or eight o'clock, and witness asked his wife to prepare a little supper. She declined, and witness and defendant retired to the dining room to partake of a cold supper. While eating, the witness' wife, the prosecutrix, came into the dining room and proceeded to scold the witness. The witness talked back somewhat roughly. She then accused the defendant of telling witness tales on her, and called the defendant many ugly names. She then went up stairs and threw the defendant's trunk out of the window, and his satchel of clean clothes out at the north door. Witness then got mad himself, went up stairs and threw his wife's daughter's trunk out at the door.

Witness then got the defendant's satchel of clothing and put it on the stair steps, that he might take it upstairs. In the meantime the defendant had taken his trunk back upstairs. When he came down stairs for his satchel, he saw Mrs. Hall standing in the door, and said to her: "I don't want you to monkey with my things any more." Thereupon Mrs. Hall caught up a chair, ran up to the defendant, and struck him over the head. Witness had just entered the hall, and seeing his wife strike the defendant with the chair, ran in between them, and told them to stop their row. Witness shoved his wife back into the room. The defendant was then about even with the sitting room, or possibly a short distance inside the room. As soon as Mrs. Hall struck the defendant, they both made a rush at each other, and it was at this time that the witness made his way between them. In the scramble to get at each other, Mrs. Hall fell to the floor. She fell some four or five feet inside the sitting room. Each continued the effort to strike the other after the witness got between them. The witness did not know whether or not the defendant struck Mrs. Hall during the fracas. If so, the witness did not see him do so, and witness saw the whole of the fight. Mrs. Hall cursed and threatened the defendant, saying that she would kill, poison, or cut the defendant, or make him leave the house.

Being subjected to cross-examination, the witness averred that he testified in this cause with the greatest reluctance. While the witness was doing his best to separate his wife and son and stop the fight, the girl, Alice Stober, was pounding the defendant's back with all the force of which she was capable. If the defendant struck Mrs. Hall during the fight, the witness saw nothing of the blow. Witness was somewhat excited, and it is possible that the defendant may have struck her

without witness seeing it. Defendant did not curse Mrs. Hall in witness' hearing. He said nothing more to her than "I don't want you to monkey with my things any more." The witness stopped the difficulty as soon as he could. Mrs. Hall cursed the defendant, calling him also, a "trifling puppy" and a "son of a b—h." She was very angry. Witness was very much excited and talked very loud in his efforts to separate the parties. The stairway ran down on the west side of the hall, and the sitting room was on the east side of the hall, the door being just opposite the foot of the stairway.

A new trial was asked because "the verdict is contrary to the law, and the evidence."

*Cowles & Story*, *J. L. Cobb*, and *J. P. Cox*, for the appellant.

*J. H. Burts*, Assistant Attorney-General, for the State.

WILLSON, J. There are three counts in the indictment, each charging an aggravated assault and battery. First, that the defendant, an adult male, committed an assault and battery upon a female; second, that the defendant, a person of robust health and strength, committed an assault and battery upon a decrepit person; and third, that he went into the house of a private family and committed the assault and battery.

A general verdict of guilty of an aggravated assault was rendered upon this indictment, without specifying upon which of the three counts it was based. As to the first count, it is not sustained by, but is contrary to the evidence. An adult, is a person who has attained the full age of twenty-one years.[1] It was proved by the testimony of defendant's father positively, that at the time of the trial, the defendant was not twenty-one years old. There was no evidence contradicting, or tending to contradict this proof, except that of the alleged injured female, who testified that she thought the defendant was twenty-one years old. She did not state that she knew his age, nor does it appear that in testifying about it, she had reference to the time of the alleged offense, or at the time of the trial. Besides, the mere opinion or belief of this witness can not be regarded as evidence in contradiction of the positive testimony of the defendant's father, who, it must be presumed, knew the age of his own son.

As to the second count, while the evidence might be held sufficient to establish the allegation that the defendant was a person of robust health and strength, itwas not sufficient to prove that the alleged assaulted party was decrepit. She was not an aged person, being only thirty-seven years old. Mr. Webster defines "aged" as follows: "Old; having lived long; having lived almost the usual time allotted to that species of being." The usual time for human beings to live, pre-

1 Schenault *v.* State, 10 Tex. (App.) 410.

scribed by revealed law, and in accord with the law of nature, is the period of three score years and ten. It is not alleged in the indictment, however, that the lady was an aged person, but that she was decrepit, and we must therefore direct our attention to this specific allegation.

What meaning are we to give the word decrepit? Words used in the Penal Code, except where specially defined by law, are to be taken and construed in the sense in which they are understood in common language, taking into consideration the context and subject-matter relative to which they are employed.[1] Mr. Webster makes the word "decrepit" a dependant of old age; that is, according to his definition, before a person can be decrepit old age must have supervened upon such person. He defines the word thus: "Broken down with age; wasted or worn by the infirmaties of old age; being in the last stage of decay; weakened by age." This word is not befined in the Code, nor do we find any definition of it in the law lexicographies. In our opinion, as used in article 496 of the Penal Code, and as commonly understood in this country, it has a more comprehensive signification than that given it by Mr. Webster. We understand a decrepit person to mean one who is disabled, incapable, incompetent, from either physical or mental weakness or defects, whether produced by age or other causes, to such an extent as to render the individual comparatively helpless in a personal conflict with one possessed of ordinary health and strength. We think that, within the meaning of the word as used in the Code, a person may be decrepit without peing old; otherwise the use of the word in the Code would be tautology. It certainly was intended by the Legislature that it should signify another state or condition of the person than that of old age. Thus, where the party assaulted was a man about fifty years old, disabled by rheumatism to such an extent that he was compelled to carry his arm in an unnatural position, and in such a manner as to render it almost if not entirely useless to him in a personal difficulty, it was held that, whilst his condition might not come technically within the meaning of the word decrepit as defined by Mr. Webster, yet it might with propriety be said that it fell in the measure of that word as used in common acceptation.[2]

But, giving to this word its broadest meaning, we do not think that the proof in this case shows that the alleged injured person was decrepit. She testifies herself that she had been sick off and on during the summer, and that she had been in bed all day the day of the difficulty. It is not shown what was the character of her sickness, or what effect it had produced upon her. On the other hand, it was proved that on the evening of the difficulty, and at the time of its occurrence, she was up

1 Penal Code, art. 10.

2 Bowden v. State, 2 Tex. (App.) 56.

and going about the house; and just before she was assaulted by the defendant she had gone up stairs and thrown his trunk of clothes out of the house through a winow, and had also thrown his satchel out of the house. It was further proved that before defendant struck or attempted to strike her she struck him with a chair. Considering all the testimony upon this question, we are of the opinion that it fails to show that the lady, at the time of the alleged assault upon her, was in a decrepit condition within the meaning of the law. Therefore the conviction can not be sustained under the second count.

As to the third and last count, the learned judge, in his charge, did not submit the issues under it to the jury. He instructed the jury as to the first and second counts only, saying nothing whatever as to the third. As this last count was not submitted to the jury, we must presume that the verdict was not based upon it, but upon one or the other, or both, of the preceding counts. We think the court very properly omitted to submit this third count to the jury, because in our opinion, the evidence did not warrant its consideration. It was shown by the evidence that the alleged assault took place in the house of defendant's father, in the common sitting room of the family, and that the defendant at the time was an occupant of the house and a menber of the family. We do not think that subdivision 3 of article 496 of the Penal Code applies to such a case. We do not believe that it was intended to make an assault and battery aggravated when committed by a person in his own house. We think the object of this provision is to protect private familes from the intrusion into their houses, and assaults made therein, by persons who are not members of the family, and who have no legal right to be upon the premises without the consent of the owner thereof.

We find in the record numerous bills of exceptions and assignments of error which we do not think it necessary to notice in this opinion. The questions presented are not of general importance, and are of a character that may, by proper investigation and effort on the part of the court and the counsel in the case, be avoided on another trial.

Because in our opinion the verdict of the jury is not supported by the evidence, the judgment is reversed and the cause remanded.

*Reversed and remanded.*

## AGGRAVATED ASSAULT — INTENT AND ACT NECESSARY

### Fondren v. State.

[16 Tex. (App.) 48.]

*In the Court of Appeals of Texas, 1884.*

**In Every Assault** there must be an intent to injure coupled with an act which must at least be the beginning of the attempt to injure at once, and not a mere act of preparation for some contemplated injury that may afterwards be inflicted. Evidence *held* to be insufficient in this case to support a conviction for aggravated assault, because insufficient to prove an assault.

Appeal from the County Court of Ellis. Tried below before the Hon. O. E. Dunlap, County Judge.

The conviction was of an aggravated assault upon one Fayette Miller, with a gun. The offense was alleged to have been committed in Ellis County on the fifteenth day of January, 1883. A fine of fifty dollars was the penalty imposed.

Fayette Miller was the first witness for the State. He testified, in substance, that some time in January, 1883, he was at the defendant's gin, in Ellis County, Texas. Mr. M. Halford came to the gin house, and said to the defendant: "I have come for one of those bales of cotton and I intend to have it. Right is right, and right wrongs no man." Halford then went out of the gin house and began to load the cotton on the wagon. Defendant followed, pushed Halford back, threw the cotton off, and said: "Don't you take that cotton." Halford struck the defendant, and the two fell to the ground, Halford on top. Halford struck defendant several blows, then got up, walked off a short distance, picked up a stick, and told the defendant that he would drop the stick when defendant put up his knife. Defendant put up his knife and started toward the gin, when Halford said to him: "You have made your brags about marking and splitting ears, but you can't do me that way." Defendant returned and he and Halford engaged in another fight. When the defendant came back this time witness could not say whether Halford was or was not rolling the bale of cotton. Soon after this the defendant's wife came upon the scene of action. She took hold of the lines and attempted to lead the horses away from the bale of cotton, when Halford went around, took hold of the horses, and told Mrs. Fondren not to meddle with the horses. The defendant then went around the wagon and said to Halford: "If you strike my wife I will cut your guts out." Halford thereupon backed off and secured a club about three feet long and two inches in diameter. Defendant then said: "If I can not protect my property without it, I

will go and get my gun." Accordingly he went to the house, about two hundred yards distant, and returned with his gun on his shoulder. When he reached a point about fifty yards distant from the party, he took his gun from his shoulder, and throwing it across his arm said: "Clear the track."

Witness, then being apprehensive of serious trouble, met the defendant and asked him "not to shoot the boy," telling him at the same time that Halford had consented to let the cotton alone. The defendant told the witness to "get out of the way," that "this is not your fight," and walked around the witness. The witness followed after him. The witness at this time did not have his knife ont. Webb then came out of the gin with a stick and told the witness to hold up; that two on one was too many. Witness then took out his knife and told Webb to stand back, that he, witness, was trying to put a stop to the row. Webb then called to defendant that witness had a knife. Defendant turned, drew his gun on witness, and told witness to put up his knife or he would shoot the witness. Witness put up his knife, and the defendant put up his gun. When witness left Halford to meet the defendant, Mrs. Fondren was standing near and talking to Halford, and she was standing in the same place when witness returned. Several children, including one of the defendant's, were standing around. About this time everything quieted down. Defendant did not frighten the witness when he drew his gun on him.

J. J. Daniels was the next witness for the State. His account of the difficulty was the same as that of the witness Fayette Miller, up to the time that the defendant went to the house and returned with his gun. Proceeding with his testimony, he stated that when the defendant got within forty or fifty yards of the crowd he pointed his gun toward the crowd and said: "Look out! I am going to shoot." Miller then walked up to defendant and told him that he should not shoot the boy. Defendant told Miller to go off, that it was none of his fight, and passed around Miller and up to where Halford and Mrs. Fondren were. Webb at this time came up with a club and stopped Miller. Miller drew his knife and told Webb to stand back. Webb replied that two on one was unfair. Miller retorted that he was only trying to stop the row. During this time Webb called to defendant that Miller had a knife. Defendant turned on Miller, covered him with his gun, and told him to put up his knife or he would shoot. Miller put up his knife and defendant pnt up his gun.

M. L. Halford, the next witness for the State, testified, in substance, that he rented land from his uncle, the defendant, in 1882, and under the contract was to give him one-half of the cotton crop grown on it. Witness had gathered and sold three bales of the cotton. In October

or November of that year witness quit the crop, but soon after returned and agreed with defendant to resume work and carry out his contract, and to pick what remained of the cotton before he got any more of it for himself. He had not picked all of the cotton remaining at the time he went for the bale which was the subject-matter of this difficulty. There remained, perhaps, some six hundred pounds of unpicked cotton in the field. When the witness went to put this bale in his wagon the defendant went and pushed the witness off, threw the cotton out of the wagon, and told witness to let the cotton alone. In pushing the witness off he scratched the witness' hand. The two clinched, fell to the ground, the witness on top, and the witness struck defendant several blows. Defendant then drew his knife and attempted to cut witness. Witness got up, walked off and got a stick, and told defendant to put up his knife. The defendant did so, and started back to the gin, when witness said: "You have made your brags about marking and turning loose, but you can not serve me so." Witness at that time was trying to get the cotton back on the wagon. Defendant picked up a stick and started back toward the witness, and another little fight ensued.

About this time Mrs. Fondren, the defendant's wife, came up, took hold of the lines, and attempted to lead the horses off. Witness told her to go away; that she was not concerned in that controversy. The defendant stepped up with his knife out and told witness not to strike his wife, unless he wanted to be cut open. Witness stepped off a short distance, picked up a stick, and told defendant to put up his knife. Defendant replied: "If I can not protect my property any other way I will do it with my gun," and went to the house to get his gun. Witness sat down on a bale of cotton, and Mrs. Fondren came to him and opened up a conversation. The remainder of the witness' statement was essentially the same as that of the witnesses Miller and Daniels.

The statements of two other witnesses, one for the State and one for the defence, were substantially the same as those of the foregoing witnesses.

Mrs. Fondren, for the defence, was the last witness to take the stand. She did not see the beginning of the difficulty, and her first appearance upon the scene was when she attempted to lead the horses from the cotton. In preventing her from doing this, Halford caught her by an arm and pressed it so tight that for several days the print of his fingers was on her arm. From this time to the culmination of the affair her account harmonized with that of the others, except, according to her statement, when Miller went to intercept the defendant, on the latter's return from the house with the gun, he, Miller, drew his knife, held it with the blade up his coat sleeve, and thus armed approached

the defendant, and in the same manner followed him back to the crowd. The defendant at no time attempted to shoot Miller.

The motion for new trial raised the question involved in the opinion, and denounced the punishment imposed by the verdict as excessive.

WILLSON. We are of the opinion that the evidence does not sustain the conviction. Miller was advancing toward defendant, armed with an open knife, when defendant was told of it, and instantly turned and pointed his gun at him, telling him if he did not put up his knife he would shoot him. Miller put up his knife and the defendant put down his gun. At the time these acts occurred defendant and another person, who was present, were angry at each other, and had just before been engaged in fighting each other, and defendant had gone off and got his gun and returned, with the avowed purpose of protecting his property from being taken by the person with whom he had been fighting. He had no difficulty with Miller, and there is no evidence that he had any feeling or malice toward him. While defendant was in an excited state of mind from his difficulty with the other party, and had his attention directed to that party, he was informed that Miller, who was in his rear, was armed with a knife, and, looking around, he discovered that such was the fact, and that Miller was advancing upon him. With a foe in front and another in the rear, as he doubtless supposed, he very naturally made the necessary preparations to defend himself. He made no attempt to shoot Miller or any one else, but merely stood upon the defensive. It does not appear that his intention was to injure Miller or any one else, unless he was forced to do so in defence of his person or his property. On the contrary, it is shown that when he saw he was no longer in danger he put down his gun and made no further hostile demonstration.

In every assault there must be an intention to injure, coupled with an act which must at least be the beginning of the attempt to injure at once, and not a mere act of preparation for some contemplated injury that may afterwards be inflicted.[1]

We think the evidence in this case fails to show any act committed by the defendant which, in law, would constitute an assault upon Miller; and because the verdict is not warranted by the proof, the judgment is reversed and the cause is remanded.

*Reversed and remanded.*

[1] Clark's Cr. L. 159, note 79.

## MAYHEM—PREMEDITATION NECESSARY.

## GODFREY v. PEOPLE.

[63 N. Y. 207.]

*In the New York Court of Appeals, 1875.*

**A Premeditated Design** to do the act is essential to mayhem, and therefore where the act is done in the heat of a sudden affray, without any evidence of premeditation, the crime is not committed.

The case is reported below.[1]

*Mitchell Laird*, for plaintiff in error.

*B. K. Phelps*, for defendant in error.

MILLER, J. The statute under which the plaintiff (in error) was indicted ar d convicted is as follows:—

"Every person who from premeditated design, evinced by laying in wait for the purpose or in any other manner, or with intention to kill or commit any felony, shall (1) cut out or disable the tongue; or (2) put out an eye; or (3) slit the lip or destroy the nose; or (4) cut off or disable any limb or member of another, on purpose, upon conviction thereof, shall be punished," etc.[2]

A question is made by the prisoner's counsel whether as the case stood upon the evidence the prisoner could be convicted of the crime of mayhem. This question was presented upon the trial in the request and refusal to charge that he could not, and by an exception to that portion of the charge in which the judge charged the jury that if they found from the evidence that the prisoner willfully and intentionally seized the left ear of the complainant with his teeth at any time during the affray with the intention of biting it off and did willfully and intentionally and on purpose bite it off, and though the intention to bite off his ear originated or was first meditated but an instant before he seized the ear, they would be authorized to find that he bit the ear off from premeditated design, within the meaning of the statute.

According to the statute there must be a premeditated design, which must be shown by lying in wait for the purpose or in some other manner. There was no evidence upon the trial to establish that the prisoner lay in wait for the complainant or that prior to the time of the commission of the alleged offense, he had contemplated or intended to do the act. The proof evinces that it was done upon the impulse of the moment in an affray which originated unexpectedly, with no previous ill feeling except what arose at the time, or apparent intention upon

1 5 Hun, 359.

2 2 Rev. Stats. 664, sect 37.

the part of the prisoner or the prosecutor to engage in any such altercation as produced the consequences which ensued. There was then no premeditated design evinced by lying in wait for such a purpose within the meaning of the statute, and under the circumstances presented it is certainly not clearly apparent how, or in what form, such premeditated design is evinced in "any other manner." The last words are not very explicit and somewhat general, but they can not, without a constrained construction be held to mean that they include cases of simple assault and battery where there is no direct proof of any intent or purpose which results unfortunately in the loss or disabling of some member of the body of the person assailed. If such a result should occur in an ordinary affray by accidental circumstances and without any manifest intention, no case would be established within the meaning of the statute. There must be a design or intention existing and a purpose to do this very act and this must be the result of premeditation. The words cited must be construed in connection with and in reference to those which precede them in the same section; and when thus interpreted they evidently mean in any like or similar manner. There are numerous instances where full force and effect may be given to this language where a premeditated design has existed without lying in wait for the purpose, while it would not be applicable to cases where no such intention has been formed or proved. Take the case of a person who had determined and threatened to cut off an ear, put out an eye or disable some limb or member of the body of another and preparing himself with the necessary weapon for that purpose should meet the individual against whom his animosity was directed and commit the offense, or if, perchance when seeing him at a distance he should follow him, suddenly rush upon his victim and carry his intention into execution. These cases, without referring to others which might be named, are sufficient to show that the language employed could be made effective and have full operation.

This interpretation of the language stated is also sanctioned by the last clause of the section which provides that the cutting off or disabling of any limb or member must be done "on purpose." If the offense was committed within the meaning of the statute it must have been done "on purpose" as well as with a "premeditated design." There is no real ground for claiming that there was premeditation and a purpose existing at any time during the progress of the conflict when the passions of both parties were aroused and there was no time or opportunity for reflection or deliberation. Such an assumption would be contrary to the natural inferences to be drawn from the circumstances and the situation of the parties at the time, and looking at them it

can not be fairly claimed that the prisoner intended to commit the offense of which he was convicted.

An argument is made by the learned counsel for the prosecution to the effect that the doctrine of instantaneous malice under the old law of murder is applicable, and that the definition of premeditation, as applied to such a case, may be invoked. I can not concur in this view. In cases of homicide, where the offense is committed by means of weapons, or by the use of violence sufficient to produce death, such a rule might well be applied, because every circumstance tends to show that the result was intended. But this differs widely from a case of simple assault and battery where there was a hand to hand fight, without any weapon which could be used to maim or disable, and every intendment is against any such purpose.

Another answer to this position is that the statute of mayhem in England as well as in this State, was evidently intended to provide for cases where there was an antecedent and secret purpose to commit the act, and not for casual and sudden affrays, when the act was done in the heat of the strife and with no direct evidence of any such intention.

It is evident that the offense of mayhem was not made out, and that the judge erred in refusing the request made; and in that portion of the charge referred to. Questions are made as to the form of the indictment as well as to some other rulings on the trial; but the consideration of them is not required, as sufficient already appears to reverse the judgment.

All concur.

---

## ASSAULT WITH INTENT—"BODILY INJURY DANGEROUS TO LIFE."

### R. *v.* GRAY.

[Dears. & B. 303.]

*In the English Court for Crown Cases Reserved, 1857.*

**A Woman was Indicted** under a statute for causing a "bodily injury dangerous to life" with intent to murder. It appeared that she had abandoned her child in a field whereby a temporary congestion of the lungs had taken place. *Held*, that this was not within the statute.

The following case was reserved on the Norfolk Spring Circuit 1857, at Huntingdon, by ERLE, J., and stated by him for the consideration and decision of the Court of Criminal Appeal.

The indictment was for causing a bodily injury dangerous to life, to wit, a congestion of the lungs and a congestion of the heart, with intent to

murder. The verdict was guilty. The facts were these. The prisoner left her infant child on a cold wet day lying in an open field, intending that it should die, and it was found there after some hours nearly dead from the effects of such exposure, there being congestion of the lungs and the heart caused thereby, which would have been in a short time fatal if relief had not been given. At the time when the prisoner left the child lying in the field she had not caused any bodily injury to it and in a few hours after the child had been found it was restored by care, and then there remained no bodily injury either to the lungs or heart, or otherwise consequential from the exposure through congestion or otherwise. Judgment was respited, the prisoner remaining in custody till the opinion of this court could be taken on the question, whether, on these facts, the conviction for causing a bodily injury dangerous to life was right.

This case was argued on 2d May, 1857, before COCKBURN, C. J., COLERIDGE, J., CROWDER, J., WILLES, J. and BRAMWELL, B.

*Couch* appeared for the Crown; no counsel appeared for the prisoner.

*Couch*, for the Crown. This indictment is under section 2 of 7 William IV. and 1 Victoria,[1] which enacts, that "whosoever shall administer to or cause to be taken by any person any poison or other destructive thing, or shall stab, cut, or wound any person, or shall by any means whatsoever cause to any person any bodily injury dangerous to life, with intent, in any of the cases aforesaid, to committ murder, shall be guilty of felony, and being convicted thereof shall suffer death." Now in this case the prisoner left her infant child in a field on a cold and wet day intending, as the jury found that it should die. There was therefore the intent to murder, and the question is, whether, the temporary injury to the child, by the congestion of the lungs and heart was a "bodily injury dangerous to life," within the meaning of the statute. The learned judge at the trial seemed to think that, to bring the case within the second section of the statute, the bodily injury must be of a like nature with the injuries previously mentioned in that section, namely, stabbing, cutting or wounding. But I submit the words upon which this indictment is framed constitute an entirely distinct provision, and create an offense different to those previously mentioned.

COCKBURN, C. J. What bodily injury is there here?

*Couch*. There is congestion of the lungs and heart, which, if relief had not been given, would shortly have caused death. The intention of the Legislature seems to have embraced every kind of attempt to murder, whatever the means employed, and therefore the words, "or

[1] ch. 85.

by any means" were introduced. If the child had been placed in an open field with the intent that it should die, and it had died in consequence, it would have been murder.

COLERIDGE, J. No doubt; but here, the child not having died, the question is, was there any bodily injury produced by the act of the prisoner? Suppose the child had been put into an exhausted receiver, but had been taken out before it had actually received any bodily injury, would that have been an offense within this section?

*Couch.* There was no bodily injury in the sense of a wound, but there is an internal injury, and it has been held that an internal wounding is within the section.[1]

COCKBURN, C. J. Must it not be an injury to the organic structure to satisfy the statute? All that was produced in this case, was a mere functional derangement. Congestion is the filling of the lungs and heart with more blood than there ought to be there. The offenses created by the preceding words of this section are cases of injury to the bodily structure. The words "stab, cut or wound" all relate to some injury to the structure, some lesion of the body.

CROWDER, J. But the section also relates to administering poison or other destructive thing.

COLERIDGE, J. I think the words, "or by any means cause bodily injury dangerous to life," were intended to meet cases of serious injury where no instrument is used, such as injuries by biting,[2] or striking with the fist, which it had been decided were not within the meaning of previous statutes.

*Couch.* The Legislature, by using the most general words, appears to have intended to make their application as wide as possible.

COCKBURN, C. J. Must not the means be applied with intent to cause the particular injury sustained? It strikes me that this was an attempt to commit murder.

BRAMWELL, B. If the prisoner, intending to kill the child, had directed upon it a blast of cold air, or a stream of water, and had thereby injured the child, would that have been within the statute? Is there any difference between that and exposing the child to the influence of the weather?

*Couch.* The prisoner in this case, placing her child in the open field, is the same as if she had directly applied the blast of cold air, or the stream of water to the child intending to kill it thereby. The Legisla-

1 In Reg. *v.* Smith, 8 C. & P. 173, a blow had been given with a hammer, on the face which broke the lower jaw in two places; the skin was broken internally but not externally, and there was not much blood; Parke, J., on consulting with Lord Denman, C. J., held the offense to come within the section in question in the principal case. See, also, Reg. *v.* Warmern, 1 Den. 183.

2 Rex *v.* Stevens, 1 Moo. C. C. 409; Rex *v.* Harris, 7 C. & P. 446.

ture intended to include every bodily injury dangerous to life, if occasioned by that which was done with intent to murder; and I submit that this case comes within the evil intended to be remedied and within the meaning of the statute, and that the conviction is right.

*Cur. adv. vult.*

The judgment of the court was delivered on the 22d of June, 1857, by —

COCKBURN, C. J. This case was argued before my brothers COLERIDGE, CROWDER, WILLES, BRAMWELL and myself on a point reserved by my brother ERLE, as to whether the prisoner, who had exposed her child, whereby temporary congestion of the lungs had taken place in the child, was liable to be indicted and convicted under the 7 William IV. and 1 Victoria.[1] We are of opinion that the conviction in this case can not be sustained. We think that, looking to the words of the act of Parliament and the other offenses provided for by the second section of the 7 William IV. and 1 Victoria,[2] the condition of the child's organs not having been attended with any lesion, there was no bodily injury dangerous to life within the meaning of the statute. The conviction therefore must be quashed and the prisoner discharged.

*Conviction quashed.*

---

FALSE IMPRISONMENT—NO CRIME WHERE PERSON GOES VOLUNTARILY—FRAUD.

## STATE *v.* LUNSFORD.

[81 N. C. 528.]

*In the Supreme Court of North Carolina, 1879.*

1. **False Imprisonment is the Illegal** restraint of one's person against his will.
2. **When on Trial of an Indictment** for such offense it appeared that the defendants went to the prosecutor's house at night, called him up out of bed, represented to him in changed voices that they were in search of a stolen horse, and offered to pay him to accompany them; and thereupon he mounted behind one of the defendants on his horse, and went voluntarily, without threat or violence from defendants, and after riding a quarter of a mile on a gallop he complained of the uncomfortable mode of transportation, dismounted and discovered he was the victim of a hoax and was left in the road by defendants: *Held*, that the fraud practiced did not impress the transaction with the character of a criminal act.

Indictment for false imprisonment tried at Spring Term, 1879, of Macon Superior Court, before GUDGER, J.

The bill charges that the defendants, Wiley Lunsford, Leander Bate-

[1] ch. 85, sec. 82.

[2] ch. 85.

man and Nelson Rogers did make an assault upon one Robert Garrison, and him the said Garrison unlawfully and injuriously, against his will, and against the laws of the State and without any legal warrant, authority, or reasonable or justifiable cause whatsoever, did imprison and detain, etc.

The jury returned a special verdict finding the following facts; on the night of the day of , 1878, the defendants went to the house of Robert Garrison, the prosecuting witness, after he had gone to bed, and called him up and represented to him that they were searching for a stolen horse which they understood had gone in the direction of Swain County, and urged him to go with him in search of the horse. The defendants changed their voices and their names. After giving them some directions about the roads, the witness yielded to their request to go with them, they offering to pay him. Garrison thought they were the persons they represented themselves to be, and were in search of a stolen horse, and got behind one of them on his horse, when the defendants rode off in a gallop some quarter of a mile before Garrison discovered who they were. He complained of being hurt from the riding, and defendants proposed that he should change and get on behind another one of the defendants. He then got down and the defendants rode off, leaving him in the dark about a quarter of a mile from his house. The defendants offered him no violence, nor did him any injury except such as resulted from the rapid riding. Defendants were not in search of a stolen horse, but used the device only for the purpose of perpetrating a practical joke on the prosecutor. Defendants were young men, and the prosecutor between sixty and seventy years of age. Upon these facts the court held that the defendants were guilty. Judgment; appeal by the defendants.

The *Attorney-General*, for the State.

*Reade*, *Busbee & Busbee*, for the defendants.

ASHE, J. False imprisonment is the illegal restraint of the person of any one against his will. The common law was so jealous of the personal liberty of the citizen, that it was regarded as a heinous offense and the infringement of this right in England under certain circumstances was visited with severe punishment. False imprisonment generally included an assault and battery and always at least a technical assault; and hence the form of the indictment, which is for an assault and battery and false imprisonment; though there may be a false imprisonment without touching the person of the prosecutor, as when a constable showed a magistrate's warrant to the prosecutor and desired him to go before the magistrate, which he did, without further compulsion. This was held to be a sufficient imprisonment, because the officer solicited a warrant for his arrest, and in going with him, he

yielded to what he supposed to be a legal necessity. But there must be a detention, and the detention must be unlawful.[1]

The prosecutor in this case went voluntarily with the defendants with the expectation of a reward for his trouble. Instead of walking to the point of destination, a short distance from his house, he preferred to mount on the crupper of one of the horses ridden by some of the party, and after going about one-fourth of a mile and discovering that he was the victim of a hoax, he complained of the uncomfortable mode of transportation, and dismounted without objection from any one. He was left all the while to the exercise of his own free will. There was no violence, no touching of his person, no threat, no intimidation of any sort. And the ruse employed by the defendants to decoy him from his house we do not think was such a fraud so as to impress the transaction with the character of a criminal act. It seems to have been one of those practical jokes that are sometimes practiced, without any intention of doing harm, or violating the law; and we are of the opinion that there was no violation of the criminal law in this case. There is error. Let this be certified, etc.

*Reversed.*

---

## FALSE IMPRISONMENT—DELAY IN TAKING BOND.

## BEVILLE v. STATE.

[16 Tex. (App.) 70.]

*In the Court of Appeals of Texas, 1884.*

1. **The Ordinance of a City** authorized the arrest by an officer of a drunken man without warrant. A. being arrested by B. for drunkenness immediately offered to give bond, which B. refused and he was confined in the calaboose about an hour. *Held,* that B. was not liable to conviction for false imprisonment.
2. **—— Authority of Officer.**—Upon the question of the right of the deputy marshal to arrest a party detected in the violation of the ordinance, the trial court charged that, in order to make a valid arrest, such officer must have "express" authority. *Held,* error.

APPEAL from the County Court of Wise. Tried below before the Hon. G. B. PICKETT, County Judge.

The opinion discloses the nature of the case. A fine of ten dollars was the penalty imposed.

The evidence disclosed, in substance, that Decatur, Wise County, was a town incorporated under the general incorporation act of the State; that its ordinances denounced drunkenness and breaches of the

[1] 3 Bla. Com. 127.

peace as offenses; that H. C. Carter was drunk and in the act of committing a breach of the peace in the presence of N. C. Cargill, marshal, and the defendant, deputy marshal, of the town; that the marshal and the defendant, having no warrant, arrested Carter, and started to the town calaboose with him; that Carter proposed, as soon as arrested, to execute a bond for his appearance before the mayor's court, and that several parties present, some of whom were solvent, proposed to sign such bond as sureties; and that the marshal declined to accept a bond. There was no proof that the marshal neard any solvent person propose to go on the bond. It was proved, also, that while the defendant and the marshal were taking Carter to the calaboose, Carter tripped the marshal, threw him down and stamped him, and, while the marshal was unlocking the calaboose door, that Carter struck the marshal a blow in the face, whereupon the marshal struck Carter a severe blow over the right eye, drawing the blood. Carter was confined in the calaboose for about one hour, and was released on bail.

The motion for new trial raised the questions involved in the opinion.

*J. H. Burts*, Assistant Attorney-General, for the State.

HURT, J. N. C. Cargill, marshal of the city of Decatur, and the appellant, deputy marshal, arrested one H. C. Carter, within the limits of said city, while said Carter was intoxicated in a public place, and in the act of committing a breach of the peace in the view of said officers. The arrest was made without a warrant. The marshal and appellant, his deputy, carried Carter to the calaboose, a place provided by the city for the detention of city prisoners, and there kept him confined about an hour, when he was liberated on giving an appearance bond. Carter proposed to give such bond when he was arrested, but this was refused by the marshal and appellant. By ordinances of the city of Decatur drunkenness and breaches of the peace are made offenses.

Appellant was prosecuted to conviction for false imprisonment; from which conviction he appeals to this court. Under the above state of facts, had appellant the right to arrest and imprison Carter as he did? We are most clearly of the opinion that he had. Nor does the fact that Carter offered to give bond when arrested affect the question.

As stated in the case of *Scircle* v. *Neeves*:[1] "There is probably not a city or town in the State making any pretense to proper municipal government that has not an ordinance in substance the same as this (one making drunkenness an offense), and whose police officers do not constantly arrest, lock up and afterward carry before the courts, persons who violate its provisions. Such persons must learn that society has the right to protect itself against the evil influences of their example,

[1] 47 Ind. 289.

and that they are proper objects of municipal legislation, arrest and punishment." This we believe to be the correct doctrine.

We are of the opinion that it was the duty of the marshal, or his deputy, to arrest and confine Carter until he became sufficiently sober and rational as not to be a nuisance to peaceable and orderly citizens of the city. Society has rights as well as the citizen, and when the good order of society is thus invaded and defied, her officers should act promptly and effectively.

This verdict is not supported by the evicence, and for this, if no other reason, the judgment would be reversed.

The learned judge charged the jury that defendant must have express lawful authority to make the arrest. This was calculated to mislead the jury. If, from all the circumstances, the law would authorize the arrest, by a fair construction, defendant would not be guilty because the power was not expressly given. Because the charge was erroneous, and because the evidence does not support the verdict, the judgment is reversed and the cause remanded.

*Reversed and remanded.*

---

## NOTES.

§ 623. **Assault — There Must be a Present Intention to Strike.** — An assault is an attempt or offer to do another person violence without actually accomplishing it. A menace is not an assault; neither is a conditional offer of violence or a threat. There must be a present intention to strike.[1] Where a gun is held in a threatening way, yet there is no intent to use it unless assaulted by the adversary, there is no assault.[2]

In *State* v. *Mooney*,[3] the prosecutor, with some other persons, had gone to Mooney's house, and after some conversation, a quarrel arose, in the course of which insulting language was used by both parties. Thereupon the defendant ordered the others to leave his house. At or about the same time he seized his gun; the witnesses differing as to whether he did this immediately, or after finding that the prosecutor and his party did not leave. A scuffle for the gun ensued between the defendant and some members of his own family, and the latter finally got possession of it. The defendant did not present it or attempt to make use of it. As the prosecutor and his friends were leaving the premises, the defendant followed them and seized an axe, getting near enough to throw it, but the witnesses differed as to whether he was near enough to strike with it. He did not attempt to use it. Subsequently, upon being dared to come out, he advanced again with the axe, but did not get nearer to them than twenty-five or thirty yards. The court charged the jury that in any view of the testimony an

1 Johnson v. State, 35 Ala. 363 (1860); People v. Lilley, *ante*, p. 783.

2 State v. Blackwell, 9 Ala. 79 (1846).

3 Phill. 434 (1868).

assault had been committed by the defendant with both the gun and the axe.

Verdict guilty; rule for a new trial discharged; judgment and appeal.

READE, J. His honor's charge "that in any view of the testimony the defendant was guilty," is so broad as to entitle the defendant to a new trial, if there is any view consistent with his innocence. After a careful consideration of the testimony, we are obliged to say that in no view of the case is the defendant guilty.

When the defendant ordered the prosecutor and his crowd to leave his house, as he had a right to do, it may have been rude behavior to seize his gun at the same time; but as he did not point his gun, or in any way offer or attempt to use it, there was certainly no assault, which is an offer or attempt, and not a mere threat, to commit violence. And so the picking up of an axe within some twenty-five yards of the prosecutor without an offer or attempt to use it, was not an assault. There is error. This opinion will be certified.

§ 624. **Assault — Intention to Injure Essential, Coupled with Act.** — In every assault there must be an intention to injure, coupled with an act towards that end, and not an act of preparation for some contemplated injury that may afterwards be inflicted.[1] There must be the commencement of an act which, if not prevented, would produce a battery. Therefore, drawing a pistol, without presenting or cocking it, is not an assault.[2] In a sudden quarrel A. and B. drew pistols and confronted each other. B. did not present his pistol at A., but threatened to shoot him if he cocked his pistol, when bystanders interfered. This was held not an assault by B.[3]

In *State* v. *Milsaps*,[4] the prisoner using insulting language to the prosecutor, picked up a stone, being about twelve feet from him, but did not offer to throw it. This was not an assault.

§ 625. **Threatening Gesture not — Pointing Cane.** — A mere threatening gesture is not an assault.[5] So to point a cane in derision at a person in the street is not an assault.[6]

§ 626. **—— Intent to Injure the Gist — Pointing Pistol not per se an Assault.** — In *Richels* v. *State*,[7] the court in reversing a conviction say: The question arises upon the charge of the court. It was so far as excepted to, in these words: "That the defendant would be guilty of an assault if they found from the evidence that he pointed a pistol purporting to be loaded at the prosecutor, within the distance such pistol would carry, notwithstanding he did not then and thereby intend to shoot and so stated." This is erroneous.

An assault is an attempt or offer to do a personal violence to another. It is an inchoate violence with the present means of carrying the intent into effect.[8] The intention to do harm is of the essence of the offense and this intention is to be ascertained by the jury from the circumstances. If at the time of menacing the prosecutor and apparently offering to harm him, defendant used words showing it was not his intention to do it at that time, it is no assault.[9] The

1 Johnson *v.* State, 48 Tex. 576 (1875).
2 Lawson *v.* State, 30 Ala. 14 (1857).
3 Rainbolt *v.* State, 34 Tex. 287 (1870).
4 82 N. C. 549 (1880).
5 Spears *v.* State, 2 Tex. (App.) 244 (1877).
6 Goodwin's Case, 6 City H. Rec. 9 (1821).
7 Sneed, 606 (1854).
8 2 Greenl. Ev., sec. 82.
9 *Ib.* sec., 83.

example given in all the books treating of this subject, of one's laying his hand on his sword, saying, "if it were not assize time, I would not take such language," is an illustration of this rule.

Pointing a pistol at another would perhaps be sufficient evidence of an intent to do harm, if nothing more appeared. But if it were shown that it was done playfully or accompanied with a declaration that he did not intend to shoot or any other words evincive of the absence of any criminal intent, then it would not be an assault. It would still be a question for the jury to determine, from all the facts, as to the intent. If the prosecutor had good reason in view of all the circumstances to apprehend danger, notwithstanding the declarations made at the time, the jury would be authorized to find the defendant guilty. For it might be well shown by the circumstances, that this disavowal of harmful intentions was insincere, or intended to put the other party off his guard.

As a matter of law then, it is not true that to point a pistol at another, is of itself an assault, as charged by his honor. It may or may not be, according to the attending circumstances. These must be such as to satisfy a jury that there was an intent, coupled with an ability to do harm, or that the other party had a right so to believe from the facts before him; otherwise there is no danger of a breach of the peace.

The judgment will be reversed and a new trial granted.

§ 627. —— **Words not an Assault.** — Threatening words and violent and menacing gestures, if unaccompanied by a present intention to do a corporal injury do not amount to assault.[1]

§ 628. —— **No Assault Where Words Explain Hostile Action.** — In *Commonwealth* v. *Eyre*,[2] a prisoner raised his hand and said to the prosecutor: "If it were not for your gray hairs I would tear your heart out." This was held no assault as the words took away the idea of an intention to strike.

In *State* v. *Crow*,[3] the defendant was indicted for an assault on William Grayson. One witness testified that he heard the parties have some words and he then saw the defendant raise a whip which he had in his hand, and shake it at Grayson, swearing that he had a great mind to kill him; and that, at the time when the defendant raised his whip, he was in striking distance of Grayson, but not strike him, although not prevented from doing so by the interference of any other person. One or two other witnesses testified that they did not see the defendant raise the whip, but heard him say to Grayson, "were you not an old man I would knock you down." The defendant's counsel contended that no assault was proved, because the words which accompanied his acts qualified them and showed that he had no intention of striking, and consequently there was no such offer or attempt to strike as constituted an assault. The court charged the jury that, notwithstanding the words used by the defendant when he raised his whip and shook it at Grayson, yet if his conduct was such as would induce a man of ordinary firmness to suppose he was about to be stricken and to strike his assailant in self-defence, the latter would be guilty. Otherwise there might be a fight and the peace broken, and yet neither party be guilty. And further, that otherwise, one man might follow another all over the court yard, shaking a stick over his head, and yet not be guilty,

[1] Smith *v.* State, 39 Miss. 54 (1860); Jarnigan *v.* State, 3 Tex. (App.) 462 (1870).

[2] 1 S. & R. 347 (1815).

[3] 1 Ired. 375 (1841).

provided he took care to declare, while he was doing so, that "he had a great mind to knock him down." The jury found the defendant guilty, and a new trial being refused, judgment was produced against him, from which judgment he appealed to the Supreme Court.

The *Attorney-General*, for the State, cited Archbold's Criminal Pleadings[1] and Hawkins.[2]

No counsel appeared for the defendant.

DANIEL, J. The judge charged the jury "that if the conduct of the defendant was such as would induce a man of ordinary firmness to suppose he was about to be stricken, and to strike in self-defence, the defendant would by such conduct be guilty of an assault." We admit that such conduct would be strong evidence to prove, what every person who relies on the plea of *son assault demesne* must prove to support his plea, to wit, that his adversary first attempted or offered to strike him; but it is not conclusive evidence of that fact, for if it can be collected, notwithstanding appearances to the contrary, that there was not a present purpose to do an injury, there is no assault.[3] The law makes allowance, to some extent, for the angry passions an infirmities of man. It seems to us that the words used by the defendant, cotemporaneously with the act of raising his whip, were to be taken into consideration, as tending to qualify that act, and show that he had no intention to strike. The defendant did not strike, although he had an opportunity to do so, and was not prevented by any other person. The judge should, it seems to us, have told the jury, that if, at the time he raised his whip and made use of the worde, "were you not an old man I would knock you down," the defendant had not a present purpose to strike, in law it was not an assault. We again repeat what was said in Davis' case: "It was difficult to draw the precise line which separates violence menaced from violence begun to be executed, for until the execution of it be begun, there can be no assault." The evils, which the judge supposed might follow, if the law was different from what he stated it to be, can always be obviated by the offendiug party being bound to his good behavior. There must be a new trial.

*New trial awarded.*

§ 629. **Assault Must be on Person.** — So besetting the house of another is not an assault[4] nor is beating his horse.[5]

§ 630. —— **Opening Railway Switch.** — In *Re Lewis*[6] the prisoner opened a railway switch with intent to cause a collision whereby two trains did come in collision causing a severe injury to a person in one of them. This was held not an assault.

§ 631. —— **Assault Must be to Person — Stopping Carriage Not.** — This was ruled in *State* v. *Edge*,[7] the court saying: "Upon a slight view it might seem that this case was decided by the case of the *State* v. *Davis and Purdue*,[8] where the defendants were found guilty of an assault in cutting a rope by which the prosecutor had tied the body of a negro to his own person. This case was decided on the ground, that every thing attached to a man's person partakes of

1 p. 347.

2 ch. 52, sec. 1.

3 State *v*. Davis, 1 Ired. 127.

4 State *v*. Freels, 3 Humph. 229 (1842).

5 Kirland *v*. State, 43 Ind. 149 (1873).

6 6 U. C. Pr. Rep. 237 (1874).

7 1 Strobh. 91 (1846).

8 1 Hill, 96.

his personal inviolability, as the clothes he wears, or the stick he carries in his hand. But the extension of this doctrine to the extent contended for in this case would confound the distinctions between trespass to the person, which is indictable, and trespass to goods, which is not. Many cases are to be found in the English Reports, where the defendant willfully ran against the carriage of the prosecutor, by reason whereof he was hurt and sustained bodily injury; but the cases go no farther. It would be going too far to say, that to stop the carriage in which the carriage is riding, without any design or manifestation of intention to do him any bodily hurt, can amount to an assault, any more than to stop a boat in which many persons were sailing, would be an assault on each and every of the passengers. In this case the declared object of the defendant Edge was to recover his negro, which the prosecutor was unlawfully carrying away. This he might lawfully do, if he could effect it without a breach of the peace or the violation of the criminal laws of the country. If this was his object, and so declared at the time, and there was no offer or attempt to commit any violence on the person of the prosecutor, I can not regard the act as any thing more than a trespass; or at most, the momentary restraint on the liberty of the prosecutor would be only a false imprisonment, which it is now settled may be committed without an assault; though the opinion seemed once to have been entertained that a false imprisonment included an assault.[1] In cases like the present, where no personal injury is done or attempted, the question is always one of intention, and the jury should be instructed to find the defendants guilty, or not, according as they should decide that he intended to do an injury to the person of the prosecutor, or not. That the jury may decide on this point, a new trial is ordered."

§ 632. —— **Force Must be External.** — In *R.* v. *Hanson*,[2] one Hanson put some cantharides into a glass of rum and gave it to Mary Warburton to drink. She drank the liquor not knowing what it contained, and was made ill. This was held not an assault.

§ 633. —— **And Must do Injury.** — To expose a child to the inclemency of the weather, where as a result no injury or inconvenience actually happens to the child, is not an assault.[3] A prisoner indicted for manslaughter and acquitted because the death was not the result of the assault can not be convicted of assault.[4]

§ 634. —— **Accident or Play — No Intent to Injure.** — There must be an intent to injure — either in bodily pain, constraint, shame or other disagreeable emotion. Thus to shove another in accident or in play[5] or in friendship[6] is not an assault.

§ 635. —— **Use of Lawful Force.** — The use of lawful force is not an assault. Thus the conductor of a car may remove a passenger violating the rules[7] or not paying fare.[8] So the sexton of a church as to persons violating

1 2 Bos. & Pul. 255.

2 2 C. & K. 913 (1849).

3 R. *v.* Renshaw, 2 Cox, 285 (1847).

4 R. *v.* Connor, 2 C. & K. 518 (1847).

5 Rutherford *v.* State, 13 Tex. (App.) 92 (1882).

6 People *v.* Hale, 1 N. Y. Crim. Rep. 533 (1883).

7 State *v.* Goold, 53 Me. 279 (1865); State *v.* Chovin, 7 Iowa, 204 (1858); People *v.* Caryl, 3 Park. 326 (1857).

8 People *v.* Jillson, 3 Park. 234 (1856).

the rules,[1] and the superintendent of a poor-house, as to the inmates,[2] or a policeman in making an arrest.[3] As to the right of parent and schoolmaster to administer corporal punishment to infant, see volume III. of this series.[4]

§ 636. **Preventing Breach of Peace.** — Laying hands on another to prevent his fighting or committing a breach of the peace is not assault.[5]

§ 636*a*. **Shooting at House Window.** — Where one shoots at a picture in the window of another with intent to destroy the picture, because he is offended by it, but without intent to do a personal injury to any one, it is not an assault upon the owner of the house.[6]

1 Com. *v.* Dougherty, 107 Mass. 245 (1871).

2 State *v.* Neff, 58 Ind. 566.

3 Doering *v.* State, 49 Ind. 60; Shovlin *v.* Com., 106 Pa. St. 396 (1884).

4 *ante*, vol. III., ch. V. And, see, Dowlen *v.* State, 14 Tex. (App.) 61 (1883), *ante*, p. 822.

5 Spicer *v.* People, 11 Bradw. 295 (1882). In People *v.* Van Vechten, 2 N. Y. Cr. Rep. 291 (1884). Learned, J., delivered the following dissenting opinion: "This was a prosecution for an assault and battery. The defence claimed that the complainant Hibbard had been previously forbidden to come into defendant's hotel where the assault had been committed; that Hibbard was drunk, and that defendant used no more force than was necessary to eject him. The defendant's counsel asked Hibbard whether the defendant, prior to the assault, had forbidden him to enter the hotel unless he had legal process. This was excluded. The inquiry was repeated in several forms and was excluded. The same questions were asked of the defendant, and again excluded. The defendant's counsel also inquired whether Hibbard at the time was drunk or sober, and this was excluded. An inquiry was also made of defendant when the conversation as to Hibbard's coming on the premises was had. This was excluded. Now there was no dispute that the premises, where the assault was committed were in the lawful possession of the defendant. Nor is it claimed that Hibbard entered by virtue of his authority as a peace officer. He says himself that he did not go there in that capacity. The place was a hotel, and very properly without some evidence on the contrary, there is an implied invitation to enter peacefully into a hotel. But certainly the proprietor may forbid such entrance. When he does forbid such entrance to any person, if that person then enter, he is a trespasser. The occupant of the premises may eject him, using no more force than is necessary. By the exclusion of the evidence which was offered, the defendant was deprived of the opportunity of justifying the alleged assault. He was placed in the condition of a person who, without any previous prohibition to Hibbard against entering the hotel, committed an assault. Now even if the jury had believed that the force used was no more than necessary to eject Hibbard, the defendant would have been convicted, because he was not permitted to show that he had previously forbidden Hibbard to enter. It was not in litigation of damages or in any such view, that the evidence of previous conversation was offered. It was to show that, at the time, Hibbard was a trespasser, and therefore, that the defendant might lawfully remove him. It is true that defendant would not then be justified in using unnecessary violence. But it does not appear that the jury thought the force used was unnecessary. The defendant was not allowed to show the fact which would have justified some degree of force. So too, I think that proof should have been admitted that Hibbard was intoxicated. Not that intoxication justifies an assault, but because the question of what is necessary force to remove an intruder from one's premises, may depend on the condition of the intruder. A degree of force may be necessary in the removal of a drunken man from one's hotel, which would be quite needless and improper in the case of one who was sober and quiet. Of course, it might be that, if the evidence of this forbidding Hibbard to enter had been received, the jury might still find that the defendant's acts were not justifiable; that he used unnecessary force in attempting to remove Hibbard. But the defendant had a right to have the jury decide this question, and of that right he was deprived. I think the conviction and judgment should be reversed and a new trial had."

6 United States *v.* Hand, 2 Wash. 435.

§ 636*b*. **Negligent Driving.** — One negligently driving over another is not guilty of an assault and battery, though he is violating a municipal ordinance against fast driving.[1]

§ 637. —— **Recaption.** — If a constable levy upon and take goods, after the authority of the seizure derived from the writ has expired, the defendants who do no more than temporarily exercise the common-law right of recaption, are not guilty of assault.[2]

§ 638. —— **Force used to Recover Property Fraudulently Taken.** — In *Anderson* v. *State*,[3] it is said: "If a man meet another in the highway and by false and fraudulent misrepresentation induce that other to surrender to him the possession of his horse and carriage and when he has so obtained possession show a different purpose by word or act to appropriate it to his own use and to escape with it, surely it will not be held the person so deprived of property is compelled to stand with folded arms and see the fellow so escape beyond the reach of the law, or a hope of the restitution of the property or be guilty of a violation of law in attempting to recover possession. On the contrary every man has a right to defend his property and his possession thereof, and to use such force as will secure to him its full enjoyment. If he use the necessary force to eject the intruder from his house or premises, upon the same principle he may use like force to recover a chattel attempted to be converted by a dissembler or felon."

§ 638*a*. **Mayhem — Premeditation necessary.** — To the crime of mayhem premeditation is necessary.[4]

§ 639. —— **Mayhem — Other Essentials.** — A permanent injury is necessary — a temporary injury of a finger, an arm, or an eye is not mayhem.[5] Biting off a small portion of the ear is not mayhem,[6] nor fracturing the skull.[7] Under a statute in Virginia, which enacts that if any person "shall unlawfully cut out or disable the tongue, put out an eye, slit a nose, bite or cut off a nose or lip, or cut off or disable any limb or member of any person whatsoever, within the Commonwealth, with intent in so doing to maim or disfigure, in any of the manners before mentioned, such person," he shall be declared a felon and suffer as in case of felony, biting off an ear is not a felony.[8]

§ 640. —— **"Maiming" by "Lying in Wait."** — A husband cutting his wife's throat while both are in bed is not "maiming" by "lying in wait" within the statute.[9]

§ 641. **Assault with Intent to Kill.** — On this charge the intent to kill must be proved.[10] To sustain an indictment under the act of March 3, 1825, it must be proved that the assault was made with the intention to take the life of

1 Com. *v.* Adams, 114 Mass. 362 (1873).
2 Finn *v.* Com., 6 Pa. St. 460 (1847).
3 6 Baxt. 608 (1872).
4 Godfrey *v.* People, 63 N. Y. 207 (1875).
5 State *v.* Briley, 8 Port. 473 (1839).
6 State *v.* Abram, 10 Ala. 929 (1847).
7 Com. *v.* Somerville, 1 Va. Cas. 163; 5 Am. Dec. 574 (1811). As to what is mayhem under the New York statute, see Burke *v.* People, 11 N. Y. (S. C.) 481 (1875.)
8 United States *v.* Askins, 4 Cranch, C. C. 98.
9 R. *v.* Lee, 1 Leach, 61 (1761).
10 Ogletree *v.* State, 28 Ala. 693 (1858); State *v.* Painter, 67 Mo. 84 (1877).

the person assaulted; an intent to torture merely, or to give pain, is not enough.[1]

Where a person aiming at A. misses him and wounds B., he can not be convicted of assault with intent to kill B.[2]

In *State* v. *Sloanaker*,[3] the prisoner was indicted for an assault and battery committed by the prisoner on James Brown with intent to kill him. On the evening of tne 25th of August preceding, upon the arrival of the train on the railroad at Claymont Station, Mr. Brown had just left the train and taken his seat in his carriage, when a pistol was discharged from the platform of one of the cars, the ball from which hit and penetrated the right side of his face, from which it was afterwards extracted, but inflicting a wound which was at one time considered to be dangerous to his life. There were some twenty persons on the platform of the station when the prisoner, who had just before been seen standing with another young man on the platform of a car with a pistol in his hand, apparently examining it as the train was starting and had partly passed Mr. Brown's carriage, suddenly brought his arm and hand with the pistol in it around in that direction and discharged it. They were both strangers to Mr. Brown, and were on their journey together from Philadelphia to Dover, to work at their trade as carpenters for a person who had employed them there. The companion of the prisoner was the owner of the pistol, and in packing his chest in the city had forgotten it until it was too late to be packed, and on leaving had put it in his pocket, and had informed the prisoner of it about the time the train reached the station, and told him he did not like to be carrying a pistol in his pocket, when the latter expressed a desire to see it, and he handed it to him for that purpose, as they went out on the platform of the car. He further testified that the prisoner was examining it when he accidentally and unintentionally discharged it, and that the prisoner did not know that it was loaded until it went off. When a gentleman on the train, who had no acquaintance with the prisoner, went to him soon afterwards and told him that it was rumored on the train that a man had been shot by him, he replied insolently to him, and said if he had done it he did not know that it was any of his business; and after the train had reached Wilmington, when he replied that he did fire a pistol in that direction, but if any one said he fired at anybody, or tried to shoot anybody, he was a liar and he would whip him, although he was not a fighting man, They were followed by officers to Dover the same night, and were arrested together in the same bed. They both said to the officers arresting them that they had got hold of the wrong parties, and when asked for the pistol denied that they had any, but on turning back the bed clothes and pillows they found one under them. The prisoner had since called on Mr. Brown, in Philadelphia, and said that he was the man who did it, and that he was sorry for it.

The Deputy Attorney-General, asked the court to charge the jury that if they were satisfied from the evidence that the pistol was recklessly discharged by the prisoner into the crowd of people then and there assembled, and particularly in such a place, regardless of its effects, or whom he might wound or kill, it was a case of malice generally against all of them, and was sufficient to sustain the felonious intent alleged in the indictment to kill the person wounded by it, although he might have been an entire stranger to the

1 United States *v.* Riddle, 4 Wash. 644.

2 Lacefield *v.* State, 34 Ark. 275 (1879).

3 1 Houst. Cr. Cas. 62 (1858).

prisoner at the time, and the latter might have had no individual or actual malice against him.

*Gordon*, for the prisoner. The felonious intent to kill must be proved in this, as in every other case, like any other material fact in it, and it was incumbent on the State to establish it. But if the pistol was accidentally or unintentionally discharged by the prisoner on the occasion, it was a case of misadventure in contemplation of law, and would be a good defence even to the misdemeanor or the assault simply, although it would be no defence in such a case in a civil action for the trespass.

GILPIN, C. J., charged the jury, that if they were satisfied that the pistol was fired by the prisoner unintentionally and by accident merely, however imprudent or improper it may have been for him to be handling it or examining it loaded in such a place and at such a time, he ought not to be convicted of either the misdemeanor or the felonious intention alleged in the indictment. But if, on the contrary, they were satisfied by the proof that he discharged it intentionally and wantonly and recklessly into the crowd of persons assembled about the place at the time, or in the direction of the carriage of the prosecuting witness, indifferent as to whom he might shoot, or what the mischief or injury might be, or where or on whom it might fall, such conduct would manifest such a wicked and depraved inclination and disposition on his part, that it might well be presumed by them that he intended at the time to shoot some one, upon the principle that every one is presumed to intend the probable consequence of his own act; and if that was so in the opinion and belief of the jury, the prisoner was guilty at least of the assault alleged in the indictment. But the felonious intention alleged in it to kill the prosecuting witness, Mr. Brown, was not a matter to be made out by inference or presumption merely, but must be proved like any other fact material in the case, in order to convict him of the felony, or felonious intention alleged in it, and the point had been several times so ruled and decided in this court. It was competent under the statute, however, for the jury to convict him upon the indictment of the misdemeanor or the assault merely. But as to the felony or intent to kill the prosecuting witness, it would have been a very different case, both in law and fact, if he had died of the wound within a year.

*Verdict, not guilty.*

§ 642. —— **Assault With Intent to Murder — Elements of Crime.** — In this charge every element of murder must be present, except the death of the assaulted party,[1] and there must be an intent to kill.[2] Presenting a pistol, loaded and cocked, within shooting distance in an angry manner, do not *per se* constitute an assault with intent to murder.[3] The evidence was held insufficient to convict in the following cases: *Black* v. *State*,[4] *State* v. *Ah Kung*,[5] *Jones* v. *State*,[6] *Erring* v. *State*.[7]

In *People* v. *Keefer*,[8] the court said: "The defendant was indicted for an assault with intent to murder one John R. Evans, and convicted of the crime of an assault with a deadly weapon, with intent to do great bodily harm. The court instructed the jury that if a loaded gun was presented within shooting range at Wilson or Evans, or at the dog, under circumstances not justified

1 Smith *v.* State, 52 Ga. 88.

2 Hairston *v.* State, 54 Miss. 689.

3 Morgan *v.* State, 33 Ala. 413 (1859).

4 8 Tex. (App.) 329 (1880).

5 17 Nev. 361 (1883).

6 13 Tex. (App.) 1 (1882).

7 4 Tex. (App.) 417 (1878).

8 18 Cal. 636 (1861).

by the law, and under circumstances showing an abandoned and malignan heart, and that the gun was fired off and inflicted a dangerous wound upon the witness Evans, then the crime of an assault with a deadly weapon, with intent to inflict a bodily injury upon the witness Evans, has been proved; and it would only remain for them to inquire whether or not the defendant was guilty of the crime. The pertinency of this charge, as we gather from the case, was shown by proofs which conduced to prove that Keeper fired a gun in the direction of Wilson and Evans and of a dog near them, there being some dispute as to whether the intent was to kill or wound the dog or these men or one of them. It is true that a person may be convicted of murder or of an assault, though no specific intent may have existed to commit the crime of murder upon the person charged. The familiar illustration is that of a man shooting at one person and killing another. In these cases, the general malice and the unlawful act are enough to constitute the offense. No doubt exists that a man may be guilty of manslaughter under some circumstances by his mere carelessness. But this rule has no application to a statutory offense like that of which the defendant was convicted. This is an assault with a deadly weapon, with intent to do great bodily harm to another person. The offense is not constituted in any part by the battery or wounding, but is complete by the assault, the weapon and the intent—as if A. snaps a loaded pistol at B. within striking distance the offense would be no more under this clause of the statute if the shot took effect. It could scarcely be contended, if a man shot at another's dog or chicken, when such shooting would be a trespass and wholly illegal, that the trespasser was guilty of this crime of assault with intent, etc., merely from the fact the owner of the animal was near by and within range of the shot, or the shot went through his hat or clothes; and yet the reason of holding thus in that case is as great as in this. So, if a man carelessly handling bricks on the roof of a house should throw them into the street below, though he might be liable, civilly and criminally, for injury done to persons thereby, he could not be guilty of the statutory offense of assault with intent to kill. The words of the statute, 'with intent to do great bodily harm to a person,'[1] are not merely formal, but they are substantial—they constitute the very *gravamen* of the offense; and the statute, like all other penal laws, must be strictly construed. It is nothing in this view that the defendant is guilty of some crime; he must be guilty of the very crime charged, which can not be unless the elements of the crime, as defined by the Legislature, appear. This is the universal rule applicable to criminal proceedings; and it is as plainly supported by common sense as by technical law. We can not make the proposition plainer by illustration. If the defendant is convicted under this charge of the court, it would seem that he might be convicted of an assault upon a dog with a deadly weapon, with intent to do a great bodily injury to a man; or of assaulting a man with a deadly weapon with intent to do that man great bodily harm, when he had no such intention.

"We know nothing of the facts of the case, and intimate no opinion as to the merits of the controversy.

*Judgment reversed and cause remanded for a new trial*

§ 642*a*. **Assault With Intent to Murder—Assault With Intent to Kill Not.**—In *Peterson* v. *State*,[2] the prisoner had been convicted of an assault with intent

1 Woods Dig. 335.

2 12 Tex. (App) 650.

to kill. On the trial, the court in its charge to the jury, when explaining the difference between an assault with intent to murder, and an aggravated assault, used this language: "The offense, if any, would not be reduced to an aggravated assault, if you believe from the evidence that the defendant assaulted Siddie Acco with a knife, which was a deadly weapon, with intent to kill." On appeal, this was held error, the Court of Appeal saying: "The charge of the learned judge, as a whole, was a very able, clear and exhaustive embodiment of the law of the dase, but we are of the opinion that the extract above quoted is erroneous; and, having direct reference to a most material issue in the case, it would be most likely to mislead the jury to the injury of the defendant's rights. The error in the paragraph quoted is this,—it concludes with the word kill instead of the word murder. The defendant may have assaulted Siddie Acco with a knife—a deadly weapon—and with intent to kill him, and yet under circumstances which would, in case the death of Acco had ensued from the assault, have reduced the homicide to manslaughter. There exists an intention to kill in manslaughter, and therefore, notwithstanding the assault in this case may have been made with the intent to kill, that would not necessarily make it an assault with intent to murder. The intent to kill may have existed without malice, and malice is as essential in the offense of an assault with intent to murder as it is in murder itself. It is clear, therefore, that, although the jury might have believed from the evidence that the assault was made with a deadly weapon, and with intent to kill, they might still very properly acquit the defendant of the charge of assault with intent to murder and find her guilty of an aggravated assault, provided the evidence did not satisfy their minds, beyond a reasonable doubt, that the homicide, if accomplished, would have been murder. But the charge referred to instructs them plainly and positively to the contrary, and while we do not doubt but that it was an accidental mistake in the otherwise model charge of the learned judge, we think it was a most vital one to the defendant, and one which demands a reversal of the judgment."

§ 643. **Assault With Intent to Murder—Must be Intent to Kill Party Assaulted.**—An intent to kill another is not enough. In *Barcus* v. *State*,[1] the court said: "At the last term of the Circuit Court of Warren County, the plaintiff in error was indicted, tried and convicted on a charge of shooting at Sandy Mitchell with intent to kill. From the judgment against him the accused prosecuted a writ of error, and asks here a reversal of that judgment upon several grounds not essential to repeat or discuss. Upon the trial, the right of the city police to arrest vagrants, without warrant, was made a prominent point, and is again pressed in the argument in this court, but we do not think that question involved at present. There is a fatal error, however, in this case, and it is this: there is no evidence that the accused shot at Sandy Mitchell. The proof is, that he shot at Henry Creighton, and according to his own declarations subsequent to the shooting, intended to kill him. Upon this point there is no conflict in the evidence. It is positive and uncontradicted, that he shot at Henry Creighton, accidentally hitting Sandy Mitchell, an innocent bystander. The verdict is wholly unsupported by the evidence. It is true, that the jury, in response to the instruction for the State have found, in substance, that the accused shot at Sandy Mitchell with the intent to kill and murder him; but the verdict must have been through some misapprehension of

[1] 49 Miss. 17.

law or fact. There is no doubt of the rule, that a man shall be presumed to intend that which he does, or which is the natural and necessary consequence of his act; and that malice, in this class of cases, may be presumed from the character of the weapon used. If the evidence in the case at bar was limited to the mere fact of shooting and the striking of Mitchell as the result of the shot, or if the evidence as to the person intended to be killed was conflicting, we might accept the verdict as conclusive; but the record before us leaves no question or doubt. Indeed, it is conclusive that Creighton and not Mitchell was the person aimed at and designed to be hit. To sustain the indictment in this case, it was incumbent on the part of the State to prove that the accused shot at and intended to kill Mitchell, whereas the proof is that he shot at Creighton with the intent to kill him. The essential averments of the indictment are, therefore, not only not sustained, but absolutely negatived. It follows that the indictment should have charged the shooting to have been at Creighton, and the result is, the judgment must be reversed and the indictment quashed, but the accused can not be set at liberty. He will be detained in custody to await a trial under another indictment, to be drawn as herein indicated."

§ 644. —— **Assault with Intent to Murder — Spring Guns.** — One who plants spring guns with a general intent to kill trespassers, and wounds one can not be convicted of assault with intent to murder.[1]

§ 645. **Assault with Intent to Commit Manslaughter.** — There appears to be no such offense as this.[2]

§ 646. —— **Assault with Intent to Rob — Subsequent Common Assault.** — In *R.* v. *Sandys*,[3] the prisoner and another were indicted for feloniously assaulting the prosecutor with intent to rob him.

It appeared that the prisoners had met the prosecutor upon the road, and as it seemed, for a frolic, demanded his money or his life. The prosecutor recognized them, and some words passed, and the prisoners offered a shilling to make it up. They tried to thrust the shilling into the prosecutor's hand, and in doing so it fell to the ground; they then insisted on his getting off his horse to pick it up. He complied, then they struck him three times against his horse, and gave him a black eye. One of the prisoners was drunk, the other was not. On these facts being proved, WIGHTMAN, J., suggested that the transaction was more of a frolic than a felony.

*Merivale*, for the prosecution, admitted this, but contended that the prisoners might be convicted of a common assault.

*Cornish*, for the prisoners, contended that the assault proved, being subsequent to the act charged as felonious, was an after thought, a distinct transaction, and in no way connected with the original felony. Assuming that there had ever been a felonious intent, it had ceased before the assault was committed. *Watkin's Case*[4] and *Phelp's Case*[5] were cited.

WIGHTMAN, J. (after consulting PATTESON, J.). My brother Patteson is clearly of opinion with me that assuming that the assault proved was not com-

1 Simpson *v.* State, 59 Ala. 1 (1877).

2 People *v.* Lilley, *ante*, p. 783.

3 1 Cox, 8 (1844). See Robertson *v.* State, 10 Tex. (App.) 642 (1881).

4 2 Moo. C. C.

5 *Ibid.*

mitted with a felonious intent, it was not so connected with the original transaction as to be the subject of felony under this indictment. His lordship then directed the acquittal of the prisoners.

§ 647. **Aggravated Assault — "Child" — "Decrepit Person."** — Under the Texas statute an assault is aggravated when made by an "adult" on a child, or a "decrepit person." But "child" is not synonymous with "minor,"[1] and a "decrepit" person is one who is wholly disabled and helpless.[2] An "adult" means a person twenty-one years old.[3]

§ 647*a*. **Aggravated Assault — Intent and Act Essential.** — Both intent and act are necessary to an aggravated assault, like common assault.[4] In Texas an assault or battery does not become aggravated by being committed upon a woman by another woman. Nor is a man necessarily guilty of an aggravated assault and battery, simply because he agrees that one woman may commit an assault on another, whether he aids her or not.[5]

§ 648. —— **"Beating."** — Pulling a man to the grouud and holding bim while another escapes is not "beating" him.[6]

§ 649. —— **"Bodily Injury Dangerous to Life."** — This does not include a mere temporary disease resulting from exposure.[7]

§ 650. —— **"Grievous Bodily Harm."** — The fact of striking a man with the fist so as to break his jaw is not *per se* sufficient to show an intent to do grievous bodily harm.[8]

§ 651. —— **"Wounding."** — To constitute a "wounding" the skin must be broken.[9] To constitute a "wounding" there must be a separation of the whole skin; a separation of the cuticle or upper skin only is not sufficient.[10] Breaking a person's collar bone and bruising him with a hammer, the skin not being broken is not a "wounding" within the English statute.[11] This word in a statute means a wounding with some instrument. Therefore, biting off the end of a person's nose, or a joint from a person's finger is not a "wounding."[12] A wound inflicted by a party's teeth is not a "wounding;" it must be done with an instrument.[13] Throwing vitriol in a person's face is not a "wounding."[14]

§ 652. —— **Dangerous Weapon — "Deadly Weapon."** — A gun or pistol used simply to strike with is not *per se* a "deadly weapon,"[15] nor is a policeman's club a "dangerous weapon."[16]

1 McGregor *v.* State, 4 Tex. (App.) 790 (1878).

2 Hall *v.* State, 16 Tex. (App.) 6 (1884).

3 Schenault *v.* State, 10 Tex. App. 41 (1881); George *v.* State, 11 Tex. (App.) 95 (1881).

4 Fondren *v.* State, 16 Tex. (App.) 48 (1884).

5 Colquitt *v.* State, 34 Tex. 550 (1870)

6 R. Hale, 2 C. & K. 327 (1846).

7 R. *v.* Gray, D. & B. 303 (1857).

8 R. *v.* Wheeler, 1 Cox, 106 (1844).

9 R. *v.* Wood, 1 Moo. 278 (1830). As to what is not a "wounding," see R. *v.* Jones, 3 Cox, 441 (1848).

10 R. *v.* McLoughlin, 8 C. & P. 635 (1838).

11 R. *v.* Wood, 4 C. & P. 381 (1830).

12 R. *v.* Harris, 7 C. & P. 446 (1836).

13 R. *v.* Jennings, 2 Lew. 130 (1835); R. *v.* Harris, *Id.* 131 (1836).

14 R. *v.* Henshall, 2 Lew. 135 (1834); R. *v.* Murrow, 2 Lew. 136 (1835); 1 Moo. 456 (1835).

15 Shadle *v.* State, 34 Tex. 572 (1870). As to what is not an assault with a deadly weapon, see Tarpley *v.* People, 42 Ill. 340 (1866).

16 Doering *v.* State, 49 Ind. 90.

§ 653. —— **Offensive Weapon.** — A common whip is not an "offensive weapon."[1]

§ 654. —— **Sharp, Dangerous Weapon.** — A blow with the handle of a pitchfork, used like a club is not an assault with a "sharp, dangerous weapon" within the phrase in a statute.[2] A "sharp, dangerous weapon" must be both sharp and dangerous.[3]

655. **Assault with Violence — Snatching Bank-bill from Hand.** — Snatching a bank-bill from the owner's hand and thereby touching his hand, but with no intention of injuring or touching his person, is not an assault with force and violence under the Massachusett's statute.[4]

§ 656. —— **Assault — Deterring Person from Giving Evidence.** — An English statute made it a felony to make use of any force or inflict any assault to deter another from giving evidence.

In an *Anonymous Case*,[5] A. while detained in gaol as a witness against certain persons was frequently spoken to on the subject by B. and C., called a spy and informer, and told not to prosecute, and two days after was assaulted and beaten by them, no illusion being made to the subject during the assault. It was held that this was not within the statute.

§ 657. —— **Beating Person to Force Confession.** — The code of Alabama provides that "all persons to the number of two or more who abuse, whip or beat any person upon any accusation, real or pretended, or to force such person to confess himself guilty of such offense" shall be punished. In construing this statute in *Underwood* v. *State*,[6] it is said: "To make out the offense contemplated by the first part of this section it is essential that the accusation should be the moving cause of the abuse or violence. The term 'accusation' must not be confounded with the act on which it is based. It means something distinct from and independent of it. If two persons were to bring a charge against a third, and beat him upon provocation of the act complained of, that is very different from inflicting the same violence upon him, not from the provocation of the act itself, but because they believed him guilty of the accusation brought against him for the commission of it. The one is simply an act of private vengeance, while the other implies, to some extent, the usurpation of legal authority — to try and punish upon a charge — what is commonly called lynching. In the present case, if the violence used towards the prosecutor was upon the provocation that the son of one of the parties had been whipped by him, the defendant would have been guilty of an assault and battery, but not of the statutory offense; while on the other hand, if the accusation was the cause, then a conviction on the indictment would have been proper. The charge of the court was erroneous, for the reason that it did not observe the distinction we have noticed.

"*Judgment reversed and cause remanded.*"

1 R. *v.* Fletcher, 1 Cush. 27 (1742).
2 Filkins *v.* People, 69 N. Y. 101 (1877).
3 People *v.* Hickey, 11 Hun, 631 (1877); People *v.* Cavanagh, 62 How. Pr. 187 (1881).
4 Com. *v.* Ordway, 12 Cush. 270 (1853).
5 3 Cox, 187 (1848).
6 25 Ala. 70 (1854).

§ 658. **False Imprisonment — Restraint Must be Against Will.** — To constitute false imprisonment it is necessary that the restraint was against the party's will. If he consent to it, even through fraud, it is not a crime.[1]

§ 659. **False Imprisonment — Delay in Taking Bail.** — An unavoidable delay of a magistrate in taking bail for a prisoner is not a false imprisonment.[2]

[1] State *v.* Lunsford, 81 N. C. 528 (1879). Evidence held insufficient to sustain conviction in Boyd *v.* State, 11 Tex. (App.) 80 (1881).

[2] Beville *v.* State, 16 Tex. (App.) 70 (1884); Cargill *v.* State, 8 Tex. (App.) 431 (1880).

# PART III.

## RAPE.

---

### RAPE — FORCE AND VIOLENCE ESSENTIAL.

### McNAIR *v.* STATE.

[53 Ala. 453.]

*In the Supreme Court of Alabama, 1875.*

**Force is an Essential Ingredient in** the crime of rape, and a charge that if the defendant intended "to gratify his passion upon the person of the female, either by force or by surprise, and against her consent, then he is guilty as charged," is erroneous.

MANNING, J. In *Lewis* v. *State*,[1] decided in 1857, a prosecution of a negro slave for rape, or attempting to commit rape, by personating the husband of a married white woman, and so effecting, or endeavoring to effect, illicit sexual intercourse with her, this court said: —

"It is settled by a chain of adjudications, too long and unbroken to be now shaken, that force is a necessary ingredient in the crime of rape.

"The only relaxation of this rule is, that this force may be constructive.

"Under this relaxation it has been held, that where the female was an idiot, or had been rendered insensible by the use of drugs or intoxicating drinks, * * * she was incapable of consenting, and the law implied force;" in support of which propositions authorities were cited. And it was further held, that where the sexual intercourse was had with the consent of the woman, "although that consent was procured by fraudulent personation of her husband, there was neither actual nor constructive force, and such act does not amount to the crime of rape."

It is not easy to conceive of a case in which an act of this sort could be more properly said to have been accomplished by "surprise." Yet it was decided, as we have seen, that it would not amount to a rape, and further, that if unsuccessful, the offender would not be guilty of an attempt to commit rape, if he did not intend to overpower the woman by force, if necessary. (This decision led to enactments to meet such a case.)

[1] 30 Ala. 54.

The offender, in the case before us, was a youth fourteen and one-half years old the female was a girl of about the same age. She was in bed in the same room in which three or four of her sisters were also sleeping. Defendant, through a window that was nailed up, broke into and entered the room, about two hours after midnight. Being aroused by his jarring against her bed, and her foot being brought into contact with his naked person, she screamed and alarmed the household, and he escaped through the window. The indictment against him was for breaking into and entering a dwelling house with intent to commit rape, and (in a separate count) with intent to commit a felony. The breaking into and entering were clearly proved, and the court charged the jury, among other things, that if this was done "with the intent upon his part to gratify his passion upon the person of the female, either by force or by surprise, and against her consent, then he is guilty as charged" in the count alleging the intent to commit a rape.

According to the reasoning in *Lewis* v. *State*, it can not be maintained that this charge was correct. It plainly implies that the crime of rape may be committed without force, either actual or constructive; whereas, not only has it always been held that there must be force, but the short forms of indictment, in which nothing is contained that was not held to be essential, prescribed by the code of this State for that crime, and the assault with intent to commit it, expressly use the word forcibly, as neccessary in describing those offenses.[1]

The very question presented by this record has been decided in other States, in cases of greater aggravation, and in which the parties accused were negroes, and the females white persons. In *Charles* v. *State*,[2] the testimony of the principal witness, a Miss Combs, was: "That about four o'clock in the morning, she was lying asleep with four other little girls, she was awoke by some one who took hold of her by the shoulders, and tried to turn her over; that she was lying with her face toward the other girls; that he made an effort to get over her; that she threw out her hand, and discovered the person to be a man and partly undressed; that she then raised the alarm, and called for help," etc.

The judge who delivered the opinion of the court, says: "In the case of *Rex* v. *Williams*,[3] it was held that in order to find a prisoner guilty of an assault with intent to committ rape, the jury must be satisfied that the prisoner, when he laid hold of the prosecutrix, not only desired to gratify his passion upon her person, but that he intended to do so at all events, and notwithstanding any resistance on her part. In the case of *Commonwealth* v. *Fields*,[4] a free negro, which was an in-

[1] R. C. 808, 809, forms Nos. 7 and 15.
[2] 6 Eng. Ark. 389.
[3] 32 Eng. Com. L. R. 524.
[4] 4 Leigh, 648.

dictment for an attempt to ravish a white woman, the jury found a special verdict — that the prisoner did not intend to have carnal knowledge of the female, as charged in the indictment, by force, but that he intended to have such carnal knowledge of her when she was asleep, and made the attempt," etc., "but used no force except such as was incident to getting in bed with her, and stripping up her night-garment in which she was sleeping, which caused her to awake. Upon that state of facts the General Court of Virginia was of opinion that he ought to have been acquitted." And upon these authorities the Supreme Court of Arkansas held that the negro Charles could not, upon the facts in the case before them, be found guilty of an assault with intent to commit rape.

The same court, in a subsequent case[1] of a very aggravated assault by a slave upon a white woman, referring to the case of *Charles* v. *State*,[2] and commenting on the nature of the crime say: "The better authority would seem to be, that if the man accomplish his purpose by fraud, as where the woman supposed he is her husband, or obtained possession of her person by surprise, without intending to use force, it is not rape, because one of the essential ingredients of this offense is wanting. So, where force is used, but the assailant desists upon resistance being made by the woman, and not because of an interruption, it can not be said that it was his intention to commit rape."

The charge of the court in the case now before us, was not in consonance with the almost uniform current of decisions in respect to the using or purpose to use force by the accused, in accomplishing the gratification of his passion in such a case, and was, therefore, erroneous.

The judgment is reversed, and the cause remanded, but the prisoner must remain in custody until discharged by due course of law.

---

## RAPE — FORCE AND VIOLENCE ESSENTIAL — ACTS AND DEVICES NOT ENOUGH.

### PEOPLE *v.* ROYAL.

[53 Cal. 63.]

*In the Supreme Court of California, 1878.*

**Force is Essential** to the crime of rape, and acts and devices without violence by which the moral nature of the woman is corrupted, and she can not resist, will not take its place.

APPEAL from the County Court of Sonoma County.

The defendant was tried for the crime of rape, committed upon the

1 Pleasant *v.* State, 13 Ark. 360. 2 *supra.*

person of a girl sixteen years of age. He was a practicing physician at Santà Rosa, and the girl was in the habit of visiting his wife. On one occasion, at about six o'clock in the evening, the defendant drove up his buggy to the house where the girl was living, and invited her to go home with him. She assented, and during the drive the defendant practiced the "manipulation" mentioned in the opinion. Upon approaching his office, which was furnished with locks and lounges, he ceased the manipulation, assisted the girl to alight, and accompanied her upstairs in to his office, where he had carnal intercourse with her. There was no evidence of force, but the girl testified that the defendant's lewd conduct during the drive made her feel so dull and stupid as to be unconscious of the nature of the act of carnal intercourse.

The defendant was found guilty of rape, and sentenced to fifteen years' imprisonment. He moved for a new trial, which was denied, and he appealed. The other facts are stated in the opinion.

*J. B. Southard*, *E. D. Haw*, and *J. T. Campbell*, for appellant, argued that force is a necessary element of the crime of rape, and that the evidence of solicitation was inadmissible.

*Barclay Henley*, and *W. E. Turner*, for the People, argued that the mental condition of the girl was the most important element in determining the criminal character of the defendant's acts; and as his manipulation was such as to overcome her power of resistance, he was as much guilty of rape as if he had overcome her by force.

By the COURT. Against the objection of the defendant the witness Smith was permitted to testify that in his opinion as a medical man the "manipulation" of the person of the prosecutrix on the same day while driving on the public road between Healdsburg and Santa Rosa, and before she accompanied defendant to his office, may have weakened her capacity to resist when the alleged rape was committed. The effect of such "manipulation" upon females, as explained by the witness, is ordinarily "to excite their passions to such an extent as to influence their judgment and mental condition." The expert adds: "If it excited no passion or gave no pleasure, it might affect the intellect or might not — might make some angry and might frighten others. Supposing it excites no passion at all and no pleasurable emotion, it might have the effect to bewilder her."

The foregoing, and more of the same kind of testimony appearing in the record, was inadmissible. The common-law judges recognized no such refinement, but referred all improper caresses and indecent liberties to the head of solicitation. The homely sense of our ancestors distinguished without difficulty between the force which constitutes rape and the blandishments of the seducer.

If such testimony was admissible at all, the jury were authorized to

regard it as evidence which made less resistance sufficient than would in their opinion have been sufficient, but for the testimony in respect of the effect of the alleged manipulation. That the evidence may have influenced the verdict can not be disputed, and the rule requires of us to reverse a judgment when improper evidence has been admitted, unless it clearly appears that the evidence erroneously admitted could not have had any effect on the action of the jury.

That the testimony of the medical witness did influence the verdict is made to appear the more distinctly by the charge of the court. Portions of the charge suggest to the jury the theory — or at least possibility — that the will of the prosecutrix and her capacity of resistance might have been destroyed by some occult influence proceeding from defendant, that her mind might have been "bewildered" or indeed "paralyzed" by some mysterious agency, entirely disconnected from any physical violence or threat of violence. There is no pretense that any drug or noxious substance was employed to render the prosecutrix unconscious, or to produce unsoundness of mind. The portions of the charge of the court referred to if they had application to any part of the evidence, could only have been understood by the jury as having application to such testimony as that given by the witness Smith; and as an instruction that the law demands less resistance on the part of the female, when erotic passion has been aroused by the solicitation of a suitor, accompanied by improper familiarities, at a period when the amatory passion is supposed to be peculiarly active, than when no such ardent appeal or manipulation has preceded the alleged illicit intercourse.

For example, amongst other matters the court charged: —

"If from all the evidence you are satisfied that, on or about the time alleged, the defendant, by manipulation, art or device, or by other means, so bewildered or overpowered the mind and will of this girl as to render her at the time unconscious of the nature of the act of carnal intercourse, or powerless to resist it, and under these circumstances he had carnal intercourse with her, he is guilty of rape."

Such language conveys the notion distinctly that seduction may be rape; that the employment of any art or device by which the moral nature of a female is corrupted, so that she is no longer able to resist the temptation to yield to sexual desire, will render sufficient less proof of resistance than would otherwise be necessary; that consent thus obtained is no consent. The proposition entirely overthrows the established law in respect to the offense with which the defendant is charged.

Judgment and order reversed, and cause remanded for a new trial.

## RAPE—WHAT IS "ABUSE" OF CHILD UNDER TEN.

## DAWKINS *v.* STATE.

[58 Ala. 376; 29 Am. Rep. 754.]

*In the Supreme Court of Alabama, 1877.*

**In a Statute Punishing carnal knowledge or "abuse" in an attempt to have carnal knowledge, of a female child under ten years of age, the word "abuse" applies only to injuries to the genital organs in an unsuccessful attempt at rape, and does not include mere forcible or wrongful ill-usage.**

INDICTMENT for having carnal knowledge of "or abuse in the attempt to carnally know," a female child under ten years of age. There was no evidence of carnal knowledge. The court charged that "the word 'abuse' was not synonymous with the word 'injure,' but meant to 'forciby use wrongfully.'" The defendant then asked the court to charge the jury that "if the evidence failed to show that the defendant injured Cora Blackshear in the attempt to have carnal knowledge of her by bruising, cutting, lacerating, or tearing in or on some part of her person, the defendant could not be convicted of the offense charged in the indictment," which charge the court refused. The defendant was convicted.

*W. D. Roberts*, for appellant.

*J. W. A. Sanford*, Attorney-General, *contra.*

BRICKELL, C. J. The indictment in the form prescribed charges that the defendant, "did carnally know or abuse in the attempt to carnally know" a female child under the age of ten years. It is founded on the statute,[1] which reads as follows: "Any person who has carnal knowledge of any female under the age of ten years, or abuses such female in the attempt to have carnal knowledge of her, must, on conviction, be punished at the discretion of the jury, either by death or by imprisonment in the penitentiary for life, or by hard labor for the county for life." The Circuit Court was of opinion and so instructed the jury that the word abuse, as found in the statute, was not the synonym of injure, but signified to forcibly use wrongfully. The correctness of the instruction is the only matter presented for consideration.

Rape, as defined by Blackstone, is "the carnal knowledge of a woman forcibly and against her will." [2] A better definition Mr. Bishop suggests is, "rape is the having of unlawful carnal knowledge by a man of a woman, forcibly, whereby she does not consent." [3] A distinct

[1] Code of 1876, sec. 4306.

[2] 4 Black. 210.

[3] Bish. on Cr. L., sec. 1115.

offense, though punished with like severity, was the carnal knowledge and abuse of a female child under the age of ten years. Force overcoming the resistance of a woman if she was not an idiot, or subdued by fraud, or rendered unconscious by the administration of drugs, medicines, or intoxicating drinks, or other substances, was an indispensable element of the offense of rape. The consent of the woman, yielded at any time before the act of penetration was complete, relieved the offense of its felonious character. Of the latter offense, the carnal abuse of female children under ten years of age, the wrongful act involved all the force which was a necessary element of the crime, and the consent or non-consent of the child was immaterial. The English statute of 18 Elizabeth,[1] directed against the offense is substantially as follows: "That if any person shall unlawfully and carnally know and abuse any woman child under the age of ten years, every such unlawful and carnal knowledge shall be felony, and the offender thereof being duly convicted shall suffer as a felon without allowance of clergy." The present statute,[2] employs the terms "carnally know and abuse any girl under the age of ten years." [3] In this country statutes have been enacted in nearly all, if not all, of the States punishing the offense and generally describing it as in the English statute by the words, "unlawfully and carnally know and abuse any woman child under the age of ten years." Several of these statutes are to be found in 2 Wharton's American Criminal Law.[4] It is perhaps true, as suggested by Mr. Bishop, that in these statutes carnally know includes in its meaning all that is signified by the word abuse.

There can not be sexual connection between a male capable of committing rape and a female child under ten years of age without injury to the private parts of the child.[5] The statutes to which we have referred are directed against the complete offense — when there is something more than mere outward contact of the genital organs — something which may be called penetration.[6] The offense then includes of necessity physical injury to the child and it is this injury the term abuse includes, though it is included also in the words carnally know. Our statute differs from these statutes and is unlike any to which we have access. It is directed not only against the offense itself when complete, but against attempts to commit it, if in the attempt there is abuse of the child. Without any contact of the genital organs, without anything which may be called penetration, there may be injury to the child's sexual organs. It is said that often the chief injury to the child results from the use of the fingers of the male. There have been

1 ch. 7.

2 24 and 25 Vict., ch. 100, sec. 50. Bish. Stat. Cr., sec. 489.

4 sects. 1124, 1132.

5 Whart. & S. Med. Jur., sec. 432.

6 Bish. Stat. Cr. sec. 494.

cases in which, without the contact which would constitute the complete offense, bodily harm has been inflicted by cutting the private parts of the child. An injury to these parts in the attempt at carnal knowledge, is the abuse to which the statute refers, and not to forcible or wrongful ill usage, which would be an element of the offense of an assault with intent to ravish the child. Abuse is stated by Webster to be the synonym of injure, and in its largest sense signifies ill usage or improper treatment of another. Its proper signification must be ascertained by reference to the subject-matter or the context and the meaning of the words with which it is associated. In this statute intended for the punishment of deflouring female children, it must be limited in signification by the words with which it is connected referring to the same subject-matter. The instruction given by the Circuit Court would render the attempt to know carnally and abuse of the child the equivalent of an assault with intent to ravish, a distinct offense, subject to a different punishment under another statute.[1] Rape and its kindred offenses are the subject of several different statutory provisions and the punishment for each offense is distinctly described. No one of these statutes embraces the offense which is included in another. The result is the instruction of the Circuit Court is erroneous, and the judgment must be reversed and the cause remanded; the prisoner will remain in custody until discharged by due course of law.

*Reversed and remanded.*

---

## ASSAULT WITH INTENT TO COMMIT RAPE — INTENT TO ACCOMPLISH PURPOSE MUST EXIST.

## COMMONWEALTH *v.* MERRILL.

[14 Gray, 415.]

*In the Supreme Judicial Court of Massachusetts, 1860.*

**On the Trial of an Indictment** charging the defendant with an assault on his daughter with intent to commit a rape, it appeared that he uncovered her person as she was lying asleep in bed, and took indecent liberties with her person, and after she awoke endeavored to persuade her to let him have connection with her, and offered her money to induce her to do so, and lay upon her, but she wholly refused his request, and he did not effect his purpose, and, when she finally refused, desisted from his intent, and left her. *Held,* that there was no evidence of the felonious intent alleged.

Indictment for an assault with intent to commit a rape. At the trial n the Superior Court in Suffolk at August term, 1859, the district attorney introduced evidence of the following facts: —

The defendant at midnight, with a light in his hand, entered the

[1] Code of 1876, sec. 4314

room of his daughter, thirteen years of age, and went to her bed, where she was asleep in her night clothes, touched her quietly to ascertain whether she was awake, raised the clothes, and examined and applied his hand to her private parts for half an hour, desisting whenever she seemed to start or likely to wake. She then awoke and sat up in bed, put the clothes down, and said she wished he would go away. He asked her to let him have connection with, and offered her money, but she refused. He then got into the bed with his private parts exposed, laid one leg over her, and continued urging her to consent to his wishes, and took hold of her hand, and asked her to put it upon his private parts. She utterly refused his request, and told him to get off from her, to get off the bed and go down stairs or she would call her mother. He laid upon the bed for half an hour or more, and then went down stairs to his own bed. He did not take hold of her at all, or use any force, except as above stated, the girl testified further that his private parts did not touch her that night; that he tried to touch her but did not succeed. The bill of exceptions stated this evidence in greater detail, and added; "the above is a statement of all the evidence of the acts done by the defendant at the time of the alleged assault."

Russell, J., instructed the jury, among other things, as follows: "If the jury, from the evidence in the case, are satisfied, beyond a reasonable doubt, that the defendant forcibly, wantonly and indecently committed any violence upon the person of his daughter, against her will, they will convict him of an assault. If they are so satisfied that he committed such violence with intent to ravish her by force and violence, against her will, they will convict of the whole offense charged. If they have a reasonable doubt as to the intent, they may acquit of that part of the charge, and convict of assault, if they are satisfied that an assault was committed."

The jury returned a verdict of guilty of the full charge in the indictment, and the defendant alleged exceptions to these instructions.

*T. L. Wakefield*, for the defendant.

*S. H. Phillips*, Attorney-General, for the Commonwealth.

Bigelow, J. We think it entirely clear, that the evidence at the trial of this case fell far short of proving any intent by the prisoner to have carnal knowledge of the prosecutrix by force and against her will. There was ample proof of gross indecency and lewdness, and of an attempt by long continued and urgent solicitations and inducements to lead the prosecutrix to consent to the wish of the prisoner to have sexual intercourse with her. These facts would have been sufficient to warrant a jury in finding the prisoner guilty of an assault.[1] But there was an entire absence of all evidence of the use of force, there was

[1] 1 Russ. Cr. (7th Am. ed.) 752.

proof of no act of violence, no struggle, no outcry, and no attempt to restrain or confine the person of the prosecutrix, which constitute the usual, proper and essential evidence in support of a charge of an intent to accomplish a felonious purpose on the body of a female by force and against her will. The gist of the aggravated charge laid in the indictment against the prisoner was the intent to ravish.

In many cases, as in the familiar instance of a charge of breaking and entering with intent to steal, proof of the actual commission of the larceny is decisive proof of the intent with which the entry was made. The overt act leaves no room for doubt as to the felonious purpose with which the previous criminal act was perpetrated. But the case at bar is a very different one. The act itself, which if committed, would be decisive proof of the intent, was never consummated, and if it had been, would have constituted a higher crime than that charged in the indictment. The nature of the charge presupposes that the intent of the prisoner was not carried out. It is, therefore, necessary that the acts and conduct of the prisoner should be shown to be such, that there can be no reasonable doubt as to the criminal intent. If these acts and conduct are equivocal, or equally inconsistent with the absence of the felonious intent charged in the indictment, then it is clear that they are insufficient to warrant a verdict of guilty.

The facts in the present case resemble those proved in *Rex* v. *Nichol*,[1] where it was shown that a teacher took very gross and indecent liberties with a female scholar under his control, of tender years, without her consent, and it was held that he was rightly convicted of an assault, but not of an intent to ravish. So in the present case, the jury should have been instructed that there was no sufficient proof to maintain the charge against the defendant of an assault on the prosecutrix with a felonious intent to have carnal knowledge of her by force and against her will. As the case was left by the court to the jury under the instructions which were given them, they were at liberty to infer that the evidence was sufficient to warrant them in finding the defendant guilty of the aggravated charge. This, we think, was erroneous. The omission to instruct the jury in a criminal case that the evidence does not prove the offense laid in the indictment is good ground of exception. (Omitting another point.)

*Exceptions sustained.*

[1] Russ. & Ry. 130.

## ASSAULT WITH INTENT TO COMMIT RAPE — INTENT TO COMMIT RAPE MUST BE PROVED.

### Thomas v. State.

[16 Tex. (App.) 535.]

*In the Court of Appeals of Texas, 1884.*

**In Order to Sustain** a conviction for assault with intent to commit rape, the proof must show that the assault was committed with the specific intent to commit rape. No other intent will suffice. A conviction for such offense is not supported by proof that the accused assaulted a woman with the intent of having improper connection with her, without the use of force, nor without her consent.

Appeal from the District Court of Anderson. Tried below before the Hon. J. J. Perkins.

The conviction in this case was for an assault with intent to commit rape upon the person of Ida Kreig, in Anderson County, on the first day of November, 1883. The penalty imposed was a term of five years in the penitentiary.

Ida Kreig was the first witness for the State. She testified, in substance, that she was a girl thirteen years of age. On the night of November 14, 1883, at about seven or eight o'clock, the witness and Henry Carswell, a little boy about eight years old, started down town in the town of Palestine, Anderson County, to purchase some lace for the witness' sister, who was to be married on the next night. When the witness reached a point in the middle of the street about opposite a store kept by a Mrs. Nelson, the defendant approached the witness and the boy, coming out of Mrs. Nelson's store, with two bottles in his hands, resembling soda water bottles. He told witness and the boy to drink. The boy drank from one of the bottles. The witness took the other bottle in her hand, but did not drink. She gave it back to the defendant, and he put it in his pocket. The defendant took the witness' hand with his left hand when he gave her the bottle. She expected him to release her hand when she returned the bottle to him. The defendant then told the witness that he would give her ten dollars if she would "give him some." Witness refused. Defendant then pulled the witness up to him and told her that he would give her a hundred dollars if she would consent; that he was a railroad man and had plenty of money. Witness again refused, telling defendant, who was showing her money, that she did not want his money. The witness then succeeded in releasing both hands, and she and the boy ran off towards Mr. Harris' house, which stood on the street. The defendant pursued and caught the witness just as she reached Harris' fence. He pushed her up against the fence, and again proposed to pay her if she

would consent to copulation. Witness and the boy went through Harris' gate on to his gallery to escape the defendant, and saw the defendant pass on down the street. Witness saw no one at Mrs. Nelson's store, or at Harris' house, though she saw a dim light in the latter building.

Witness and the boy remained on Harris' gallery some minutes, until they thought that the defendant had gone. They looked around for him, and, not seeing him, came out and started along a road that ran diagonally through the space where the stock yards were once located. At this point the road intersected a street which led into town. When they had crossed the street and started across the stock pen, the witness looked around and saw the defendant as he rose up from the ground at the corner of Harris' fence. The defendant started in pursuit, running at his best, and the witness and the boy ran, screaming, and still pursued by the defendant, until they encountered Mr. Whittle on the road intersecting the street near Mrs. Potts'. Defendant pursued, until he came within eight or ten feet of witness, the boy and Mr. Whittle, when seeing Whittle on horseback with a gun, the defendant turned and ran in another direction. About this time, the witness' step-father, Mr. Warner, came up with a basket containing purchases, and asked what was the matter. On being told, Warner sat his basket down and ran after the defendant. Witness saw the defendant again that night. He was the same man she saw at Mrs. Nelson's store, the same man who pursued her, the same man who was now on trial. She had never seen that man before that night.

Witness did not cry out or give any alarm in the street near Mrs. Nelson's store. She saw a light in that store, but saw no person in it. She gave no alarm at Harris'. She saw no person at Harris'. She did not give any alarm until she was pursued the last time by the defendant. She gave no reason for not doing so, though she was asked by counsel. The defendant did not throw her down at Harris' fence, nor did he lift up her clothes. He only put his hand on her as she ran. The witness said that she knew what the defendant meant when he asked her to "give him some," but declined to answer how she knew.

Henry Carswell testified, for the State, that he was eight years old. Ida Kreig came to the house where the witness lived on the night of the alleged offense, and asked him to go with her to town, and the two went together. They saw the defendant in the street near Mrs. Nelson's store. He is the same man who pursued witness and Ida across the stock pen grounds.

J. C. Whittle was the next witness for the State. He testified that that he had been hunting on the day of the alleged assault, and left the duck pond, about eight miles distant from Palestine, near dusk. He

rode in quite a brisk walk until he reached the suburbs of the town when he checked up to a slow walk. Witness reached the stock pen grounds at the point where the road crossing it diagonally intersects the street which runs north and south by Mrs. Pott's residence, between eight and nine o'clock. As witness was crossing the stock pen grounds, and nearing the street last mentioned, he heard the voices of children screaming. Supposing the parties to be children at play, the witness at first paid no attention to the screaming. The voices came nearer and nearer, and sounding more like children in fright, the witness stopped his horse and turned in his saddle to see what was the matter. Ida Kreig and Henry Carswell about that time came running and screaming toward the witness who was then holding his gun muzzle up, the breach resting on his thigh. At the same time witness saw a man stop suddenly, and then run off rapidly in a northerly direction. He had approached within ten, fifteen, or twenty steps of the children. The children appeared to be very much frightened, excited and nearly out of breath. Witness asked Ida what was the matter and she replied that the man was after her. About the same time Mr. Warner, Ida's step-father, came up, and being informed of the assault, and being directed to the man who was running off, but in sight, he sat his basket on the ground, requesting the witness to stay with the children, and started in pursuit. The witness went home with the children, and there saw the defendant in charge of a policeman. The witness had never seen the defendant before that night to know him, and could not swear that he was the same man he saw running after and off from the children a short time before. The children caught up with witness about one hundred yards from where witness first heard them screaming. The witness described the topography of the stock pen grounds. Chas. Finger lived in a house about sixty feet east of Harris, and parties lived east and west of Finger. The distance between Harris' house and Nelson's store is about one hundred yards. There was a light in Nelson's store, and the door was open. Witness did not remember that he saw anybody in the store as he passed it. He did not see the children as he passed that store. If the children were in Harris' yard or on the street near the house when the witness passed, they would have been too far to witness' left to be noticed unless they made a noise. Witness heard no noise on the street and saw no other persons than the persons mentioned.

W. B. Warner was the last witness for the State. He testified that he was the step-father of Ida Kreig. He knew the defendant, C. H. Thomas. Defendant was a married man, and in November, 1883, lived near the witness. The witness heard the children screaming on the evening in question, and, thinking he recognized Ida's voice, went

rapidly to the point from whence the sounds came. He there found Ida, Henry Carswell and Mr. Whittle. Asking what was the matter, Ida told him that a man was after her, and pointed out the retreating figure of a man. Witness pursued instantly, keeping the man constantly in sight, until he overtook him after a chase of about two hundred yards. The defendant is the same identical man who was pointed out to him by Ida Kreig as the man who had pursued her. The State closed.

Lively Jowers, a colored woman, was the only person introduced by the defence. She testified that, crossing the stock pens on her way home from work, on the night in question, she heard children screaming, and turned and looked toward the point from where the screaming seemed to come. She then saw Ida Kreig and Henry Carswell running and screaming. At the same time she saw the defendant, whom she knew well, standing at the corner of Mr. Harris' fence. He did not move while the witness was looking at him. Thinking nothing was wrong, the witness started on. She walked some distance before she looked back again. When she did look back all the parties were standing just as they were when witness first saw them. Defendant was then dressed in dark clothes and hat. He had two bottles, resembling soda water bottles in his hands. It was a moonless, but bright star light night. The witness and the defendant were about two hundred yards apart.

The motion for a new trial presented, among other grounds, the issues discussed in the opinion.

*Gammage & Gregg* and *T. J. Williams*, for the appellant.

*J. H. Burts*, Assistant Attorney-General, for the State.

WILLSON, J. 1. To authorize a conviction of the offense of assault with intent to rape, it devolves upon the State to prove satisfactorily such specific intent. That particular intent, no other, will make this offense. Thus an assault with intent to have an improper connection with a woman, but without the use of force, and not without the consent of the woman, would not be an assault with intent to rape.[1]

In explaining to the jury the law of assault and assault and battery, the learned judge in one paragraph of his charge says: "Any unlawful violence upon the person of another with intent to injure such person is a battery, and where violence is actually committed upon the person of another, no matter how slight, it rests with the person inflicting the injury to show the accident or innocent intention." This portion of the charge is assigned as error, and was made a ground of defendant's motion for new trial

[1] Pefferling v. State, 40 Tex. 486; Curry v. State, 4 Tex. (App.) 574.

Whilst the paragraph is in almost the exact words of the code,[1] and in the abstract is unquestionably correct, still we think it was error to give it in this case. The burden was upon the State to show, beyond a reasonable doubt, that defendant committed the assault, and that he committed it with the specific intent of raping the person assaulted. He might have committed the assault and injury with some other intent than that of rape, and if so, certainly he could not be convicted of this offense because he failed to show that his other intention was an innocent one. Suppose he assaulted the girl with intent to persuade her to such carnal intercourse with him, but with no intent to force her to such carnal intercourse; he would not be guilty of an assault with intent to rape, and yet he would be unable to show that he committed the assault with innocent intention. This charge instructed the jury that it devolved upon the defendant to show his innocent intention. His innocent intention of what? Of persuading, or of forcing the girl to have carnal intercourse with him? Considering the charge as a whole, we understand that it only devolved upon the defendant to show his innocent intention as to the rape in order to relieve him of this charge, but we very much doubt whether the jury so understood the charge. It is quite probable, we think, that they understood it to devolve upon the defendant the burden of proving an innocent intention of committing any offense or wrong upon the girl.

But, however it may have been understood by the jury, we think it was wrong to give it, because it shifted the burden of proof from the State to the defendant upon an issue, the affirmative of which the State was bound to prove beyond a reasonable doubt. There are instances where it is proper to thus shift the burden of proof, and where it would be proper to instruct the jury in this manner; but this case does not present such an instance.[2] We think this error in the charge was calculated to mislead the jury to the prejudice of defendant's rights, and it is therefore such error as demands a reversal of the judgment. In all other respects the charge of the learned judge is a clear, forcible and correct exposition of the law of the case.

2. Considering the whole evidence as presented by the record, the case to our minds, is a singular one, if the defendant's intention was to commit rape. We think the evidence was unsatisfactory as to such being his intention. In view of the meagerness of the evidence tending to establish this specific intent, and of the alleged newly discovered evidence, we think the court should have granted defendant a new trial.

The judgment is reversed and the cause is remanded.

*Reversed and remanded.*

1 Penal Code, art. 485.

2 Jones *v.* State, 13 Tex. (App.) 1; Curry *v.* State, 4 Tex. (App.) 574.

## ASSAULT WITH INTENT TO COMMIT RAPE — NO PRESUMPTION OF INTENT.

## STATE *v.* MASSEY.

[86 N. C. 659; 41 Am. Rep. 478.]

*In the Supreme Court of North Carolina, 1882.*

**On an Indictment** for assault with intent to commit rape it appeared that the prosecutrix with a boy six years old was trundling a carriage with a baby in it. The defendant, seventy-five yards distant shouted, "Halt, I intend to ride in the carriage; if you don't halt, I'll kill you when I get hold of you." The prosecutrix ran, trundling the carriage, and the defendant pursued, telling her to stop, until she came up with another woman. *Held*, insufficient to convict of assault with intent to commit rape.

Conviction of assault with intent to commit rape. The head-note states the facts.

*Attorney-General*, for State.

*Reade, Busbee & Busbee*, for defendant.

ASHE, J. That the defendant is guilty of an assault according to the testimony of the prosecutrix, there can be no question; but we are of the opinion that the evidence in the case did not warrant the jury in convicting him of the intent charged, and that the court erred in not submitting to the jury the instruction asked by the defendant.

We think the jury should have been instructed that there was no evidence, or at least none reasonably sufficient to maintain the charge against the defendant of an assault on the witness, with a felonious intent to have carnal knowledge of her person by force and against her will. Such a charge would have been substantially that asked for by defendant. But as the case was left to the jury without any instructions, they were at liberty to infer that the evidence was sufficient to warrant them in finding the defendant guilty of the assault with intent. In this consists the error. Where a judge refuses to instruct the jury that the evidence does not prove the offense charged in the indictment, it is good ground for exception.

In order to convict a defendant on the charge of an assault with intent to commit rape, the evidence should show not only an assault, but that the defendant intended to gratify his passion on the person of the woman, and that he intended to do so at all events, notwithstanding any resistance on her part.[1]

When the act of a person may reasonably be attributed to two or more motives, the one criminal and the other not, the humanity of our

[1] Roscoe's Cr. Ev. 310; Rex *v.* Lloyd, 7 C. & P. 318; Joice *v.* State, 53 Ga. 50.

law will ascribe it to that which is not criminal. "It is neither charity, nor common sense, nor law, to infer the worst intents which the facts will admit of. The reverse is the rule of justice and law. If the facts will reasonably admit the inference of an intent, which though immoral is not criminal, we are bound to infer that intent." [1] Every man is presumed to be innocent until the contrary is proved, and it is a well established rule in criminal cases that if there is any reasonable hypothesis upon which the circumstances are consistent with the innocence of the party accused, the court should instruct the jury to acquit, for the reason the proof fails to sustain the charge. The guilt of a person is not to be inferred because the facts are consistent with his guilt, but they must be inconsistent with his innocence.

Even conceding that the defendant pursued the prosecuting witness with the intent of gratifying his lustful desires upon her, does it follow that he intended to do so "forcibly and against her will." That is an essential element of the crime charged and must be proved. It must be established by evidence that does more than raise a mere suspicion, a conjecture or possibility, for evidence which merely shows it possible for the fact in issue to be as alleged or which raises a mere conjecture that it is so, is an insufficient foundation for a verdict, and should not be left to the jury.[2]

There is no evidence in this case in our opinion from which a jury might reasonably come to the conclusion that the defendant intended to have carnal knowledge of the person of the prosecutrix, at all hazards and against her will. At most the circumstances only raised a suspicion of his purpose and therefore should not have been left to the consideration of the jury.

In the case of *Commonwealth* v. *Merrill*,[3] which was an indictment for an assault, with intent to commit rape, the court says: "The nature of the charge presupposes that the intent was not carried out. It is, therefore, necessary that the acts and conduct of the prisoner should be shown to be such that there can be no reasonable doubt as to the criminal intent. If these acts and conduct are equivocal or equally consistent with the absence of the felonious intent charged in the indictment, then it is clear that they are insufficient to warrant a verdict of guilty."

The attorney-general relied upon *Neeley's Case*. The opinion there was delivered by the late chief justice, to whose eminent abilities and learning we are always disposed to yield a becoming deference; but it was a divided court; there was a dissenting opinion filed by Mr. Jus-

1 State *v.* Neeley, 74 N. C. 425; *s. c.* 21 Am. Rep. 496, dissenting opinion.

2 Matthis *v.* Matthis, 3 Jones, 132; Sutton *v.* Madre, 2 *Id.* 320; Wittkowsky *v.* Watson, 71 N. C. 451; State *v.* Bryson, 82 *Id.* 576.

3 14 Gray, 415.

tice Rodman and concurred in by Mr. Justice Bynum, both highly distinguished for their learning and legal acumen; and after a careful consideration of the different views of the question presented by these eminent jurists, we feel constrained to differ from the majority of the court and adopt the reasoning and conclusion of the dissenting opinion as enunciating the correct principle applicable to the cause.

A *venire de novo* must, therefore, be awarded the defendant. Let this be certified.

Error. *Venire de novo.*

---

## NOTES.

§ 660. **Rape — Force and Violence Essential.** — Force and violence on the man's part must be proved,[1] arts or devices practiced on her to inflame her passion,[2] or fraud,[3] is not enough.

§ 661. —— **Penetration Must be Proved.** — Penetration must be proved. In *R.* v. *Gammon*,[4] it was held that if the hymen was not ruptured there was not sufficient penetration to constitute rape.

In *Davis* v. *State*,[5] a conviction for rape was reversed, on the ground that the proof of penetration was insufficient, the court saying: "The only question upon which the testimony left any room for dispute or ground upon which to rest an opinion was, whether the alleged offense had been completed by penetration. While the slightest penetration is sufficient, still there must be satisfactory proof of some to consummate the offense. It must be shown, says Tindal, C. J., that the private parts of the male entered, at least to some extent, those of the female. Unless this is the case, the accused may be guilty of an attempt to commit the crime of rape, but not of its actual commission.

"The proof upon this point, consisted of the evidence stating the position in which appellant and the girl, alleged to have been ravished, was found by her mother, the red and swollen condition of her private parts, and the witness' statement that she was convinced and fully satisfied from what she saw take place at the time, and also from the examination of the person of her daughter, that there had been penetration. On the other hand she testified that there was no laceration or blood that she could discover, resulting from such penetration, and a surgeon, who was examined as a witness, stated, after having made a private examination of appellant, that though there were exceptions to the rule, a man of his dimensions could not evidently or probably, penetrate a female of the age and size of the girl alleged to have been injured, without laceration. He also stated, however, if she could be so penetrated, the condition of her parts, as described by her mother, would be a natural consequence of the act.

"This reference to the testimony shows (as, we regret to say, we find of much too frequent occurrence, in cases of the greatest importance), a want of that

[1] McNair *v.* State, 53 Ala. 453.

[2] People *v.* Royal, 53 Cal. 63 (1878).

[3] *ante*, vol. III., cap. IV. "Consent."

[4] 5 C. & P. 321 (1832).

[5] 42 Tex. 226 (1875).

full and thorough development and exploration of all the facts and circumstances connected with and bearing on the case, of which it would seem to to reasonably susceptible, and such, as its vital importance evidently demands. No medical examination of the child was made, nor was the physician, who testified in the case, interrogated in reference to the symptoms described by the mother, except in the particular previously referred to. The time and circumstances under which the mother made her examination are not shown. The neighbor, to whose house she was taken immediately after the alleged act, was not examined. It does not appear whether the child's under clothing was inspected, and many other matters tending to aid in a correct conclusion, do not appear to have been adverted to, so far as we can see from the statementof facts.

"It is said by Wharton, in his work on Criminal Law, after commenting on several English cases, discussing the necessity of proof of penetration: 'The practice seems to be, to judge from the cases just cited, not to permit a conviction in these cases, in which it is alleged violence has been done, without medical proof of the fact whenever such proof was attainable. It seems but right, both in order to rectify mistakes and to supply the information necessary to convict, that the prosecutrix should be advised at the outset, so that she can take the necessary steps to secure such an examination in question. If this principle be generally insisted upon, there is no danger of any conviction failing because of non-compliance with it, and on the other hand, many mistaken prosecutions will be stopped at the outset.'[1]

"While we can not say that the necessity of a medical examination has been regarded as absolutely indispensable to a conviction in all cases by the American courts, or that we are prepared to yield our assent to so broad and unqualified a proposition as seems to be approved by this able commentator, yet we think, the great and essential importance of this character of evidence can not be denied, and especially in cases like this, when the party alleged to be injured is incapable of testifying, and the proof of penetration can be established by circumstantial testimony only, and that by no means of an absolute or conclusive character, it can hardly be overestimated.

"These considerations lead us to the conclusion—without, however, intending to intimate any opinion as to the proper conclusion which should be reached in a more full and careful consideration of the case — that in view of the vague and indefinite, and somewhat contradictory testimony on which it was tried, the absence of such instructions as would probably have enabled the jury to have given a more full and thorough consideration to the evidence applicable to the only real and vital question in the case, the nature of the offense, the circumstances under which it is alleged to have been committed, the difficulty of disproving the charge in most cases of this kind when unfounded, the extreme penalty of the law imposed by the verdict, and the humane and merciful principle of our criminal law, giving the accused the benefit of all reasonable doubt, the motion for a new trial should have been granted.

"The judgment is reversed, and the cause remanded.

*"Reversed and remanded."*

§ 662. —— **Proof of Emission.**— In Ohio it was held in *Blackburn* v. *State*,[2] that emission was a requisite, and the same has been held in North Carolina.[3]

1 sec. 1138.

2 22 Ohio St. 102 (1871). And so in incest Noble *v.* State, 22 Ohio St. 541 (1872).

3 State *v.* Gray, 8 Jones, 170.

§ 663. —— **Not Rape if Woman Consent.** — And if the woman consent, even though her consent is the result of fraud, it is not rape.[1]

§ 664. —— **Intent Must be to Effect Purpose at all Hazards.** — The prisoner must intend to effect his purpose at all events, and notwithstanding any resistance on the woman's part.[2]

§ 665. —— **Evidence Held Insufficient.** — In many cases the conviction has been reversed on the ground that the evidence did not prove the crime.[3] The most important of the cases are given in the succeeding sections.

§ 666. **Rape — Conviction Reversed for Insufficient Evidence — People v. Ardaga.** — In *People* v. *Ardaga*,[4] the prosecutrix, Delfina, was the only witness called for the People. She testified that she went from Los Angeles to Wilmington on a pleasure trip, and stopped at the house of Mannella Ruelina, and that she slept with her child, and that another bed in the same room was occupied by Frank Silver; that about twelve o'clock at night, while she was asleep, three men broke into the room and took her from the bed; that she did not awake until they had carried her to the door, when she screamed; that one of the men held a pistol pointed at her head, and threatened to kill her if she did not keep still; that they put her on horseback, and carried her in her night clothes two miles, when the four men each had intercourse with her by force; and that they then carried her back to the room. She admitted that she was living with Frank Silver, and had been living with him three years, but claimed that she had been true to him since she had lived with him. She also admitted that four persons besides herself and Silver were sleeping in the house, and that she could not say she was virtuous. She further testified that the defendants were two of the four men. The two not on trial had not been arrested. The defendants were convicted, and appealed from the judgment and from an order denying a new trial. By the Court. The defendants were convicted of rape on the uncorroborated evidence of the prosecutrix, who admitted herself to be an unchaste woman. Her story is so grossly improbable on the face of it, as to render the inference irresistible that the jury must have been under the influence of passion or prejudice. In *People* v. *Benson*,[5] the defendant was convicted of rape on the uncorroborated but positive testimony of the woman alleged to have been outraged; and in reversing the judgment and ordering a new trial, this court said that the story of the woman was "so improbable of itself as to warrant us in the belief that the verdict was more the result of prejudice or popular excitement than the calm and dispassionate conclusion upon the facts by twelve men sworn to discharge their duty faithfully. * * * A conviction upon such evidence would be a blot upon the jurisprudence of the country, and a libel upon jury trials." In *People* v. *Hamilton*,[6] which was a similar case, we arrived at the same conclusion, and reversed the judgment, observing that "the ends of justice demand that the cause shall be tried anew."

1 See *ante*, vol. III., cap. V., "Consent."

2 R. *v.* Lloyd, 7 C. & P. 318 (1836); R. *v.* Wright, 4 F. & F. 967 (1866); Irving *v.* State, 9 Tex. (App.) 66 (1880); Curry *v.* State, 4 Tex. (App.) 574 (1878); Sanford *v.* State, 12 Tex. (App.) 196 (1882).

3 Topolanck *v.* State, 40 Tex. 160 (1874); Cato *v.* State, 9 Fla. 163 (1860); People *v.* Benson, 6 Cal. 225 (1856); People *v.* Hamilton, 46 Cal. 844 (1873).

4 51 Cal. 371.

5 6 Cal. 221.

6 46 Cal. 540.

We are of the same opinion in the present case. Judgment and order reversed, and cause remanded for a new trial.

§ 667. —— **Rape — Evidence Insufficient to Convict — Christian v. Commonwealth.** — In *Christian* v. *Commonwealth*,[1] the prisoner had been convicted below of an attempt to commit a rape under the following circumstances: The prosecutrix proved that one night, about four months before the trial, she wen with the prisoner to a performance of negroes from Washington, given at the Metropolitan Hall, the prisoner paying all expenses; that after the performance was over, they started home together. On the way home, when near the Tredegar Works, the prisoner asked her an unfair question; asked her to do it; and she refused; and he laid hold of her, pushing her down on a pile of lumber, choking her, and trying to pull up her clothes; that she resisted, and that he did not accomplish his object; and after a while desisted from his effort, and she started on home, he following behind her, entreating her to yield to his wishes, but making no effort to lay hold of her again, or use any violence towards her; that she had never been married, and lived on Brown's Island, with a negro woman; herself and her two children, and the negro woman, comprising the household.

"Whether the proof is sufficient or not must depend upon the circumstances of each case; among which the character and condition of the parties may have an important bearing. Acts of the accused, which would be ample to show and produce conviction on the mind, that it was the wicked attempt and purpose to commit this infamous crime, if done in reference to a female of good and virtuous character, would be wholly insufficient to establish guilt, if they were acts done to a female of dissolute character or easy virtue. The certificate of facts in this case shows that the accused and the prosecutrix were both negroes, and had been to witness some dramatic exhibition of negroes at night, at the Metropolitan Hall, to which the prosecutrix had gone with the accused, and at his expense; and that the alleged attempt to commit the crime was against one whose virtue had been overcome on previous occasions; as she was by her own admission, the mother of two bastard children. The evidence indicates that he had used her pretty roughly, in a way that would have been horrible and a shocking outrage towards a woman of virtuous sensibilities, and should have subjected him to the severest punishment which the law would warrant. But how far it shocked the sensibilities of the prosecutrix does not appear. It by no means appears, from the facts certified, that it was an attempt to ravish her against her will; or that it was not only an attempt to work upon her passions, and overcome her virtue, which had yielded to others before, how often does not appear. But that he desisted when he could probably have accomplished his purpose, if it had been to force her, when he found her more unyielding than he perhaps expected, without any interference, or any outcry on her part, together with his after conduct, show, we think, that his conduct, though extremely reprehensible, and deserving of punishment, does not involve him in the crime which this statute was designed to punish. We are of opinion, therefore, to reverse the judgment of the Hustings Court of the City of Richmond." CHRISTIAN, STAPLES and BOULDIN, JJ., concurred in the reversal of the judgment upon the facts proved; but they thought the indictment good."

MONCURE, J., concurred in the opinion of ANDERSON, J.

*Judgment reversed.*

[1] 23 Gratt. 954 (1873).

§ 668. **Rape — Evidence Held Insufficient to Convict — People v. Hamilton.**— In *People* v. *Hamilton*,[1] the court in reversing a conviction for rape say: "The indictment charges the defendant with the crime of rape, alleged to have been committed on the person of a child under ten years of age. At the trial he was convicted of an assault with the intent to commit rape, and was sentenced to confinement in the State prison for fourteen years. He appeals from the judgment and from the order denying his motion for a new trial. It appeared in evidence, that the child on whom the assault is alleged to have been made, is a step-daughter of the defendant, and was residing on a farm, in the same house with the defendant and his wife, the mother of the child. At the time of the trial, she was under thirteen years of age, and was the only witness called to prove the accusation. She testified not only to the assault, with the intent to commit rape, but also to the complete accomplishment of the criminal intent. No witness was called to corroborate her testimony in any particular, as to time, place or circumstances, or in any respect whatever, except as to her age. The defendant, who testified in his own behalf, explicitly denied the truth of her testimony in respect to the alleged assault and the perpetration of the crime. Her version of the affair is, that the offense was accomplished in the barn, about fifty yards distant from the dwelling house; and that immediately afterward the defendant ordered her to assist her younger brother, a boy five or six years of age, to carry from the barn to the house a box of soap of the usual size; that on reaching the house with the soap she found her mother engaged in her usual household duties, but did not state to her the occurrence at the barn; and on the contrary, proceeded to assist her about her household affairs as usual; that no bleeding resulted from the assault upon her, and it does not appear that she complained of any pain or injury. She further testified that she did not inform her mother of the occurrence at the barn until about two years afterward, and she assigns as a reason for her silence that he threatened to kill her if she disclosed the facts, and that she was afraid of him. Two physicians were called, who testified that though it was not impossible for a man to have carnal knowledge of a child of such tender rears, it was in the highest degree improbable that bleeding and great bodily pain would not ensue. This is all the testimony; and on these facts we are asked to award a new trial, on the ground that the evidence was insufficient to support the verdict. The almost uniform practice of this and other appellate courts is, to refuse to disturb verdicts on this ground when there is a substantial conflict in the evidence. The rule is founded on the fact that the jury had the opportunity to observe the demeanor of the witnesses, and is, therefore, more competent than we to decide upon their credibility. The rule is a most salutary one, and one not to be lightly departed from. Nevertheless, there are exceptional cases, in which the preponderance of evidence against the verdict is so great as to produce a conviction that, in rendering it, the jury must have been under the influence of passion or prejudice. Such was the case of *People* v. *Benson*,[2] which was also a prosecution for rape on a girl thirteen years of age, who was the sole witness to prove the charge. She testified positively to the forcible commission of the act of sexual intercourse on the occasion complained of, but admitted on cross-examination, that on many previous occasions she had carnal intercourse with the defendant, and on none of them had made any outcry, though the defendant's wife was in an adjoining room; nor had she ever disclosed the facts to his wife;

[1] 46 Cal. 549 (1875).

[2] 6 Cal. 221.

assigning for a reason that she was afraid the defendant would kill her. The defence introduced evidence of the bad character of the prosecutrix for chastity, and that she had frequently expressed feelings of friendship for the defendant. On these facts the defendant was convicted, and on appeal this court said that the story of the girl was 'so improbable of itself as to warrant us in the belief that the verdict was more the result of prejucice or popular excitement than the calm and dispassionate conclusion upon the facts by twelve men sworn to discharge their duty faithfully. A conviction upon such evidence would be a blot upon the jurisprudence of the country, and a libel upon jury trials.' In some respects the present case is very similar to *People* v. *Benson*, just noticed. The charge rests upon the uncorroborated testimony of a child, who, at the time, was under ten years of age; and who not only made no outcry, but immediately went about her daily duties, as though nothing unusual had occurred, and failed for two years to disclose the facts, even to her mother. When, in addition, she admits that no flow of blood followed the alleged outrage, and it does not appear that she suffered or complained of any bodily pain, it is almost inconceivable that a jury free from passion or prejudice, would not, at least, have entertained a reasonable doubt as to the guilt of the defendant. A charge of so heinous a nature, when supported by even the slightest evidence, arouses in the public mind an intense indignation against the supposed culprit; and it is not surprising that the same feeling sometimes finds its way into the jury-box. That it did so, to some extent, in the present case is manifest from the unseemly conduct of one of the jurors, who in the progress of the trial interrupted the counsel for defence in a most improper manner, and evinced clearly that he was under the influence of passion or prejudice, or both. On the whole, we think the ends of justice demand that the cause shall be tried anew.

"Judgment reversed, and cause remanded for a new trial; *remittitur* forthwith."

§ 669. **Rape — Offense Held not Proved on the Facts — Boxley v. Commonwealth.** — In *Boxley* v. *Commonwealth*,[1] the prisoner being convicted of rape, appealed to the Supreme Court, which held the evidence insufficient to sustain the conviction, in the following opinion: 'We are of opinion that the Circuit Court erred in refusing, under all circumstances of the case, to grant the new trial.

Without recapitulating or very critically analyzing the testimony, we are compelled to say that the evidence adduced to establish the felonious act — the *corpus delicti* — is, to say the least of it, of a very doubtful and inclusive character. It consists exclusively of the statements of the person upon whom the offense is charged to have been committed, and is certified by the court as follows: 'On the ——— day of June, 1873, it being Sunday, about twelve o'clock m., Miss Martha Spencer was at the spring (which is about one hundred yards from her father's house), had filled her bucket and was sitting down on a rock at the spring; while sitting there, some one came up behind her and seized her by the shoulders, pulled her over backwards, her bonnet falling over her eyes; the person making the attack spoke to her in a low tone, and told her "not to make a noise" (a suggestion which, for some reason, she seems to have duly respected). "She screamed once" (whether in a similar tone or not does not appear); "but the bonnet was held over her mouth and ears and eyes so that she was unable to make further outcry, and could only catch a glimpse of her

[1] 24 Gratt. 655.

ravisher. Her arms were not confined, and she made an attempt to pull the bonnet away from her eyes. She was very weak and very much frightened, and notwithstanding her resistance, he accomplished his purpose and ravished her."

This is her own account of the alleged criminal act, and it is all we have directly on the subject. She proves no other violence than enough to draw her backwards by the shoulders from her seat, and to hold her bonnet over her face. Her person was examined by two physicians, and whilst they both testified that it was apparent that she had had recent sexual intercourse, they also proved that there was nothing to indicate that it had been accomplished by violence; "that no bruises were found about the face, arms or person of the prosecutrix, except a small, almost imperceptible bruise under each knee."

It was also proved that Miss Spencer was "a large, stout woman," and the accused was a medium-sized man, about twenty-three years old.

Can we say, upon such testimony, that the criminal act has been established? It would reqnire a large decree of charity and credulity to believe that at noonday, and within one hundred yards of her father's house, and within two or three hundred yards of the house of a neighbor (William Spencer), a rape was perpetrated on this large and stout woman, with both her arms perfectly free, by a medium-sized man, who neither threatened her with violence nor did anything to disable her, and who, from her own account, had the use of but one arm, the other being employed in holding her bonnet over her face whilst the act was committed; and that all this had been accomplished with no noise to alarm the families which were near; with not the slightest indication, from the appearance of the ground, that there had been a scuffle; and with no scratch or bruise on the person of the female, to show that her chastity had been violated without a struggle! Such testimony we think exceedingly weak, to say the least of it, to show that a rape had been committed at all, especially when it appears in the record that the accused, who lived at her father's house, had previously, in his kitchen, attempted to take improper liberties with Miss Spencer, which she does not appear to have disclosed or resented.

But conceding the rape to be established, the evidence to connect the accused with the act is yet more doubtful and unsatisfactory. Although the accused had resided at her father's house for a year or two previous to the occurrence, and was, of course well known to the witness -- voice features, gestures and person, — yet she does not swear to his identity. He spoke to her with his face very near to hers, yet she does not say that she recognized his voice. She says she only caught a "glimpse of the lower part of his face," and only saw his back "at a distance of about fifty or a hundred yards, running away." What she was doing from the time he left her person until he reached the distance of fifty or one hundred yards, does not appear; yet when she did see him, she seems to have been perfectly cool and collected, for she can tell that he wore a dirty shirt and a black felt hat. She says that, from the glimpse she had of his face, and the sight she had of his back as he ran away, she believed it was the prisoner. And this was all the evidence of identity, except the evidence of William Spencer, who lived about two or three hundred yards from the home of the prosecutrix. He proves that he saw, on what day and at what hour does not appear, a man whom he took to be Wilson Boxley, walking very rapidly along the road leading from Bannister Spencer's, and now and then looking backwards. He called to him and asked, "What's your hurry?" but received no answer. He was one hundred yards off, and witness was not sure it was Boxley.

"The man he saw wore a white chip hat," not a black felt hat, as proved by Miss Spencer to have been worn by the person who assailed her.

It was further proved that the accused lived about two miles from the home of Miss Spencer, and that he remained at his work as usual for three or four days after the occurrence at the spring, when he was charged with this offense by the brothers of Miss Spencer, and beaten by them. He then went to the court house and caused a warrant to be issued against them; and it was not not until after these proceedings that the present prosecution was commenced. We think the evidence wholly insufficient to identify the prisoner as the guilty party. Were this not so, the evidence, to say the most of it, leaves the question of identity extremely doubtful, and, under the circumstances, the verdict of the jury should have been set aside, and a new trial awarded, to allow the accused the privilege of introducing the testimony set forth in his own affidavit and that of Dr. Melvin, of which he was evidently deprived by surprise.

Dr. Melvin's testimony, as set forth in his affidavit, would still further have weakened the testimony on the question of identity. He was the committing magistrate, and the testimony of Miss Spencer, as detailed by him, is materially variant from her testimony in court; and the facts set forth in the prisoner's affidavit satisfactorily explain his failure to have Dr. Melvin before the court. Under all the circumstances, this court is of opinion that the circuit court erred in refusing to set aside the verdict and to award the prisoner a new trial.

§ 670. "Abuse" of Child. — In a statute punishing the "abuse" of a child, the word "abuse" is restricted to injury of the genital organs.[1]

§ 671. **Assault with Intent to Commit Rape — Intent to Commit Rape must be Proved.** — The evidence must show an intent to commit rape — that is to say that the prisoner intended to accomplish his purpose at all hazards and to use force and violence to do so.[2]

Where the prisoner uses force at first but desists on the woman's resisting, this is not an assault with intent to commit rape.[3]

Thus to assault a woman with intent to persuade her to have intercourse with him, but with no intent to force her to it, is not assault with intent to commit rape.[4]

In *Commonwealth* v. *Fields*,[5] the prisoner, a negro, was indicted for attempt to rape a white woman. The jury found "he intended only to have carnal knowledge of her while she was asleep; that he made the attempt to do so, but used no force except such as was incident to getting in bed with her and stripping up her night garment in which she was sleeping, and which caused her to awake." The court held that this was not an attempt to commit a rape.

In *Thompson* v. *State*,[6] the defendant entered the room of a domestic at night; was seen to come in by herself and by a little girl who slept with her. He put his hand on her when she pulled up the bedclothes, being too frightened to scream, and the defendant immediately left the room. In another bed in the same room three little girls slept, and in a room across the hall the

1 Dawkins v. State, 58 Ala. 376 (1877).

2 Com. v. Merrell, 14 Gray, 415 (1860); Pefferling v. State, 40 Tex. 493 (1874); Rhodes v. State, 1 Cold. 351 (1860); State v. Priestly 74 Mo. 24 (1881).

3 Pleasant v. State, 13 Ark. 372 (1853); Charles v. State, 11 Ark. 390 (1850).

4 Thomas v. State, 16 Tex. (App.) 539 (1884). And see Peterson v. State, 14 Tex. (App.) 162 (1883).

5 4 Leigh, 468 (1832).

6 43 Tex. 583 (1875).

rest of the family. A conviction of assault with intent to commit rape was reversed by the Supreme Court. "The evidence," said MOORE, J., "shows an unwarranted liberty with the person of a female of a gross, wanton and outrageous character, well calculated to arouse the strongest feelings of shame mortification and indignation which was therefore, unquestionably an aggravated assault on her. But the manner, time, place and circumstances under which the assault was committed, however wanton and unjustifiable, were not such as justifies the presumption that it was with the intent to accomplish the purpose for which he may have entered the room, without consent and by means of force. To support the verdict it is necessary that it should appear that the intent with which the assault was made went to this extent. The improbability that he could suppose that he would be able to accomplish a design when the slightest outcry would have defeated it, renders it quite improbable that this was his intention. But it is not sufficient to support the verdict that this possibly may have been the purpose and intent with which he made the assault. The burthen was upon the State to show beyond reasonable doubt that such was the fact, and as this was not done the motion for a new trial should have been granted."

§ 672. **Assault with Intent to Commit Rape — Evidence not Sufficient — Saddler v. State — Sanford v. State.** — In *Saddler* v. *State*,[1] the opinion of the court was delivered by WINKLER, J., as follows: The appellant was charged by the indictment with an assault with intent to ravish and carnally know one certain female whose name is set out in the indictment, "by force and without her consent."

The person upon whom the assault is alleged to have been committed was the only witness who testified at the trial. Her testimony, after stating that she was a widow and living with her son, and identifying the defendant, in reference to the charge said: "My son was not at home on the night of the 13th July, 1881; there was no one there with me that night except my little grand child, about five or six years old. The defendant knew my son was away from home that night. I slept under an arbor that night, and some time during the night the defendant woke me up by pulling up my clothes, and when I looked up he was standing by my bed. I told him to leave and he stepped back a foot or two and stopped and looked back at me, and said he would leave when he pleased. I ordered him three times to leave, and he walked off muttering something I could not understand. The moon was shining brightly and I recognized the defendant Dick Saddler. I know him well."

It must be conceded that agreeably to this testimony the conduct of the defendant was highly improper, and perhaps sufficient to subject him to a conviction for an aggravated assault; but, however reprehensible his conduct, we are constrained to say that the testimony utterly fails to show any attempt on his part to employ any force whatever in the accomplishment of his purpose, whatever that may have been.

When rape is intended to be accomplished by force, the force must be such as might reasonably be supposed sufficient to overcome resistance, taking into consideration the relative strength of the parties and other circumstances of the case.[2] An assault with intent to commit any other offense is constituted by the existence of the facts which bring the offense within the definition of an

1 12 Tex. (App.) 194 (1882).

2 Penal Code, art. 529.

assault, coupled with an intention to commit such other offense, as maiming, murder, rape or robbery.[1] It was perhaps a delicate subject for the trial judge to deal with under the circumstances, but inasmuch as he refused a new trial on the evidence, which is wholly insufficient to support the verdict, rather than the case stand as a precedent this court can not do otherwise than reverse the judgment and remand the case for a new trial.

*Reversed and remanded.*

In *Sanford* v. *State*,[2] it was held that a conviction for an assault with intent to commit a rape by force is not warranted by proof that the defendant, against the will of the female, indecently fondled her person with the intent to induce her thereby to submit to his embrace. It must appear that has intent was to accomplish his purpose by force and against her will. And the evidence was held insufficient to sustain a conviction for an assault with intent to commit a rape by force.

The indictment charged that the appellant, an adult male, did, on December 24, 1881, make an assault on Zona Bean, "a female girl," and did beat, wound and ill-treat her, with intent, against her will and without her consent, to rape and carnally know her. The jury found the appellant guilty as charged in the indictment, and assessed his punishment at confinement in the penitentiary for a term of five years.

Zona Bean, for the State, testified that she was twelve years of age, and lived with her mother in the town of Longview, in a house situated about twelve feet from a public highway. There was no fence around the house, and there were several occupied houses close by; the nearest one being about twenty feet distant. Early in the day alleged in the indictment, witness' mother went down town, leaving witness and two other children at the house. About eleven o'clock, and while witness was standing at the looking-glass, combing her hair, the defendant came to the house and asked witness to come and sit in his lap. She told him she would not, and then he took her by the arm, pulled her on the lounge, put his hand under her clothes and felt of her naked knee. Witness got up, and was again pulled down by the defendant, who offered her fifty cents, then a dollar, and then a dollar and a half. She refused his offers, and then he put her on the bed and placed his heart to hers. While in this position her clothes were down and he made no attempt to raise them, nor did he unbutton his pants or expose his person. His hands were over her shoulders and resting on the bed. When witness got up from the bed she immediately went out of the house and stood at a fence which enclosed a negro's cabin, about twenty feet distant. Defendant, when she had left the house, soon came and tried to get her back into the house. He offered her a dollar, but she refused to go. He returned to the house and came back two or three times to the witness, and tried to get her into the house again. She continued to refuse, and remained at the fence until her mother came home, which was between eleven and twelve o'clock. When her mother came, witness told her in defendant' presence what he had been doing. He denied it and said it was not so, but witness' mother told him he had better leave; and he said all right and did leave. Defendant had been boarding with them for about a month. The night preceding the defendant's attempt on the witness, she sat in his lap until her mother told her to get up.

S. Camp, for the State, testified that he lived close by the house in which Zona Bean lived, and about noon of the day alleged in the indictment he saw Zona out in the yard crying, and observed the defendant go to her and offer her

[1] Penal Code, art. 506.

[2] 12 Tex. (App.) 196 (1882).

a dollar to go back into the house. She did not go, and the defendant left her and went into the house. People were almost constantly passing by the house along the public road.

Mrs. Bean, the mother of Zona, testified for the State, and corroborated such of the latter's statements as related to what passed after the witness returned home on the day in question.

The defence introduced no evidence.

WINKLER, J. The indictment charges the appellant with an assault with intent to rape one Zona Bean, who is alleged to be a female girl.

The judge who presided at the trial gave to the jury, among other instructions, the following: "To constitute an assault to commit rape in this case, the purpose and intent must have been to have carnal knowledge of Zona Bean by force. If his intent was to try to accomplish his purpose by coarse, vulgar familiarity, and the same produced shame and disgust, but force to have carnal knowledge was not used or intended, the offense would be an aggravated assault and battery." This was substantially a correct charge and applicable to the facts testified to on the trial. A charge similar in character, though couched in language somewhat variant, was asked by the defendant and refuse by the court.

The fourth ground in the motion for a new trial is as follows: "Because the verdict was contrary to the evidence, there being no testimony elicited upon the trial of this cause tending to show that any force was used upon the part of this defendant in attempting to commit the crime with which he is charged in the indictment." The court overruled the motion for a new trial. The testimony was not sufficient to show an assault with intent to commit rape, as charged in the indictment. The court erred in refusing a new trial on the fourth ground of the motion, and for this error the judgment must be reversed and a new trial awarded. Other errors complained of need not be noticed for the reason that they are not likely to occur on another trial.

For the error herein set out, the judgment will be reversed and the cause remanded.

*Reversed and remanded.*

§ 673. **Assault with Intent to Commit Rape — Evidence Held Insufficient — House v. State.** — In *House* v. *State*,[1] WHITE, P. J., said: Our statute declares that 'if any person shall assault a woman with intent to commit the offense of rape, he shall be punishable by confinement in the penitentiary not less than two nor more than seven years.'[2] Succinctly given, the evidence in the case before us may be stated as follows: On the morning of the 23d of February, A. D. 1880, Miss Maggie Coulter, the assaulted female, a white woman, was washing clothes in the wash-room of a Mr. Sturgeon, at whose house she lived, and at about half-past five o'clock a. m. she went out into the yard to get a bucket of water. Just as she dipped up the water and turned around, she saw a negro man standing at the corner of the kitchen, which was in the same building with the wash-room, the witness' bed-room being between the two rooms. There were lights in the kitchen and wash-room. As the negro man advanced from where she first saw him, towards witness, he passed across the light from the kitchen door, which was open. Witness recognized him, and knew it was Nathan House, the appellant, whom she knew well, he having

[1] 9 Tex. (App.) 53 (1880).

[2] Penal Code, art. 503.

worked at the same place where she staid for some time. Defendant came straight towards her, until he got up close enough to take hold of her, when he reached out both hands as though he would take her in his arms. She screamed aloud, and threw up the bucket, and ran into the house. Defendant then passed out of the gate. Defendant did not put his hands on her, and he said nothing at all during the occurrence. It was ascertained that the window of the wash-room had been raised, and a stick placed under the sash to hold it up, by some one, before the meeting of the parties, as we have just detailed it. In brief, this is the evidence for the State. For the defence an *alibi* was attempted to be proven. Admit that the facts above stated for the prosecution were true, is the offense of an assault with intent to commit rape made out with that degree of certainty which precludes the possibility that such motive and purpose may not have actuated the conduct of defendant? We think not. The cases of *Thompson* v. *State*,[1] and *Curry* v. *State*,[2] present much stronger inculpatory circumstances, and yet, upon appeal, were both reversed, because the facts were not sufficient and a new trial should have been granted.

The judgment is reversed and the cause remanded.

*Reversed and remanded.*

§ 674 **Evidence Insufficient to Show Intent — Dissenting Opinion in State v. Neely.** — In *State* v. *Neely*,[3] on an indictment for assault with intent to commit rape, the evidence was as follows: The prosecutrix, a white woman, having parted from a companion, started to go home alone through the woods. She heard the respondent, a negro, call out to her to "stop," and saw him running after her about seventy yards away. She began to run as hard as she could, and was pursued by the respondent, who called to her to stop three times, and was catching up with her. He pursued her about a quarter of a mile through the woods, when seeing a dwelling house near by, turned back and ran off. A majority of the court, PEARSON, C. J., delivering a remarkable opinion,[4] held that there was sufficient evidence to support the indictment.

[1] 43 Tex. 583.

[2] 4 Tex. (App.) 574.

[3] 74 N. C. 425.

[4] PEARSON, C. J. "A majority of the court are of the opinion that there was evidence to be left to the jury as to the intent charged. For my own part I think the evidence plenary, and had I been on the jury would not have hesitated one moment. I see a chicken cock drop his wings and take after a hen; my experience and observation assure me that his purpose is sexual intercourse; no other evidence is needed. Whether the cock supposes that the hen is running by female instinct to increase the estimate of her favor and excite passion, or whether the cock intends to carry his purpose by force and against her will, is a question about which there may be some doubt; as for instance, if she is a setting hen and "makes fight," not merely amorous resistance. There may be evidence from experience and observation of the nature of the animals, and of male and female instincts, fit to be left to the jury upon all of the circumstances and surroundings of the case. Was the pursuit made with the expectation that he would be gratified voluntarily, or was it made with the intent to have his will against her will and by force? Upon this case of the cock and the hen, can any one seriously insist that a jury has no right to call to their assistance their own experience and observation of the nature of animals and of male and female instincts. Again: I see a dog in hot pursuit of a rabbit; my experience and observation assure me that the intent of the dog is to kill the rabbit; no doubt about it, and yet according to the argument of the prisoner's counsel, there is no evidence of the intent. In our case, when the woman leaves the railroad and starts for her home, and is unaccompanied, to pass through woodland for one-fourth of a mile, a negro man calls her to stop; he is at the distance of seventy-five yards; she with female instinct from the tone of his voice, looks and sees his purpose, and runs as fast as she can through the woodland and makes the head of the lane in sight of the house before

RODMAN, J., delivered the following dissenting opinion which was concurred in by BYNUM, J., and which is undoubtedly the law.[1] "In the opinion of the court as delivered by the Chief Justice, the argument is that because from certain actions of certain brute animals, a certain intent would be inferred, a like intent must be inferred against the prisoner from like acts. It seems to me that the illustrations are not in point even if that method of reasoning be allowable at all. The chicken cock in the case supposed has no intent of violence. He expects acquiescence, and knows he could not succeed without it, and besides he is dealing with his lawful wife. But the method of reasoning is misleading and objectionable on principle. It assumes that the prisoner is a a brute, or so like a brute that it is safe to reason from the one to the other; that he is governed by brutish, and in his case, vicious passions, unrestrained by reason or a moral sense. This assumption is unreasonable and unjust. The prisoner is a man, and until conviction at least, he must be presumed to have the passions of a man, and also the reason and moral sense of a man, to act as a restraint in their unlawful gratification. Otherwise he would be *non compos mentis*, and not amenable to law. He is entitled to be tried as a man, and to have his acts and intents inquired into and decided upon, by the principles which govern human conduct, and not brutish conduct. Assume as the opinion of the court does, that the inquiry as to his intent is to be conducted upon an analogy from the intents of brutes, you treat him worse than a brute, because what would not be vicious or criminal in a brute is vicious and criminal in him, being a man. When you assume him to be a brute, you assume him to be one of vicious propensities. If that be true, what need of court and jury? The prisoner is not only *feræ naturæ* but *caput lupinum* whom any one may destroy without legal ceremony. The evidence of the prisoner's intent is circumstantial; the circumstances being the pursuit and its abandonment when he got in sight of White's house. It is the admitted rule in such cases that if there be any reasonable hypothesis upon which the circumstances are consistent with the prisoner's innocence, the judge should direct an acquittal, for in such cases there is no positive proof of guilt. The particular criminal intent charged must be proven. It will not do to prove that the prisoner had that intent or

he is able to catch her; he pursues to the end of the lane, and then flees and attempts to escape in the woods. It is said in the ingenious argument of the counsel of the prisoner, his intent may have been to kill the woman, or to rob her of her shawl or her money, and if the jury can not decide for which of these intents he pursued her, they ought to find a verdict for the defendant. The fallacy of this argument is, I conceive, in this: it excludes all the knowledge which we acquire from experience and observation as to the nature of man. This is the corner stone on which the institution of trial by jury rests. To say that a jury are not at liberty to refer to their experience and observation, when a negro man, under the circumstances of this case, pursues a white woman, starting at, say seventy-five yards and gaining on her, and being near when she gets in sight of the house, when he stops and flees into the woods, is, as it seems to me to take from a trial by jury all of its recommendations. Our case particularly called for the observation and experience of the jurors as practical men. The prisoner had some intent when he pursued the woman. There is no evidence tending to show that his intent was to kill her or to rob her, so that the intent must have been to have sexual intercourse, and the jury considering that he was a negro, and considering the hasty flight of the woman, and the prisoner stopping and running into the woods when he got in sight of the house, and the instinct of nature as between male and female, and the repugnance of a white woman to the embraces of a negro, had some evidence to find that the intent was to commit a rape."

1 The opinion of the majority of the court has been since overruled by the same court, Chief Justice PEARSON having subsequently died. State *v.* Massey, *ante*, p. 895

some other, although the other may have been criminal; and especially if the other, although immoral, was not criminal. In *Rex* v. *Lloyd*,[1] it was held by Patteson, J., 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 passions on the prosecutrix, but that he intended to do so at all events and notwithstanding any resistance on her part.[2] It is not proof of guilt, merely, that the facts are consistent with guilt; they must be inconsistent with innocence. It is neither charity nor common sense, nor law, to infer the worst intent which the facts will admit of. The reverse is the rule of justice and law. If the facts will reasonably admit the inference of an intent, which though immoral is not criminal, we are bound to infer that intent.

"In the present case, may not the intent of the prisoner have been merely to solicit the woman, and to desist, if she resisted his solicitations? Or may it not be that he had not anticipated resistance, and would desist in case it occurred? Either hypothesis will do, and either is consistent with every fact in evidence; with the pursuit and with its abandonment, when the prisoner apprehended discovery. There is absolutely no evidence that the prisoner had formed the in tent charged, viz.: to know the woman in spite of resistance and at all hazards.

"We are told in the Sacred Book that "whoso looketh on a woman to lust after her hath committed adultery in his heart;" adultery, not rape. In the minds of men there is a wide space between the immoral intent to seduce a woman, and the criminal intent to ravish her. It is at this point that the inference drawn from the assumed identity of civilized men, with brutes, is most misleading and unfair. A man may perhaps be easily led by his passions to form the immoral intent to solicit a woman, and to attempt to execute it. But, as a reasoning being, he will pause before he forms the intent, and attempts to execute it, to commit so hideous and penal a crime as rape; one so certain of detection and punishment. The moral sense which every man has, in a greater or less degree, and the terrors of the law, come in to hold him back from the determination to commit the crime, and to make him take a period for deliberation, which, in the absence of evidence to the contrary, it must be presumed he availed himself of. Whereas, in the brute, there are no such restraints, as the gratification of his passions is neither a sin nor crime. Surely the same rules of evidence can not apply to beings so different and acting under different moral and legal responsibilities.

"The difference in color between the prosecutrix and the prisoner, although it would aggravate the guilt upon the prisoner upon conviction, can not justly affect the rules of evidence, by which his guilt is inquired into. These must be the same for all classes and conditions of men.

"It seems to me that the decision of the court is a departure from what I had supposed to be a firmly established rule of evidence for the protection of innocence."

§ 675. —— **Penetration Proved.** — On an indictment for assault with intent to commit rape if penetration is proved, the prisoner can not be convicted.[3]

§ 676. —— **Intoxication of Prisoner.** — It may be shown in defence that at the time the prisoner's physical system was greatly weakened by drink — as rendering him incapable of committing the crime.[4]

[1] 7 C. & P. 318 (32 E. C. L. R. 523).
[2] Roscoe Cr. Ev. 811.
[3] R. v. Nicholls, 2 Cox, 181 (1847).
[4] Nugent v. State, 18 Ala. 521) 1850). And see *ante*, Vol. II., p. 678.

# PART IV.

## HOMICIDE.

### HOMICIDE — NEW-BORN INFANT — INDEPENDENT LIFE.

### STATE *v.* WINTHROP.

[43 Iowa, 519.]

*In the Supreme Court of Iowa, 1876.*

**An Infant Although Fully Delivered,** can not be considered in law a human being and the subject of homicide until life, independent of the mother, exists; and the life of the infant is not independent, in the eye of the law, until an independent circulation has become established.

Indictment for murder. Conviction of manslaughter.

ADAMS, J. The defendant is a physician, was employed by one Roxia Clayton to attend her in child-birth. The child died. The defendant is charged with producing its death. Evidence was introduced by the State tending to show that the child, previous to its death, respired and had an independent circulation. Evidence was introduced by the defendant tending to disprove such facts.

The defendant asked the court to give the following instruction: "To constitute a human being, in the view of the law, the child mentioned in the indictment must have been fully born, and born alive, having an independent circulation and existence separate from the mother, but it is immaterial whether the umbilical cord which connects it with its mother be severed or not."

The court refused to give this instruction, and gave the following:—

"If the child is fully delivered from the body of the mother, while the after-birth is not, and the two are connected by the umbilical cord, and the child has independent life, no matter whether it has breathed or not, or an independent circulation has been established or not, it is a human being, on which the crime of murder may be perpetrated."

The giving of this instruction, and the refusal to instruct as asked, are assigned as error.

The court below seems to have assumed that a child may have independent life without respiration and independant circulation. The idea

of the court seems to have been that the life which the child lives between the time of its birth and the time of the establishment of respiration and independent circulation is an independent life; yet, the position taken by the attorney-general, in his argument in behalf of the State, is fundamentally different. He says: "It will probably not be contended that independent life can exist without independent circulation, and hence the existence of the former necessarily presumes the existence of the latter, and so other and further proof is unnecessary." He further says: "The instruction complained of amounts to nothing more than the statement that, if the child had an independent life, then it was not necessary to establish those facts upon which the existence of life necessarily depends." If such was the meaning of the court below, the language used to expess it was very unfortunate. The court said that, if the child had independent life, it is no matter whether an independent circulation had been established or not. The attorney-general says that if the child had independent life, it had independent circulation, of course. But whether we take the one view or the other, we think the instruction was wrong. We will consider first the view that independent life and independent circulation necessarily co-exist, and examine the instruction as though that were conceded.

It follows that, where a child is born alive, and the umbilical cord is not severed, and independent circulation has not been established, independent life is impossible, and the instruction amounts to this, that if the jury should find independent life, under such circumstances, although it would be impossible, they might find the killing of the child to be murder. Such an instruction could serve no valuable purpose, and would necessarily involve the jury in confusion. It would do worse than that — it would tell the jury in effect that they might find independence of life in utter disregard of the conditions in which alone it could exist. To show how the defendant was prejudiced, if the instruction is to be viewed in this light, we may say that there was evidence that the *ductus arteriosus* was not closed. This evidence tended to show, slightly at least, that independent circulation had not been established. The instruction told the jury, by implication, that they might disregard this evidence. But we feel compelled to say that we do not think that the attorney-general's interpretation of the instruction ever occurred to the court below. It is plain to see that the court below meant that independent life is not conditioned upon independent circulation. The error, if there was one, consisted in assuming that it was not. The question presented for our determination is by no means free from difficulty. Can the child have an independent life, while its circulation is still dependent on the mother? There are two senses in which the word independence may be used. There is actual independ-

ence, and there is potential independence. A child is actually independent of its father when it is earning its own living; it is potentially independent when it is capable of earning its own living.

We think the court below used the word independent in the latter sense. While the blood of the child circulates through the *placenta*, it is renovated through the lungs of the mother. In such sense it breathes through the lungs of the mother.[1] It has no occasion, during that period, to breathe through its own lungs. But when the resource of its mother's lungs is denied it, then arises the exigency of establishing independent respiration and independent circulation. Children, it seems, oftentimes do not breathe immediately upon being born, but if the umbilical cord is severed, they must then breathe or die. Cases are recorded, it is true, where a child has been wholly severed from the mother, and respiration has not apparently been established until after the lapse of several minutes of time. During that time it must have had circulation and the circulation was independent. Whether it had appreciable respiration, or was in the condition of a person holding his breath, is a question not necessary to be considered for the determination of this case. It is sufficient to say, that while the circulation of the child is still dependent, its connection with the mother may be suddenly severed by artificial means, and the child not necessarily die. This is proven by what is called the Cæsarean operation. A live child is cut out of a dead mother and survives. Such a child has a potential independence antecedent to its actual independence. So a child which has been born, but has not breathed, and is connected with the mother by the umbilical cord, may have the power to establish a new life upon its own resources, antecedent to its exercise. According to the opinion of the court below, the killing of the child at that time may be murder. It is true, that after a child is born, it can no longer be called a *fœtus*, according to the ordinary meaning of that word. Beck says, however, in his Medical Jurisprudence:[2] "It must be evident that when a child is born alive, but has not yet respired, its condition is precisely like that of the *fœtus in utero*. It lives merely because the *fœtal* circulation is still going on. In this case none of the organs undergo any change." Casper says, in his Forensic Medicine,[3] "In *foro* the term 'life' must be regarded as perfectly synonymous with 'respiration.' Life means respiration. Not to have breathed is not to have lived."

While, as we have seen, life has been maintained independent of the mother, without appreciable respiration, the quotations above made indicate how radical the difference is regarded between *fœtel* life and the

1 Whart. & S. Med. Jur. vol. 2, sec. 128.

2 vol. 1, sec. 498.

3 vol. 3, sec. 33.

new life which succeeds upon the establishment of respiration and independent circulation. If we turn from the treatise on Medical Jurisprudence to the reported decisions, we find this difference, which is so emphasized in the former, made in the latter the practical test for determining when a child becomes a human being in such a sense as to become the subject of homicide. In *Rex* v. *Enoch*,[1] Mr. Justice J. Parke, said: "The child might have breathed before it was born, but its having breathed is not sufficiently life to make the killing of the child murder. There must have been an independent circulation in the child, or the child can not be considered as alive for this purpose."

In *Regina* v. *Trilloe*,[2] Erskine, J., in charging the jury, said: "If you are satisfied that this child had been wholly produced from the body of the prisoner alive, and that the prisoner willfully and of malice aforethought strangled the child after it had been so produced, and while it was alive, and while it had independent circulation of its own, I am of the opinion that the charge is made out against the prisoner." [3] It may be asked why, if there is a possibility of independent life, the killing of such a child might not be murder. The answer is, that there is no way of proving that such possibility existed if actual independence was never established. Any verdict based upon such finding would be the result of conjecture.

*Judgment reversed.*

---

MURDER—INFANTICIDE—CHILD MUST BE BORN—DELIBERATION.

## Wallace *v.* State.

[7 Tex. (App.) 570.]

*In the Court of Appeals of Texas, 1880.*

1. **If a Woman with a Sedate** and deliberate mind, before or after the birth of her child, formed the design to take its life, and after the parturition was complete and the child born alive and in existence, she executed her design and took its life, it was murder with express malice and in the first degree. But if the design to take the life of her child was formed and executed when her mind, by physical or mental anguish, was incapable of cool reflection, and when she had not the ability to consider and contemplate the consequences of the fatal deed, and she conceived and perpetrated it under a sudden, rash impulse after the child had been wholly produced from her body and while it had existence, the crime was murder in the second degree.
2. **If in a Case of this Character** the jury might have concluded from the evidence that the defendant took her infant's life before its birth was complete, or that she caused its death by means which she used merely to assist her delivery, it was incumbent on the court to instruct for acquittal in the event the jury should so find.

Appeal from the District Court of McLennan. Tried below before the Hon. L. C. Alexander.

1 5 C. & P. 539.

2 1 C. & M. 650.

3 See, also, Greenl. on Ev., vol. III., sect. 136.

The indictment charged that the appellant, on March 21, 1879, and immediately after the birth of her female infant, strangled it to death by tying a string around its throat.

About sunset on the day prior to the infanticide, the defendant, a negress, came to the house of Cæsar Williams, a negro who lived about six miles south of Waco in McLennan County. Neither he nor his wife knew the defendant, but she was given a bed and stayed all night with them. The indications of her pregnant condition were observed. The next morning she got up and left the house, but returned in about half an hour, joined the family at breakfast, and afterwards went with her hostess to the cow-pen. After remaining there a little while, and complaining that she was sick, she went down to a branch about a hundred yards from the house. Cæsar's wife returned to the house from the cow-pen, and in about half an hour observed the defendant's head above the brush and bushes near the branch. About eight o'clock the same morning she was seen on her way to her mother's, some four or five miles distant.

The next day Cæsar's wife and another negro woman found the corpse of a new-born infant near the branch where the defendant was seen the preceding morning. A domestic string was wound twice around its neck and tied in a hard knot behind. The child was full-sized, with developed limbs and nails and a full head of hair. Near by was found an apron worn by the defendant when she came to Cæsar's.

A physician who at the instance of the coroner made an examination of the corpse described the indications upon which he based his professional opinion that the child had been born alive and that it was strangled to death by the string, which he said was tight enough to have strangled a grown person. He observed no swelling of the face or head. Another physician, testifying for the defence, said that the signs of strangulation were swelling of the head and face, and that an absence of these signs would indicate that some other cause than strangulation occasioned the death. He further stated that there is no test enabling a medical expert to affirm that a dead infant had or had not been born alive. The utmost ascertainable from *post mortem* observation is that the lungs had been distended with air either before or after birth, and by either a natural or an artificial process.

C. Stubblefield, for the defence, testified that, about a week before the child was found, the defendant, who had been in his employ, informed him that he would have to get another servant, as she was pregnant and would soon be confined, and wanted to go to her mother's for that purpose. He further testified that he was aroused by the defendant before day on the 19th of March, who took him to her room,

where another negro woman also slept. This other negress was subject to fits, and was in great pain, going through all manner of contortions. Witness quieted her and returned to his bed, but was soon awakened by cries of the defendant. Going again to her room, he found her greatly excited, and engaged in a violent struggle with the other woman, who was in another fit. The defendant was greatly frightened, and was exerting every effort to get loose from the grasp of the other woman. Witness finally released her, and she ran out of the door and fell down a flight of four steps to the ground. She left his employ the same evening. She had never attempted to conceal her pregnancy from him.

The jury found the defendant guilty of murder in the second degree, and assessed five years in the penitentiary.

*Williams & Inge*, for the appellant.

*Thomas Ball*, Assistant Attorney-General, for the State.

Clark, J. If the defendant, with a sedate and deliberate mind, anterior or subsequent to the act of parturition, conceived the design to take the life of her new-born infant, and in pursuance of such formed design did take its life in the manner alleged in the indictment, and such infant was wholly produced from the body of its mother alive, and was in existence by actual birth at the time the injuries causing death were inflicted, then she would be guilty of murder with express malice. If, however, the design to take its life was formed and executed when her mind, by reason of physical or mental anguish, was incapable of cool reflection, and she was not sufficiently self-possessed to consider and contemplate the consequences about to be done, but, yielding to a sudden, rash impulse, she conceived and perpetrated the fatal deed after the infant had been wholly produced from her body and had an existence by actual birth, then she was guilty of murder in the second degree.

We can not say that the charge of the learned judge who presided on the trial below submitted these issues with that accuracy which usually characterizes his instructions; nor do we feel an assurance that the jury may not have been misled by the general terms employed in defining the ingredients especially of murder in the second degree. Abstractly considered, the definition may not be inaccurate in ordinary cases, but in this case the better practice would have been to have submitted that issue substantially as above indicated. In this particular case, it is not well conceived how any legal provocation, excuse or justification could arise, if the defendant strangled her own child after birth; and the instruction was practically tantamount to an announcement that the defendant was guilty of murder in the second degree if she voluntarily and intentionally killed the child by the manner and means alleged.

We are also of opinion that the charge is materially defective in another respect. The issue of strangulation before birth was not submitted to the jury. It is true that among other definitions the jury were told that "in order that a child be in existence by actual birth, the parturition must be complete, and the body of the child must be expelled from the mother, and it must be alive; so that the destruction of vitality in a child before it is completely born is not murder, under whatever circumstances committed." But after applying the law to the particular case with reference to murder in the two degrees, it was incumbent upon the court to do likewise with reference to that phase of of the evidence which might tend to the exoneration of the defendant. Presented in the form of an abstract proposition, it was not brought to the attention of the jury with that distinctness which the law demands. If they believed from the evidenee that the defendant took the life of the deceased, by the means and in the manner alleged, yet the same was done before the child was completely born, or if they believed from the evidence that the means used, and which resulted in death, were merely for the purpose of assisting delivery, in either event they should acquit.

The instructions asked on circumstantial evidence should also have been given.[1]

The judgment is reversed and the cause remanded.

*Reversed and remanded.*

---

## MURDER — DEATH MUST BE THE RESULT OF ACT — TIME.

## PEOPLE *v.* ARO.

[6 Cal. 208.]

*In the Supreme Court of California, 1856.*

1. **To Constitute Murder**, the death must be the result of the prisoner's act, and must take place within the time provided by law.
2. **An Indictment for Murder**, charging that the accused, on or about a certain day, did willfully, feloniously and with malice aforethought, kill, murder and put to death a certain person, with a pistol and knife, without specifying further the facts and the manner, is bad.
3. **Murder a Conclusion of Law.** — Murder is a conclusion of law drawn from certain facts.
4. **In an Indictment for Murder**, the time of the death must be stated, so that it can be legally considered the consequence of the felony charged.

Appeal from the District Court of the Fourteenth Judicial District, County of Plumas.

[1] Harrison *v.* State, 6 Tex. (App.) 42; Hunt *v.* State, 7 Tex. (App.) 212.

The defendant was tried and convicted of murder, on the following indictment: —

"Jacinto Aro is accused by this indictment of the crime of murder a felony committed as follows: The said Jacinto Aro did, on or about the second day of November, A. D. 1854, and before the finding of this indictment, at or near a place formerly known as the Rock River House, in said county of Plumas, with a Colt's pistol and dirk-knife, willfully, feloniously and with malice aforethought, kill, murder and do to death one (name unknown) a Chinaman, against the form of the statute made and provided, and against the peace and dignity of the State of California."

Defendant appealed.

*Cole & Whiting*, for appellant.

*Wm. T. Wallace*, Attorney-General, for the State.

The opinion of the court was delivered by Mr. Chief Justice MURRAY. Mr. Justice TERRY concurred.

The record in this case comes before us in such a loose and imperfect manner that we are unable to consider many of the errors assigned by the prisoner's counsel. There is no statement, or bill of exceptions, properly authenticated, and the attempted appeal upon the merits is characterized by an ignorance of the former rulings of this court, and a recklessness of human life reprehensible in the extreme.

There is, however, one point arising upon the judgment roll, which fully justifies a reversal, and an arrest of what might otherwise properly be considered a judicial murder. It has been erroneously supposed by many of the profession, that the adoption of our criminal code of procedure worked an entire abolition of all the rules which the wisdom of the common law had thrown around criminal proceedings for the safety of the citizen, and that the only defence against a prosecution is to be found in the statute. Such, I apprehend, was never the intention of the Legislature; the main object to be obtained by them was the simplification of practice and pleading in criminal cases, by removing the rubbish and unmeaning technicalities resorted to, and invented by the judges in England to shield the accused against the rigor of punishment, which, though sanctioned by law, was relaxed by the humanity of the bench, and which, so far from accomplishing the end proposed, was found to defeat justice by permitting the escape of the guilty rather than protecting the innocent. It was against these, the age and reason of their employment having long since passed away, that the statute was mainly directed, leaving those rules which were founded in principle to a great extent unchanged.

There is little or no difference between the requirements of an indict-

ment at common law, and under our statute, except in the manner of stating the matter necessary to be contained.

The indictment in this case charges the accused with the crime of murder "committed with a Colt's revolver and bowie-knife," but contained no description of the offense, or statement that the deceased came to his death by the wounds inflicted, or the day of his death.

Murder is a conclusion drawn by the law from certain facts, and in order to determine whether it has been committed, it is necessary that the facts should be stated with convenient certainty: "for this purpose the charge must contain a certain description of the crime of which the defendant is accused, and a statement of the facts by which it is constituted, so as to identify the accusation, lest the grand jury should find a bill for one offense and the defendant be put on his trial in chief for another." This is necessary, so that the prisoner may know of what crime he is accused, and have time to prepare for his defence on the facts. It is also necessary that the jury may be warranted in their finding, the court in its judgment, and the prisoner be protected against any subsequent prosecution for the same offense.[1]

The necessity of a statement of the facts and circumstances constituting the offense still exists, and is directly recognized by the two hundred and thirty-seventh section of the statute, which provides that the indictment shall contain "a statement of the acts constituting the offense," etc., as well as the precedent given in the statute which points out how such facts shall be charged. In this particular, at least, it may be safely said that our statute has not altered the common law; and no one, I apprehend, would maintain, that under the old system of practice, either in England or the United States, the allegation of a legal conclusion, instead of the facts which are predicate of a conclusion, ever has been held sufficient. In addition to these views it has already been stated the day of the death is not laid, which ought to have been done, that the court could be informed whether such death occurred in the time provided by law, so that it might be legally considered as the consequence of the assault or felony charged.

For these reasons the judgment is reversed and the cause remanded, with directions to the court below to hold the prisoner in custody until a new indictment can be found.

[1] 1 Chitty Cr. L. 170; Willis v. People, 1 Scam. 401.

## MURDER — TIME OF COMMITTAL — WHEN FATAL BLOW IS STRUCK.

## PEOPLE *v.* GILL.

[6 Cal. 637.]

*In the Supreme Court of California, 1856.*

1. **The Crime of Murder** is committed not on the day when the victim dies, but on the day on which his injury was received.
2. **Where an Act is Passed Between** the time of the commission of the act and the death of the victim, defining the offense, and providing for its punishment, and providing that upon trials for crimes committed previous to its enactment, the party shall be tried by the laws in force at the time of the commission of the crime, the prisoner must be tried under the law in force when the violation of the law was committed.

Appeal from the District Court of the Sixth Judicial District.

The defendant was indicted for the crime of murder, charged to have been committed March 22, 1856. The case was tried September 8, 1856. The jury found a verdict of guilty of murder in the second degree. Defendant moved for a new trial, which was overruled, and defendant appealed.

*Bowie* and *Griffith*, for appellant.

This is an indictment for murder, charged to have been committed by the appellant, on the 22d day of March, A. D. 1856, upon the person of one Allen McClory. Upon the trial the jury found a verdict of guilty of murder in the second degree.

The crime, if committed, was committed on the 22d of March, A. D. 1856, when no such crime as murder in the second degree was known to the land. The act defining and providing for the punishment of this offense was not passed until April 16, 1856, — long after the act charged in the indictment is alleged to have been done. That act specially provides that upon all trials for crimes committed previous to its passage, they shall be tried by the laws in force at the time of their commission.[1]

This trial, then, was had under a law that had no existence; the jury found their verdict under a misapprehension of the law; the trial itself is a nullity, as also is the verdict.

*William T. Wallace*, Attorney-General, for the People.

The prisoner is charged with the crime of murder, committed on the 22d day of March, 1856. The evidence shows that the killing took place on that day. As the law then stood he was guilty of murder, or of voluntary manslaughter; if the latter, he might be imprisoned three years.[2]

But on the 19th of April last the law was amended.[3] Murder is

1 See Stats. 1856, p. 221, sec. 106.
2 See Comp. Laws, pp. 640, 641.
3 Stats. 1856, p. 220.

divided into murder of the first and second degrees — the former is punishable by death, the latter by imprisonment, which may extend to life. Manslaughter is made punishable by imprisonment for ten years.

The jury found the prisoner guilty of "murder in the second degree," and the court sentenced him to ten years' imprisonment. When the deed was done there was no such offense as murder in the second degree — and the state of the law was such that, if guilty, the prisoner must either have been executed or imprisoned not exceeding three years. Under such circumstances, I do not think that the conviction can be sustained. The act of April 19, when applied to this case, becomes *ex post facto*.

Mr. Chief Justice MURRAY delivered the opinion of the court. Mr. Justice TERRY concurred.

The prisoner was indicted for murder, charged to have been committed on the 22d day of March, 1856, and was found "guilty of the crime of murder in the second degree."

At the time of the killing, charged in the indictment, there was no such crime known to the law as murder in the second degree, and the party could only have been convicted of murder or manslaughter.

The act defining the offense of which the prisoner is found guilty was not passed until the 16th of April, 1856, and provides that, upon trials for crimes committed previous to its passage, the party shall be tried by the laws in force at the time of the commission of such crime.

It is supposed, however, that this case presents an exception to the rule thus established. The blow was given before, but the death ensued after, the passage of the last statute. The death must be made to relate back to the unlawful act which occasioned it, and as the party died in consequence of wounds received on a particular day, the day on which the act was committed, and not the one on which the result of the act was determined, is the day on which the murder is properly to be charged.

Besides this, although it is not absolutely necessary to state the precise day on which the killing took place, still a conviction in a case like the present, where the party was called upon, by the indictment, to answer an offense under one statute, and was found guilty under another, would be bad, and ought to be arrested on motion.

The judgment is reversed, and the court below directed to re-try the prisoner for murder.

## HOMICIDE — EFFECT OF ERRONEOUS TREATMENT OF WOUND CAUSING DEATH.

## PARSONS v. STATE.

[21 Ala. 300.]

*In the Supreme Court of Alabama.*

1. **If a Wound is Inflicted** not dangerous in itself, and the death which ensues was evidently occasioned by the grossly erroneous treatment of it, the original author will not be accountable. But if the wound was mortal or dangerous, the person who inflicted it cannot sheler himself under the plea of erroneous treatment.
2. **The Evidence was Conflicting**, as to whether the deceased came to his death from the effects of a wound inflicted by the prisoner, or from the improper treatment of it by the attending physician in sewing it up. The prisoner's counsel requested the court to charge that if the wound was not mortal, and it clearly appeared that the deceased came to his death from the erroneous treatment, and not from the wound, they must acquit the prisoner. This charge the court gave, with this qualification, "that if the ill treatment relied on, was the sewing up of the wound, the defendant would not be excused if otherwise guilty." *Held*, that the qualification was erroneous.

Error to the Circuit Court of Dallas. Tried before the Hon. E. PICKENS.

The facts sufficiently appear from the opinion of the court.

*W. M. Murphy*, for the plaintiff in error.

*M. A. Baldwin*, Attorney-General, *contra*.

GOLDTHWAITE, J. The prisoner was indicted for the murder of one Mayo. On the trial of the case below, the evidence was conflicting as to whether the deceased came to his death from a wound inflicted by the defendant, or from the improper treatment which was resorted to by the attending physicians, the wound not being considered a mortal one. It was what is termed a "punctured wound" and the improper treatment which was relied on was, the bringing of its edges together, and sewing it with stitches. The court, upon this evidence, was requested by the counsel for the prisoner to charge, "that if the wound was not mortal, but by ill treatment or unwholesome application the said Mayo died, if it clearly appears that this treatment, and not the wound was the cause of his death, the defendant should be acquited." This charge the court gave, but with the addition, "that if the ill treatment relied upon, was the sewing up of the wound with stitches or other compresses, that the defendant would not be excused if otherwise guilty," and this addition or qualification of the charge is relied upon as the ground of reversal. We all agree that, ordinarily, if a wound is inflicted, not dangerous in itself, and the death was evidently occasioned by grossly erroneous treatment, the original author will not be account-

able.[1] The charge given by the court below asserts the general proposition that if the wound was not mortal, and the death properly to be attributed to the treatment, the prisoner should be acquitted, but the qualification a majority of the court hold to be erroneous, for the reason that it made an improper exception to the rule stated in the charge. In other words, they understand the charge as a whole to assert the proposition, that while the prisoner might be excused by the erroneous treatment of the attending physician, yet, if such treatment consisted in the sewing up of the wound, he would be held accountable; thus excluding from the operation of the rule the actual case which the evidence tended to establish. I can not agree with this construction, and while I admit the charge is wanting in precision and fulness of expression, I think it states the law correctly.

The evidence being conflicting as to the cause of the death, and doubtful as to the character of the wound, these were matters proper for the determination of the jury; and if the death was the natural consequence of the wound, or the wound was mortal, the defendant was answerable; and, as I understand the charge, it asserted simply this proposition. The erroneous treatment which was relied on consisted in the sewing up of the wound, instead of having it open; and the presiding judge, after laying down the general rule, went on to inform the jury, that if the defendant relied on the particular treatment resorted to, the sewing up of the wound, it would not operate to excuse him, if, without reference to such treatment, he was guilty; or in his own language, "if otherwise guilty." The construction placed by a majority of the court upon the qualification, gives no effect whatever to the words I have quoted, and strike out of the charge the limitation which qualifies the entire sentence. Regarding the legal proposition asserted by the charge as correct, yet as its tendency may have been to mislead the jury, in a case of this character, I concur in the reversal on that ground.

Let the judgment be reversed, and the cause remanded; the prisoner to remain in custody until discharged by law.

[1] 1 Hale's P. C. 428; 1 East C. L. 344, sec. 113.

## HOMICIDE—INDEPENDENT ACT OF THIRD PERSON INTERVENING.

### STATE v. SCATES.

[5 Jones (N. C.), 420.]

*In the Supreme Court of North Carolina, 1858.*

**Where a Judge charged the jury that if one person inflicts a mortal wound, and before the assailed person dies, another person kills him by an independent act, the former is guilty of murder, it was *held* to be error.**

Indictment for murder tried before SAUNDERS, J., at the Spring Term, 1858, of Cleveland Superior Court. The charge was for the murder of a small child of the age of about two years, by burning and by a blow. The deceased was the child of the prisoner's wife, born previously to his marriage with her, and it was proved by one Ettress that the prisoner's mother was greatly displeased at the marriage, and told the prisoner that, if he did not put the child out of way, she would; that the prisoner was a weak-minded man, but considered as perfectly sane. This witness saw the child a few days after he was burnt, and that there was no mark, then, on the forehead, but he saw such a mark some days before its death. The burning took place about the first of March, and the child died about the first of April.

Dr. Hill saw the deceased about twenty hours after it was burnt. He dissected the burnt parts, and found the injuries very extensive, the arms, back and thighs were roasted,—crisped like a piece of leather. He stated that there was a wound in the forehead, as if from a blow; he was fully satisfied the burning in itself was fatal, and must have produced death, but he "doubted as to the immediate cause of death—thought it was produced by the blow."

He explained on cross-examination that he thought the burning the primary cause of the death, but that it was probably hastened by the wound on the head.

The court charged the jury that the confessions of the prisoner had been received by the court, but it was for the jury to say whether they were made, and if made, how far they were true; that as to the cause of the death, it was for them to say whether it had been produced by the burning, or other means, and that if produced by the burning, they should be satisfied that the burning was the act of the prisoner; "and even should they share in the doubt expressed by the doctor, that the blow had caused its immediate death, yet if satisfied that the burning was the primary cause of the death, and the blow only hastered it, it would be their duty to convict."

Verdict, guilty. Judgment and appeal by the defendant.

*Attorney-General*, for the State.

*Gaither*, for the defendant.

BATTLE, J. (omitting a ruling as to confessions). Upon the other point in the case, we are decidedly of opinion that the prisoner is entitled to a new trial. As to the cause of the death of the deceased, his Honor charged the jury that if they "should share in the doubt expressed by the doctor, that the blow had caused the immediate death, yet, if satisfied that the burning was the primary cause of the death, and the blow only hastened it, it would be their duty to convict." This instruction was given upon the supposition that the blow was inflicted by another person, and the proposition could be true only when the testimony connected the acts of such person with the prisoner, so as to make them both guilty, and we at first thought such was the proper construction to be put upon the language used by his Honor; but, upon reflection, we are satisfied that a broader proposition was laid down, to wit: that if the prisoner inflicted a mortal wound, of which the deceased must surely die, and then another person, having no connection with him, struck the child a blow, which merely hastened its death, the prisoner would still be guilty. The testimony presented a view of the case to which the proposition was applicable, and it becomes our duty to decide whether it can be sustained upon any recognized principles of law. Murder is the killing with malice prepense, a reasonable being, within the peace of the State. The act of killing, and the guilty intent, must concur to constitute the offense. An attempt, only, to kill with the most diabolical intent, may be moral, but can not be legal murder. If one man inflicts a mortal wound, of which the victim is languishing, and then a second kills the deceased by an independent act, we can not imagine how the first can be said to have killed him, without involving the absurdity of saying that the deceased was killed twice. In such a case, the two persons could not be indicted as joint murderers, because there was no understanding, or connection between them. It is certain that the second person could be convicted of murder, if he killed with malice aforethought, and to convict the first would be assuming that he had killed the same person at another time. Such a proposition can not be sustained.

The prisoner must have a new trial. This renders it unnecessary for us to consider the effect of the alleged erroneous entry of the verdict.

*Judgment reversed.*

## HOMICIDE — CAUSE OF DEATH — IMPROPER TREATMENT OR NEGLECT CONTRIBUTING THERETO — MALICE NOT IMPLIED.

## MORGAN *v.* STATE.

[16 Tex. (App.) 593.]

*In the Court of Appeals of Texas, 1884.*

1. **Implied Malice — Malice not Presumed.** — On a trial for murder the jury were instructed as follows: "Implied malice is an inference or conclusion of law upon certain facts found by the jury. Thus the law implies malice from the unlawful killing of a human being, unless the circumstances make it evident that the killing was either justifiable, or, if not justifiable, was so mitigated as to reduce the offense below murder in the second degree." *Held,* error.
2. **Cause of Death — Improper Treatment Contributing to Death — Texas Statute.** — The Texas code enacts: "The destruction of life must be complete by such act, agency, procurement or omission; but, although the injury which caused death might not, under other circumstances, have proved fatal, yet if such injury be the cause of death, without its appearing that there has been any gross neglect or manifestly improper treatment of the person injured, it is homicide." *Held,* that if the injury be such that death is not a certain result — if it be such that human aid and skill may prevent its fatal termination — then it is such an injury as comes within the meaning of the words quoted. But if the injury be such that no human aid or skill could prevent its fatal termination, then the injury is not such as comes within the meaning of the words.
3. **At Common Law, the Neglect or Improper Treatment** must produce the death in order to exonerate the person who inflicted the original injury. Under the statute it is not necessary that the neglect or improper treatment shall contribute in any degree to the death, but if there be gross neglect or manifestly improper treatment, either in preventing or in aiding the fatal effects of the injury, the death of the injured person is not homicide by the party who inflicted the original injury.
4. **"Gross Neglect and Improper Treatment,"** as construed by the majority of the court, are held to mean, not only such as produce the destruction of human life, but as well such as allow, suffer or permit the destruction of life.

APPEAL from the District Court of Travis County.

*Walton & Hill* and *Sheeks & Sneed*, for the appellant.

*J. H. Burts*, Assistant Attorney-General, for the State.

HURT, J. The appellant in this case was convicted of murder in the second degree. A reversal of the judgment is sought on three grounds: —

1. Error in the admission of certain evidence.
2. Defects in the charge of the court in two particulars.
3. Error in refusing charges requested by the defendant.

First ground. The witness Cummings, M. D., stated that he believed that the wound in the temple, and not that inflicted by the trephining operation, killed the deceased. He was then asked by the State's counsel if this conclusion was concurred in by the other physicians present, viz.: Taylor, Wooten, Given, Johnson and Gasser. To this question the defendant objected, because the desired evidence was heresay. The objection was overruled, and the witness answered that

the opinion which he had given as to the cause of the death was concurred in and agreed to by the other physicians before named at the time of the *post mortem* examination.

We are of the opinion that the objection of the defendant should have been sustained. This evidence was clearly heresay, and not admissible. But, as all of these physicians were examined as witnesses, and testified that, in their opinion, the wound in the temple, and not the trephining operation, caused the death of the deceased, certainly no injury appears to have been done the defendant by its introduction.

Second. Error in the charge in the first particular, viz.: that in the ninth subdivision of the charge implied malice is explained as follows: "Implied malice is an inference or conclusion of law upon certain facts found by the jury. Thus the law implies malice from the unlawful killing of a human being, unless the circumstances make it evident that the killing was either justifiable, or, if not justifiable, was so mitigated as to reduce the offense below murder in the second degree."

The proposition contained in this charge is simply this: That when an unlawful killing is shown, the homicide is presumed by law to be upon malice, and in order to meet and overcome this legal presumption, the evidence — circumstances — must make it evident that the killing was justifiable, or so mitigated as to reduce the offense below murder in the second degree. The appellant objected at the time to this charge. Is it obnoxious to the objection urged to it in the appellant's brief? Does this charge shift the burden of proof? We think not. Does it infringe the doctrine of reasonable doubt? We are of the opinion that it does, and this is so, and is susceptible of the clearest demonstration.

Let us illustrate: A. is charged, and is on trial for, the murder of B. The State proved that A. unlawfully killed B., and here closed. A. adduces evidence and circumstances tending to justify or reduce the homicide below murder. Must his justification be evident? Or must the evidence and circumstances render evident the fact that the homicide was not malice, but was manslaughter or negligent homicide? Suppose that neither justification, manslaughter, nor negligent homicide is by the evidence made evident; but suppose the evidence adduced by the State or the defendant which tends to support justification, manslaughter or negligent homicide is sufficient to raise a reasonable doubt of the existence of malice, sufficient to warrant the jury in calling in question this legal presumption. Should the jury find malice and convict of murder? Evidently they should not. A preponderance of evidence in support of circumstances which tend to justify or reduce is not required, the correct proposition being that the State must prove malice, and that if there be a reasonable doubt of its existence, either

from the evidence or from any evidenee, whether adduced by the State or by the defendant, he can not be legally convicted of homicide upon malice.

Let us view this subject in another light. An indictment for murder charges at least three distinct offenses; while it charges others, three will suffice for the present purpose, to wit, murder in the first degree, murder in the second degree, and manslaughter. Now, the defendant is notified and called upon to answer each of these offenses. And the State, under these charges, can and must prove one of these charges, beyond a reasonable doubt, to be entitled to a conviction. These charges, or one of them, viz., murder in the first degree, murder in the second degree, and manslaughter, though contained in the same indictment, and though the trial may be upon all at the same time, must be established by the same character of proof—proved in the same manner—as if the trial was upon an indictment which charged but one. And in order to convict of the highest, viz., murder in the first degree, the burden is upon the State to show that the homicide was committed under such circumstances as to constitute murder of the first degree. And so with murder of the second degree; proof must be made that the killing was upon malice, and this must be shown beyond a reasonable doubt. Just what facts will make such proof we are not now discussing.

To entitle the State to a verdict of murder in the second degree, she must prove that the defendant took the life of the deceased, and that the homicide was prompted by a wicked and depraved heart, void of social duty and fatally bent on mischief, that is, by malice. These facts are established by proof of the existence of the facts and by proof of the absence of facts.

Again let us illustrate: A. is upon trial for the murder of B. The State finds that A. shot and killed B. This would be a very remarkable case if the evidence were to step here—such a case as will never arise if prosecuted with the slightest attention, and hence we will not discuss such a case. But suppose that a witness were to swear that he saw B. standing on the street, and that A. drew his pistol, and while B. was standing on the street, A. shot and killed him; and here the evidence closed. This being the case, all of the case, very evidently A. would be guilty of homicide upon malice, for he who would shoot down a human being under these circumstances, certainly would be prompted by a wicked and depraved heart, a heart void of social duty and fatally bent upon mischief. But suppose B. had been breathing out deadly threats against A., of which he had been informed, and that just before he shot, B. did some act showing an intent to execute his threats? Here we find an issue for the jury, viz.: was the homicide upon malice

or in self-defence? and if there should be a reasonable doubt of the malice, A. should be given the benefit of this doubt and acquitted of homicide upon malice. We could illustrate with reference to manslaughter and negligent homicide, in fact, to all offenses embraced in murder, but deem the above sufficient.

We are of the opinion that the charge was erroneous, and, as it was excepted to at the time, we are also of the opinion that it contained such error as requires the reversal of the judgment.

But is urged that in *Sharp* v. *State*,[1] this precise charge was, by the court, held sufficient. In this case it does not appear that the attention of this court was called to the word "evident." In regard to this charge the learned judge (Winkler) says that it sufficiently informed the jury as to what facts and circumstances would justify them in descending from the first degree and convicting of murder in the second degree, if, indeed the defendant was entitled to a charge on that grade of offense under the proofs adduced. But if it was the intention of this court to hold that the word "evident" was properly used, and that in fact justification, or the reduction of the offense to manslaughter, etc., must be made evident by the evidence, then that case is overruled.

But again it is urged by the State that as the court charged the jury that if they had a reasonable doubt of the defendant's guilt of murder of the second degree they must acquit, that therefore the error above noticed was rendered harmless. These charges are in direct conflict, and as defendant objected at the time, and as we can not say that the jury was not misled by the erroneous charge, we feel constrained to reverse the judgment.

The next ground of complaint to the charge is in reference to the twelfth and thirteenth subdivisions of the charge. On the nineteenth day of January, 1883, the deceased was stabbed with a pocket knife in the left temple. When struck with the knife the deceased fell to the ground, and, upon examination was found in a comatose state, in which condition he remained up to his death, which was on the twenty-fifth day of January, 1883. On the twentieth day of January the surgeons performed the trephining operation, taking from the back part of the head two pieces of the skull.

The autopsy disclosed that the knife had entered through the skull and penetrated the brain about two and a half inches, in an inward, backward and slightly upward direction. Along the track of this wound in the temple it was suppurated. A triangular piece of skull, size and shape about one inch from the base to the apex of the triangle, was

[1] 6 Tex. (App.) 650

driven into the brain. There is no reason for doubt that the wound inflicted in the temple by the defendant produced the death of the deceased; all of the surgeons agree to this. Two of the surgeons, however, on the twentieth of January, mistaking an irregularity, a congenital malformation of the skull, for a fracture, operated by trephining, and two pieces of skull were taken from the back part of the head. To the wound in the temple nothing whatever was done except to bandage and keep it cool, when by proper treatment the piece of bone could have been removed, and a chance given the deceased to recover. That there is evidence in this record tending strongly to show that there was gross negligence and manifestly improper treatment of the deceased can not be denied and must be conceded.

Under the above facts — all of the facts relating to the different wounds, their character and the negligence and their improper treatment — what instructions should be given to the jury by the trial judge? The appellant complains of the charges of the court touching this matter. What, therefore, did his honor below charge?

"3. Homicide is the destruction of the life of a human being by the act, agency, procurement or culpable omission of another.

"4. The destruction of life must be complete by such act, agency, procurement or omission; but, although the injury which caused death might not under other circumstances have proved fatal, yet if such injury be the cause of death, without its appearing that there has been any gross neglect or manifestly improper treatment of the person injured, it is homicide.

"5. The neglect or improper treatment referred to has reference to the acts of some person other than he who inflicts the first injury, as the physician, nurse or other attendant.

"12. If the jury find from the testimony that the defendant, at the time and place as alleged in the indictment, with a knife did inflict the wound in the head of the said Joseph Henderson, as charged, and they further find from the testimony that there has been gross neglect or manifestly improper treatment of said Henderson, by any one or more of the physicians attending him, between the infliction of the wound and his death, which improper treatment or neglect, if any, caused the death of said Henderson, then the jury can not find the defendant guilty of taking the life of Henderson. And if the jury so find from the testimony, then they will find the defendant not guilty. If the wound (if shown by the testimony), inflicted by the defendant upon Henderson was not in itself mortal, and Henderson died in consequence of improper treatment by his physicians, and not of the wound, then the jury will find the defendant not guilty.

"13. If the testimony should show that the wound, as alleged, was

inflicted by the defendant upon the head of the deceased, and that on a subsequent day, and before the death of said Henderson, the physicians, in mistake as to the nature of the injury, operated upon the back part of the head of the deceased, and in so operating inflicted injuries to the head and brain of the deceased, and that the death of the said Henderson occurred on January 24, from the joint effect of said wounds inflicted by defendant and by the physicians, then the jury must be satisfied from the testimony that the wound inflicted by the defendant was clearly a sufficient cause of the death without the concurrence of that by the physicians, and if the jury so find they will find the defendant guilty. But if the death of Henderson is shown to have been caused by the joint effects of said wound inflicted by the defendant and that inflicted by the physicians, and it should not be made clearly and satisfactorily to appear that the wound inflicted by defendant was sufficiently a cause of the death of Henderson, then the jury should acquit the defendant."

Do these charges of the learned judge inform the jury correctly of the rule by which they are to be governed in determining whether or not defendant destroyed the life of the deceased, Henderson? We are of the opinion, keeping the facts of the case upon this point before us, and as directly applicable thereto, these charges, taken together, contain a full, clear and concise statement of the law, and that there is no error apparent to us.

But suppose, it may be asked, that there was gross negligence or manifestly improper treatment by the attending surgeons, the wound not being necessarily mortal, can the defendant be convicted of the homicide? Now, before proceeding to answer this question, we desire to make these observations: —

1. A wound is mortal when beyond the skill of surgery. It is mortal, because death is inevitable from the nature of the wound.

2. A wound is mortal unless relieved by surgery. Now, if A. inflicts a wound upon B. from which there is no chance of recovery, aided by the most skillful surgeon, and B. dies, A. is guilty of the destruction of B.'s life. But suppose that A. inflicts a wound upon B., from which he might be relieved by rational surgery, but, unless aid is given, B. must, from the very nature of the wound, die, and aid not being given, B. dies, will any rational mind question the fact that A. destroyed B.'s life? The condition in which A. placed B. is that which must lead to death, and that which did lead to death. Now, can it rationally be contended that, as B., by proper treatment, might have been relieved, therefore A. did not destroy B.'s life — that A. did not kill B.? Who will assert such a proposition? If, therefore, A. did kill B., must he escape because of the gross improper treatment of the surgeons, when,

in fact, he destroyed the life of his fellow-man? The plainest principles of justice revolt at such a conclusion. On the other hand, suppose that the wound or injury inflicted, in conjunction with the improper treatment, produced the death, the wound not being necessarily mortal, should the defendant be held responsible for the homicide? Clearly not, nor is he so held in the charge of the court, the jury being told in the charge, under this state of case, to acquit.

Again it is urged, as there is evidence tending to show that the wounds inflicted by the surgeons weakened the patient and lessened his vitality, that although the wound inflicted by defendant destroyed the life of the deceased, that being aided in this manner by the wounds inflicted by the trephining operation, the defendant can not be held responsible for the homicide. This proposition is not supported to its full extent by evidence. Doctor Wooten swears that the patient was weakened, and that his vitality was lessened, but he is very clear and positive that the patient died of wound given by the defendant. And not only so, the evidence is conclusive that of this wound death was inevitable, unless relieved by surgery, and, to produce death, the wounds inflicted by the surgeons in the trephining operation would have required several days' time.

We must not lose sight of the plain and practical question, which is: Did defendant, unaided, destroy the life of the deceased Henderson? If he did, he should be held responsible for the homicide. If not, there being evidence of gross negligence, and manifestly improper treatment by the surgeons, he should not. This question, we think, in all phases was correctly submitted to the jury by the very clear and concise charge of the learned judge who tried this case. It follows that, if the charge of the court was correct, full and complete upon this subject, there was no error in refusing the charges requested by the defendant.

Other objections to the charge have been considered by us, but we do not think them well taken.

For the error in the charge of the court relating to implied malice, or murder in the second degree, the judgment is reversed and the cause remanded.

WILLSON, J. Whilst concurring in the disposition made of this case, I do not agree to that portion of the opinion which approves as correct law the twelfth and thirteenth paragraphs of the charge of the learned trial judge, and which are quoted at length in the opinion of Judge HURT.

In order that my views may be properly presented and understood, I will first refer to and state the common law upon the subject embraced in the said paragraphs of said charge, and then show wherein, in my judgment, the provisions of our code upon the same subject prescribes rules

in some respects essentially different from the common law, and from the charge referred to.

Mr. Greenleaf very tersely states the rule of the common law as follows: "If death ensues from a wound given in malice, but not in its nature mortal, but which being neglected or mismanaged, the party died, this will not excuse the prisoner who gave it, but he will be held guilty of the murder, unless he can make it clearly and certainly appear that the maltreatment of the wound, or the medicine administered to the patient, or his own misconduct, and not the wound itself, was the sole cause of his death; for if the wound had not been given, the party had not died."[1]

Lord Hale states it thus: "If a man give another a stroke which, it may be, is not in itself so mortal, but that with good care he might be cured, yet if he dies within the year and day, it is a homicide, or murder as the case is; and so it has always been ruled. But if the wound be not mortal, but with ill applications of the party, or those about him, of unwholesame salves or medicines, the party dies, if it clearly appears that the medicines and not the wound was the cause of the death, it seems it is not homicide; but then it must clearly and certainly appear to be so. But if a man receive a wound which is not in itself mortal, but for want of helpful applications or neglect it turns to a gangrene or a fever, and the gangrene or fever be the immediate cause of the death, yet this is murder or manslaughter in him that gave the stroke or wound; for that wound, though it was not the immediate cause of the death, yet if it were the mediate cause, and the fever or gangrene the immediate cause, the wound was the cause of the gangrene or fever, and so consequently *causa causans.*"[2]

The foregoing quoted texts are fully supported by other distinguished authors upon criminal law, and by numerous adjudged cases, both English and American.[3]

This common-law doctrine has likewise been quoted and approved by this court, but in the cases in which this was done it does not appear that the question presented in the case now before us was raised or considered. I do not, therefore, regard the questions as having been directly passed upon and determined in either of those cases, or in any other case decided by this court. The two cases I allude to are *Williams* v. *State*[4] and *Powell* v. *State.*[5]

[1] 3 Greenl. Ev., sec. 139.

[2] 1 Hale's P. C. 428.

[3] 1 Russ. on Cr. 505; Roscoe's Cr. Ev. 717; 2 Bish. Cr. L., sec. 635 *et seq.;* Com. *v.* Green, 1 Ashm. 289; State *v.* Scott, 12 La. Ann. 274; Com. *v.* Hatchett, 2 Allen, 136; Parsons *v.* State, 21 Ala. 300; Livingston's Case, 14 Grat. 592; Com. *v.* Fox, 7 Gray, 585; State *v.* Morphy, 33 Iowa, 270; Reg. *v.* Holland, 2 M. & R. 351; Allison's Cr. L. Scotland, 147.

[4] 2 Tex. (App.) 171.

[5] 13 Tex. (App.) 244.

As I understand the twelfth and thirteenth paragraphs of the charge of the court, which are approved by Judge Hurt, they are a substantial enunciation of the common law upon the subject under consideration. This being the case, the same are correct, unless the common law has been changed by the provisions of our code. I will now proceed to point out wherein, in my opinion, the common law with reference to this subject has been materially changed, modified and ameliorated by our statute. I will first quote at length the articles of our Penal Code bearing upon the question. They are as follows: —

"Article 546. Homicide is the destruction of the life of one human being by the act, agency, procurement or culpable omission of another.

"Article 547. The destruction of life must be complete by such act, agency, procurement or omission; but, although the injury which caused death might not under other circumstances have proved fatal, yet if such injury be the cause of death, without its appearing that there has been gross neglect or manifestly improper treatment of the person injured, it is homicide.

"Article 548. The foregoing article, in what is said of gross neglect or improper treatment, has reference to the acts of some person other than him who inflicts the first injury, as of the physician, nurse or other attendant. If the person inflicting the injury which makes it necessary to call aid in preserving the life of the person injured, shall willfully fail or neglect to call such aid, he shall be deemed equally guilty as if the injury were one which would inevitably lead to death."

It is to be noticed that there is a difference, though perhaps not a very material one, between the definition given at common law of "homicide," and that given in our code. Blackstone defines it as "the killing any human creature."[1] Hawkins defines it "the killing of a man by a man."[2] Our code is more specific, and states it to be the destruction of the life of one human being, by the act, agency, procurement or omission of another. And it goes still further and requires that the destruction of life must be complete; not only so, but must be complete by the act, agency, procurement or omission aforesaid — that is, it must be complete by the act, etc., of the defendant. I find no such special requirement as this in the common law, though it may perhaps be embraced within the general rules on the subject. I have merely called attention to these differences to show that our code upon this subject is by no means an exact copy from the common law, but contains some things which are not expressed so fully, if expressed at all, by the common-law writers.

I come now to the most material points involved in this contention.

[1] 4 Bla. Com. 177.

[2] 1 Hawk. Pl. Cr., ch. 8, sec. 2.

What is meant by the words "but although the injury which caused death might not, under other circumstances, have proved fatal," used in article 547 above quoted? In my judgment, they refer to all injuries which are not of themselves inevitably fatal, or which are not inflicted under circumstances which make them inevitably fatal. In other words, all injuries which under the circumstances of the particular case are not necessarily fatal, but which may cause death. An injury which must cause death under any state of circumstances, such as the severance of the head from the body, the severance of the carotid artery, or the breaking of the neck, would not come within the meaning of the words quoted. For injuries of this character no legislation is required, because they can not be affected either by cure or negligence, skillful or unskillful treatment. They produce death in spite of any human aid. But, if the injury be such that death is not a certain result thereof, if it be such that human aid and skill may prevent its fatal termination, then it is such an injury as the words quoted refer to. I need no better illustration of the idea I am endeavoring to express than the case before us. In this case, the wound inflicted upon the deceased by the defendant was a mortal wound, but it was not necessarily fatal; it would not surely and inevitably produce death; it was within the power of human aid and skill, perchance, to prevent it from terminating fatally. It was, therefore, in the language of the statute, "an injury which might not, under other circumstances, have proved fatal." That is, this injury, if it had been properly treated, skillfully attended to, by those called to treat it, might have been cured and the life of the deceased saved. But if it had nevertheless produced the death, although by proper and timely aid and treatment death might have been prevented, still it would be homicide by the act of the defendant, unless it should appear that there had been gross neglect or manifestly improper treatment of the person injured by some other person than the defendant.

In my opinion, just here is the important change made by our statute in the common law. At common law the neglect or improper treatment must produce the death in order to relieve the person who inflicted the original injury from the homicide. Such neglect or improper treatment, and not the wound, says Mr. Greenleaf, must appear to be the sole cause of the death. Our statute, as I interpret it, does not require that the neglect or improper treatment should produce the death, either in whole or in part. If there be gross neglect, or manifestly improper treatment, either in preventing or in aiding the fatal effects of the injury, the death of the injured person is not homicide by the party who inflicted the original injury. To illustrate: If A. should cut B. with a knife, severing a small artery, this wound would not be necessarily fatal, yet it would certainly prove so unless properly and promptly attended

to. The injured party would surely bleed to death in a short time if left without the proper aid, but with proper treatment the artery would be closed, the flow of blood thereby stopped, and death prevented. Now, suppose a surgeon is called to treat this wound, and instead of attempting in any way to stop the flow of blood, he administers to the wounded man chloroform, and leaves him to bleed to death. Here would be gross negligence, manifestly improper treatment of the injured person, and yet the death of such person would be the result solely of the wound, and not of the neglect or improper treatment. At common law this would be homicide in A. who inflicted the wound, but it would be homicide in the surgeon who permitted the man to bleed to death, when, by the exercise of proper care, and the use of well known and effective means, he could have prevented it. I think "gross neglect and improper treatment," as used in our statute, are not only such as produce the destruction of life, but are such, also, as allow, suffer or permit such destruction of life.

In this connection, and in support of my construction of these provisions of the Code, I call attention particularly to that portion of article 548, which provides: "If the person inflicting the injury which makes it necessary to call aid in preserving the life of the person injured shall willfully fail or neglect to call such aid, he shall be deemed equally guilty as if the injury were one which would inevitably lead to death." I find no such provision as this in the common law. What is the object of this provision? Manifestly it is to cause the person who inflicts a personal injury upon another to furnish such aid as may be necessary to prevent a fatal result of such injury. What is the effect of the provision? If the party who inflicts the injury willfully fails to furnish the aid necessary, and the injured party dies from the injury, the injury is regarded as inevitably fatal, and no question as to neglect or improper treatment can arise in the case as a matter of defence. In such case he who inflicted the injury would not be excused of the homicide, even had the death in fact been produced solely by the gross negligence or manifestly improper treatment of those who had the treatment of the case. But, on the other hand, suppose there is no such willful neglect of the defendant to call aid; suppose he promptly calls a surgeon who has the reputation of being learned and skillful in his profession, and suppose this surgeon grossly neglects the case or treats it in a manner manifestly improper, what then is the meaning and effect of this provision? In such case, in my opinion, the homicide is shifted from the defendant to the surgeon, and I can not read these articles of the code in any other light. The provision I have last quoted, it seems to me, is inconsistent with the common-law rule, but harmonizes with and makes perfect the rule which, I think, is prescribed by the code.

If, as contended, the author of the code merely intended, in the three articles quoted, to declare the common-law rule upon the subject, he certainly did not do so very clearly or forcibly, and yet among all the great productions there is not perhaps a more perfect work than our Penal Code. I am sure that those articles are intended to, and do, modify the common-law rule, and to the extent that I have suggested, and consequently beyond the limits of the charge given to the jury in this case. In this connection I will say that our Supreme Court, in the case of *Brown* v. *State*,[1] in referring to said articles of our Code, said: "Our law undoubtedly changes the rule of the common law, the theory of which was that he who caused the first injury should be held guilty." The subject is not discussed in that opinion, nor are the changes referred to pointed out, and the case is only valuable for the purpose of showing that this is not the first time that the common-law rule upon this subject has been challenged, and denied to be the law of this State. I do not wish to be understood as approving the changes in the common-law rule which, in my opinion, have been effected by our statute. It is no business of mine whether such changes are wise or impolitic. My duty and my desire is to arrive at an understanding of the case as it is, not the law as I might wish it to be.

It is not a consequence of this view of our law that the defendant would escape all punishment for his criminal act. While he might not be guilty of homicide, he might yet be guilty of an assault with intent to murder, and might properly be convicted of such offense under the indictment in this case.[2]

I think that the learned trial judge should have instructed the jury upon the law of the offense of assault with intent to murder, even under his view of the other law of the case. I presume he did not give such instructions because they were not requested, and for the further reason, perhaps, that he did not think the evidence justified them. I do not regard the evidence as so conclusive in its nature, in regard to the cause of the death, as to exclude that issue from the consideration of the jury. It was a part of the defence that it was the gross neglect and the manifestly improper treatment of the surgeons that produced the death, and not the wound inflicted by the defendant. This was one of the issues presented by the defence. The State proved by a number of physicians and surgeons who had examined the case, that, in their opinions, the wound inflicted by the defendant was the sole cause of the death. This evidence, it is true, was competent and sufficient, but it was not conclusive. It might be met, and, perhaps in the estimation of the jury, be wholly overthrown by other evidence in the case. The jury were the judges of the credibility of the witnesses,

1 38 Tex. 482.

2 Code Crim. Pr., art. 713; Peterson *v.* State, 12 Tex. (App.) 650; Snapp *v.* State, 3 Tex. (App.) 138.

and of the weight of the testimony. Some of these expert witnesses who gave it as their opinion that the wound inflicted by defendant alone causedthe death, had themselves inflicted mortal wounds upon the deceased. They had sawed twice into the back portion of the deceased's skull, and had taken out two pieces of the skull bone. These surgical wounds were in a very vital portion of the skull, and where the skull was perfectly sound. All the expert witnesses admit that these wounds were unnecessary, and were perhaps mortal wounds, but that, in their opinions, they did not cause the death. It seems to me that this evidence should have been submitted to the jury for their opinion in connection with instructions as to the law of assault with intent to murder. Under the charge as given to the jury, they had but one alternative, and that was to convict the defendant of homicide, or acquit him of any offense whatever. The charge of the court did submit to the jury the issue as to the cause of the death. Having done this, it seems to me to follow, as a matter of course, that instructions as to assault with intent to murder should have followed.

I must say, further, that I do think the charge upon justifiable homicide is entirely correct. It required the defendant to resort to all other means except flight of preventing the threatened injury to himself before taking life, regardless of the imminence of his peril. I think the law upon this subject has been settled otherwise by several decisions of this court.[1]

WHITE, J. I have read with much consideration and great interest the very able opinions of my brethren as to the proper construction to be given the language of articles 547 and 548 of the Penal Code. My conclusions are that the views expressed by Judge WILLSON are correct. I am, therefore, constrained to concur in his opinion, however much I may doubt the wisdom or the policy of a statute which, in my humble judgment, properly admits only of such construction. It does occur to me that if the injury which causes the death under the conditions named in the statute would only amount to homicide, without its appearing that there has been any gross neglect or improper treatment of the person injured, that then the converse of this proposition must also follow inevitably, viz.: that, if it does not appear that there has been any gross neglect or improper treatment of the party injured, by the physician, nurse, or other attendant, it is not homicide in him who inflicts the first injury. Our business is to interpret the law as we find it in the code. With its policy we have nothing to do.

For the additional reasons stated in Judge WILLSON's opinion, the judgment should be reversed and the cause remanded.

*Reversed and remanded.*

1 Kendall *v.* State, 8 Tex. (App). 569; Foster *v.* State, 11 Tex. (App.) 105; King *v.* State, 13 Tex. (App.) 277.

## HOMICIDE — CORPUS DELICTI MUST BE PROVED.

## RULOFF v. PEOPLE.

[18 N.Y. 179.]

*In the Court of Appeals of New York, 1858.*

1. **To Warrant a Conviction of Murder** there must be direct proof either of the death, as by the finding and identification of the corpse, or of criminal violence adequate to produce death and exerted in such a manner as to account for the disappearance of the body.
2. **The Corpus Delicti, in Murder,** has two components, death as the result and criminal agency of another as the means. It is only where there is direct proof of one that the other can be established by circumstantial evidence.
3. **The Rule of Lord Hale,**[1] forbidding a conviction of murder or manslaughter unless the fact be proved to be done, or at least the body found dead, commented upon and affirmed.

Writ of error to the Supreme Court. The appellant was indicted in Tompkins County for the murder of his infant child by various means, — stabbing, choking, drowning, poisoning, etc., set forth in different counts. The indictment was brought by *certiorari* into the Supreme Court, and, the venue having been changed, was tried at the Tioga Circuit in October, 1856, before Mr. Justice MASON. The prisoner having been convicted, moved for a new trial upon a bill of exceptions, which was denied, and having been sentenced at general term in the Sixth District, brought the case into the court by writ of error. The exceptions and facts material thereto are sufficiently stated in the following opinion.

*Francis M. Finch*, for the plaintiff in error.

*Daniel S. Dickinson*, for the People.

*By the Court*, JOHNSON, C. J. At the opening of the trial the counsel for the prosecution, in answer to a question of the prisoner's counsel, stated that he did not propose to prove by any direct evidence, that the infant daughter of the prisoner, with whose murder he was charged by the indictment, was dead or had been murdered, or that her dead body had been found or seen by any one, but that from the lapse of time since the child and her mother were last seen, and from other facts and circumstances, he should ask the jury to infer and presume and find that the infant daughter was dead and that she was murdered by the prisoner. "The prisoner's counsel, on this, moved the court to stop the trial, for want of proof of the *corpus delicti;* that the rule laid down by Lord Hale, that no person should be convicted of murder or manslaughter unless the facts were proved to be done or at least the body found dead," is the rule universally acted upon by our courts, and

[1] 2 P. C. 290.

should never be departed from. The judge reserved the question till the evidence should be closed.

The prosecution gave proof tending to show that the prisoner did not live happily with his wife; that his wife and infant daughter were seen alive and well on the evening of June 24, 1845, by a woman who lived across the road from Ruloff's house. No person shows that either of them has been seen since. The next day Ruloff borrowed a wagon from a neighbor and took into it a box from his own house, which the neighbor helped him to place in the wagon; he drove off with it — where, is not shown; on the following day he returned with the wagon and box. It was shown that he had in his possession a ring which his wife had worn on the twenty-fourth, and a shawl and some other articles of her apparel; that he told stories as to her being at sundry places where she was proved not to have been, and generally conducted himself in such a way as to lead strongly to the inference that he was the author of whatever had happened to his wife and child, if anything had, in fact, happened to them. In the house clothes were found lying about in disorder, dishes unwashed, a skirt lying in a circle at the foot of the bed, and shoes, stockings and diapers. It was sworn that Ruloff had a cast iron mortar of twenty-five or thirty pounds weight, and flat irons, which on searching the house were not found. He absconded and was in Chicago, early in August, under a false name; there said his wife and child had died six weeks before on the Illinois River, in Illinois, and left a box containing books, papers and articles of woman's apparel, which had belonged to Mrs. Ruloff, a paper on which were the words, "Oh, that dreadful hour!" and a lock of light brown hair in another paper, labeled "A lock of [Harriet's or Mary's] hair;" the witness thought the word was "Harriet's."

At the close of the evidence, the prisoner's counsel renewed his motion, made at the opening of the cause, and insisted that, as it now appeared that no direct evidence of the death or the murder of the infant daughter had been given, no conviction for murder could be properly had or allowed, and that the jury should be so advised and and instructed, and should be directed to find a verdict of not guilty. The judge refused so to advise, direct and instruct the jury, and to his refusal the prisoner's counsel excepted.

The judge then charged the jury. After explaining the legal definition of murder, and the legal presumption of innocence in favor of the prisoner, and the duty of the prosecution, before they could rightfully ask a conviction, not only to prove the alleged murder, but also to establish by evidence the guilt of the prisoner beyond any reasonable doubt, he proceeded as follows: "The first branch of the case, the *corpus delicti*, as it is termed in the law, by which is meant the body

of the crime, the fact that a murder has been committed, must be clearly and conclusively proved by the government. The *corpus delicti* is made up of two things: first, of certain facts forming the basis of the *corpus delicti*, by which is meant the fact that a human being has been killed; and secondly, the existence of criminal and human agency as the cause of the death. Upon this first branch of the case, the prisoner's counsel insists that it can only be proved by direct and positive evidence; that the government must prove the fact of death by witnesses who saw the killing, or at least the dead body must be found. It has been said by some judges, that a conviction for murder ought never to be permitted unless the killing was positively sworn to, or the dead body was found and identified. This, as a general proposition, is undoubtedly correct, but, like other general rules, has its exceptions. It may sometimes happen that the dead body can not be produced, although the proof of death is clear and satisfactory. A strong case in illustration is that of a murder at sea, when the body is thrown overboard in a dark and stormy night, at a great distance from land or any vessel. Although the body can not be found, nobody can doubt that the author of such crime is guilty of murder. In such a case the law permits the jury to infer that death has ensued from the facts proved; the circumstances being such as to exclude the least, if not almost every probability, that such a person could have escaped with life; and yet there is a bare possibility in suoh a case that the person may have escaped with life.

"I am of opinion that the rule, as understood in this country, does not require the fact of death to be proved by positive and direct evidence in cases where the discovery of the body, after the crime, is impossible. In such cases the fact may be established by circumstances where the evidence is so strong and intense as to produce the full certainty of death. By the proof of a fact by presumptive evidence, we are to understand the proof of facts and circumstances from which the existence of such fact may be justly inferred. The facts and circumstances to establish the death in the case of murder, in the absence of any positive evidence, must be so strong and intense as to produce the full certainty of death, or, as Mr. Wills says, 'the death may be inferred from such strong and unequivocal circumstances as render it morally certain, and leave no ground for reasonable doubt.' The government claim that they have proved the body of the crime, in the case under consideration, up to the strictest requirements of the rule. This is for you to determine. The determination of it involves the examination of all the facts and circumstances disclosed by the evidence in the case."

After, then, observing briefly upon some parts of the evidence, the

judge concluded his charge by stating the rule that should govern them in their ultimate conclusion, as follows: "In regard to the first branch of the case, the establishment of the *corpus delicti*, the body of the crime, before you find it against the prisoner you must be satisfied from the evidence in the case that it is established by presumptive evidence of the most cogent and irresistible kind, that is, established by circumstances proved, so strong and intense as to produce the full certainty of death.

"In regard to the second branch of the case, by which we mean the traverse between the government and the prisoner, as to the question of his guilty agency in the commission of the alleged murder; as to this question, the rule is, that the government are required, before they can claim a conviction, to prove by their evidence the guilt of the prisoner, beyond any rational doubt. If, upon a full and deliberate consideration of all the evidence in the case, doubts remain in the minds of the jury, it is their duty to acquit. Upon this branch of the case, the doubts, however, which require an acquittal, should be rational doubts. They are not doubts which may arise in a speculative mind, after the reason and judgment are thoroughly convinced in the cause."

The defendant's counsel excepted to so much and such parts of the charge and instructions given to the jury as submits to them to infer, presume and find, without direct proof, the death and the murder of the infant daughter of the defendant.

The question presented to us, therefore, is whether there is a rule of law, in respect to the proof in cases of homicide, which does not permit a conviction without direct proof of the death, or of the violence or other act of the defendant which is alleged to have produced death.

If it be objected that such a rule may compel the acquittal of one whom the jury are satisfied is guilty, the answer is, that the rule, if it exists, must be regarded as part of the humane policy of the common law, which affirms that it is better that many guilty should escape than that one innocent should suffer; and that it may have its probable foundation in the idea, that where direct proof is absent, as to both the fact of death and of criminal violence capable of producing death, no evidence can rise to the degree of moral certainty, that the individual is dead by criminal intervention, or even lead by direct inference to those results; and that where the fact of death is not certainly ascertained, all mere inculpatory moral evidence wants the key necessary for its satisfactory interpretation, and can not be depended on to furnish more than probable results. It may be also, that such a rule has some reference to the dangerous possibility that a general preconception of guilt, or a general excitement of popular feeling, may creep in, to supply the evidence, if, upon other than direct proof of death,

or a cause of death, a jury are permitted upon whatever evidence may be presented to them, competent on any part of the case, to pronounce a defendant guilty.

I proceed, therefore, to consider whether any such rule is to be found in the common law. Lord Hale says: "I would never convict any person of murder or manslaughter unless the fact were proved to be done, or at least the body found dead, for the sake of two cases — one mentioned in my Lord Coke's Pleas of the Crown,[1] a Warwickshire case; another, that happened in my remembrance, in Staffordshire, where A. was long missing, and upon strong presumptions B. was supposed to have murdered him, and to have consumed him to ashes in an oven that he should not be found, whereupon B. was indicted for murder, and convicted and executed, and within one year after A. returned, being, indeed, sent beyond sea by B., against his will, and so, though B. justly deserved death, yet he was really not guilty of that offense for which he suffered."[2] It forms part of the chapter in which he treats of "evidence requisite, or allowed by acts of Parliament, and presumptive evidence." Considering the law of evidence first in treason, requiring two witnesses, then upon indictment for murder against the mother of a bastard child, where by act of Parliament the mother of such a child, concealing its death, was to suffer as in murder, unless she proved by one witness that the child was born dead, and next, the subject of presumptive evidence, he says: "In some cases presumptive evidences go far to prove a person guilty, though there be no express proof of the fact to be committed by him; but then it must be very warily pressed, for it is better five guilty persons should escape unpunished than one innocent person should die." This observation he follows by a case illustrative of his meaning, where one was executed for stealing a horse, which was proved to have been stolen, the prisoner was found in possession of the horse, "a strong presumption that he stole him," and yet it afterwards appeared that another person stole the horse, and that the prisoner's possession was innocent. He proceeds: "I would never convict any person for stealing the goods of a person unknown, merely because he would not give an account how he came by them, unless there were due proof made that a felony was committed of these goods." Then follows the passage first cited, which is the earliest statement of the doctrine for which the defendant contends.

When this was written, a prisoner charged with murder or any inferior felony, was neither allowed the advantages of sworn witnesses, or the full aid of counsel, and it is therefore quite apparent upon the whole passage that Lord Hale was here stating, not what prudential

1 cap. 104, p. 532.

2 2 Hale's P. C. 290.

principles ought to govern the action of individual jurors in weighing evidence, but what, acting as judge, and exercising the control which judges were then accustomed to exercise, he would govern them by.

The case cited in Coke was of an uncle who brought up his niece, whose heir at law he was. He correcting her on some occasion she was heard to cry out, "Good Uncle, kill me not," and afterwards disappeared and could not be found. He was arrested on suspicion, and to avert this, produced as his niece another child of similar appearance. The imposition was detected, and he, being indicted, was on trial, convicted on these circumstances and executed. The niece afterwards made her appearance, and was proved to be the true child. Lord Coke reports this case, as he says, to the end that judges, in case of life and death, judge not too hastily on bare presumption.

In *Hindmarsh's Case*,[1] the indictment for murder of a ship captain contained two counts, one for killing by beating, the other for drowning. The fact happened at sea; a witness proved that he was awakened at midnight by a violent noise; that on reaching the deck, he saw the prisoner take the captain up and throw him overboard into the sea, and that he was not seen or heard of afterwards. Another witness proved that the witness proposed to one Atkyns to kill the captain; and another proved that on the deck, near where the captain was seen, a billet of wood was found, and that the deck and part of the prisoner's dress were stained with blood. *Garrow*, of counsel for the prisoner contended, citing the passage from Hale, that the prisoner was entitled to be acquitted for want of proof of the death, as he might have been picked up by some other ship. He cited a case before Justice Gould, where the mother and reputed father of a bastard child took it to the margin of a dock in Liverpool, stripped it and threw it in. The body of the child was not afterwards seen; and as the tide ebbed and flowed in the dock, the judge, observing to the jury that the tide might have carried out the living infant, directed them to acquit him. The court, which consisted of Sir James Marriott, Judge of Admirality, Mr. Justice Ashurst, Baron Hotham, and others, admitted the general rule of law; and Mr. Justice Ashurst left it to the jury, on the evidence, to say whether the captain was not killed before his body was thrown into the sea. The jury found the fact to be so. The case came afterwards before all the judges, who held the conviction to be right, and the prisoner was executed.

Blackstone says,[2] all presumptive evidence of felony should be admitted cautiously, for the law holds that it is better that ten guilty persons escape than that one innocent suffer; and Sir Matthew Hale, in

[1] 2 Leach's Cr. L. 569.

[2] 4 Com. 358.

particular, lays down two rules most prudent and necessary to be observed: (1) Never to convict a man for stealing, etc.; and (2) never to convict any person of murder or manslaughter, till at least the body be found dead.

In *Regina* v. *Hopkins*,[1] a woman was indicted for the murder of her illegitimate child. It was born March 23, and sent to a nurse, where it remained until April 7, when the prisoner took it away, stating an intention to go to her father's. She was seen the next day at several times, the latest being at six in the evening, with the child in her arms on the way to her father's. Between eight and nine she arrived there without the child. The dead body of a child was found on the 13th, in a river near the place where she was last seen with her child, which upon proof of its age and appearance was shown not to be her child. Lord ABINGER, after stating the particulars of this latter proof, added, "with respect to the child which really was the child of the prisoner, she can not by law be called upon either to account for it or say where it is, unless there be evidence to show that her child is actually dead," and directed an acquittal.

In the *Case of Videtto*,[2] Walworth, C. J., says: "One rule which ought never to be departed from is, that no one should be convicted of murder upon circumstantial evidence, unless the body of the person supposed to have been murdered has been found, or there be other clear and irresistible proof that such person is actually dead."

It does not appear that this direction was material on that trial, and it is cited only to show how constantly the doctrine has been received as clear and undisputed law.

In the *Case of Wilson*,[3] the cook of the steamer Eudora was indicted for the murder of the captain upon Long Island Sound; after five months a body floated on shore, which the prosecution claimed was shown to be that of the murdered man. Strong, J., who presided at the trial, charged the jury, "that ordinarily there could be no conviction for murder until the body of the deceased was discovered. That there were several exceptions to the rule, however, as where the murder has been on the high seas, at a great distance from the shore, and the body had been thrown overboard, or where the body had been entirely consumed by fire, or so far that it was impossible to identify it. But, in the present case, the scene of the supposed tragedy was near the shore, and there was strong reason to suppose that if a murder had been committed, the body of the deceased would be discovered. The exception to the rule is therefore inapplicable, and the jury must be

[1] 8 C. & P. 591.

[2] 3 Park. 609.

[3] 3 Park. Cr. R. 207.

satisfied that the body discovered was that of the murdered captain, before they could convict the prisoner."

In *Tawell's Case*,[1] Baron Parke, told the jury, that "the only fact which the law requires to be proved by direct and positive evidence is the death of the party by finding the body, or, when such proof is absolutely impossible, by circumstantial evidence leading closely to that result — as where a body was thrown overboard, far from land, when it is quite enough to prove that fact without producing the body."

These are the cases in which the rule contended for by the defendant has been recognized as the clearly acknowledged law regulating the production of evidence, in cases of homicide. No case is to be found which has been determined the other way. That no more reported cases contain the rule, is to be accounted for on the ground that the doctrine has been universally acted on and acquiesced in, while it is equally certain that any case departing from the rule would not have escaped observation.

A great deal of strong general language has been used by judges in respect to the power of circumstantial evidence to afford sufficient ground to warrant conviction, and many instances of this have been cited and are relied on by the prosecution. Most of those expressions have been used, in answer to the position that circumstantial evidence ought not to be relied on to prove any part of the case for the prosecution. But I have not found any case in which a judge, speaking directly to the point here involved, has said that without direct evidence on either branch of the *corpus delicti* a conviction for murder could be allowed.

The cases contained in The Theory of Presumptive Proof, for a considerable time after its publication, formed the basis of repeated attacks upon the value of circumstantial evidence for any purpose of inculpation in criminal cases. It was to dispel this error that judges often had occasion, and sometimes took occasion, to vindicate its employment. But that the general language thus employed was not intended, by those who used it, to conflict with the rule for which the defendant in this case contends, is fairly to be inferred.

In Cowen & Hill's Notes to Phillips,[2] after a review of the cases contained in The Theory of Presumptive Proof, and sustaining in the strongest manner, the general value and importance of circumstantial evidence against the attacks upon it, as well those contained in the work mentioned as those founded upon the cases which that work first collected, the authors say: "In these cases of homicide, the precaution of Lord Hale seems to be enough for laying the foundation of circumstan-

1 Will's Cir. Ev. (3d ed.) 181.

2 Vol. 1, p. 394.

tial evidence, citing in terms the rule. A departure from this important suggestion, which is now universally acted upon, was a capital error in *Miles' Case*, before cited from the above named work. The body being afterwards found, it plainly appeared that the death was accidental. The judge should have stopped the prosecution. In the two illustrative cases cited by Hale, one of the persons supposed to have been murdered, was sent on a long sea voyage, and the other had run away. The rule that the body must be found dead, is adhered to with great strictness in the English courts."

No one was better qualified than Judge Cowen, both by long experience and great learning, to speak of what rules were universally acted on in the courts of England and of this country. It is quite plain, too, that his general remarks on the value of circumstantial evidence must in his own view have been consistent with the rule which he thus lays down and approves.

In the next place, I proceed to consider the principal cases relied on for the People.

Mr. Justice Washington, in *United States* v. *Johns*,[1] says: "That the prisoner perpetrated the act, or directed or procured it to be done, positive evidence is not necessary. Circumstantial evidence is sufficient, and is often more persuasive to convince the mind of the existence of a fact than the positive evidence of a witness, who may be mistaken; whereas a concatenation and a fitness of many circumstances made out by different witnesses, can seldom be mistaken, or fail to elicit the truth. But then those circumstances should be strong in themselves, should each of them tend to throw light upon and to prove each other, and the result of the whole should be to leave no doubt upon the mind that the offense has been committed, and that the accused and no other could be the person who committed it." The defendant was on trial for casting away a ship. That augur holes had been found in her bottom, which nearly sunk her, was proved by pumping her out and bringing her to port. The whole question of fact was the personal guilt of the accused. The remarks are just; indeed they are cited by Judge Cowen with approbation in the same note before referred to, and are followed by his statement of the rule, in cases of homicide, as to proof of the fact of death.

The same remarks are applicable also to *Jacobson*'s *Case*,[2] where Mr. Mr. Justice Livingston is reported to have said: "The rule in this court, even in capital cases, is, that should the circumstances of a case be sufficient to convince the mind and remove every rational doubt, the jury is bound to place as much reliance on such circumstances as on direct

[1] 1 Wash. C. C. 363.

[2] 2 City Hall Rec. 131, 143

and positive proof, for facts and circumstances can not lie." This was also in a case of casting away a ship, and the only question was of the personal guilt of the defendant. It was no way necessary for the judge's argument, nor required by fairness to the defendant, that he should stop to state an exception as to the fact of death in murder.

In the *Case of Burdett*[1] the question was whether a libel had been published in a certain place; and the observations of the judges are, of course, to be construed with reference to the point before them. All the judges speak of the necessity of a resort to presumptive evidence, and recognize the fact that, even in cases of murder, a great part of the convictions rest upon that sort of evidence to establish the guilt of the accused; but Abbott, C. J., only notices that kind of proof in its application to the fact of death. Speaking of the cases of supposed murder mentioned by Lord Hale, which, as he says, have since operated as a caution to all judges, he observes: "In those cases there was no actual proof of the death of the person supposed to have been slain, and consequently no proof that the crime of murder had been committed." From nothing which is said, or omitted to be said, in that case can it be fairly inferred that any of the judges denied the correctness of the rule stated by Lord Hale. What was said by Mr. Justice Best comes nearest to the purpose for which it was cited on the part of the People. He said: "Until it pleases Providence to give us means beyond those our present faculties afford of knowing things done in secret, we must act on presumptive proof, or leave the worst crimes unpunished. I admit, where presumption is raised as to the *corpus delicti*, that it ought to be strong and cogent." The *corpus delicti*, in murder, is a compound fact, made up of death as result, and criminal agency of another person as means; and, therefore, if he had been speaking of murder, he might have employed this expression without intending to deny the rule that as to one or the other branch of the crime there must be direct evidence. But it was in no way necessary, or conducive to the argument he had in hand that he should be minutely accurate on the point before us, for, in the case of which he was speaking the *corpus delicti*, the publication of the libel by the defendant, was admitted, and the presumptive proof which he had sustained related only to the place of publication.

What was said by Mr. Justice Park, in *Rex* v. *Thurtell*, tried for the murder of Weare, which is quoted in the opinion of Mr. Justice Mason, was said in a case where the body of the defendant had been found recently dead, and was intended to answer the address of Thurtell to the jury, which had mainly turned on certain cases which we

[1] 4 Barn. & Ald. 161.

read, exhibiting the fallibility of circumstantial evidence.[1] It affords no inference that he denied the rule of Lord Hale.

In *United States* v. *Gilbert*,[2] an indictment for robbery on the high seas, Judge Story, in summing up, adverted to certain cases which had been cited to show the danger of relying on presumptive evidence, in capital cases, as sufficient proof of guilt. He says: "They are brought to establish these propositions on trials for murder: (1) That there ought to be no conviction for murder unless the murdered body is actually found; (2) that men have been convicted of murder on false testimony. The first proposition certainly can not be admitted as correct, in point of common reason or of law, unless courts of justice are to establish a positive rule to screen persons from punishment, who may be guilty of the most flagitious crimes. In the case of murders on the high seas the body is rarely if ever found, and a more complete encouragement and protection for the worst offenses of this sort could not be invented than a rule of this strictness. It would amount to a universal condonation of all murders committed on the high seas." Strong as this language is, I find in it no support for the idea that, in the absence of ahy direct evidence showing that anybody has been killed, and accounting for the absence of the dead body, it is to be put to a jury to find, according to their belief, that a murder has or has not been committed.

The other cases cited for the prosecution, *People* v. *Thorn*,[3] *Commonwealth* v. *Harman*,[4] *State* v. *Turner*[5] and *Commonwealth* v. *Webster*,[6] except that last mentioned, were cases in which the fact of death was clearly established by finding the body; and in *Webster's Case* the identification of the remains as those of Dr. Parkman was the vital fact on which the success of the prosecution depended.

I proceed to consider briefly what has been written by elementary writers on this subject.

Mr. Starkie,[7] under the rule which he lays down, that it is essential that the circumstances should to a moral certainty actually exclude every hypothesis, but the one proposed to be proved, says, "Hence results the rule in criminal cases, that the coincidence of circumstances tending to indicate guilt, however strong and numerous they may be, avails nothing, unless the *corpus delicti*, the fact that the crime has been actually perpetrated, be first established. So long as the least doubt exists as to the act, there can be no certainty as to the criminal agent. Hence, upon charges of homicide, it is an established rule that the

[1] 2 Chron. of Crime, Lond. 1841, p. 85.
[2] 2 Sumn. 27.
[3] 6 L. R. 54.
[4] 4 Barr. 269.
[5] 1 Wright, 20.
[6] 5 Cush. 310.
[7] 1 Stark. Ev. 575.

accused shall not be convicted unless the death be first distinctly proved either by direct evidence of the fact or by inspection of the body — a rule warranted by melancholy experience of the conviction and execution of supposed offenders, charged with the murder of persons who survived their alleged murderers; as in the case of the uncle, cited by Sir Edward Coke and Lord Hale."

On the subsequent page of the same work, when speaking of the proof of the death of the person specified in the indictment, as having been murdered, he says: "It has been laid down by Lord Hale, as a rule of prudence in cases of murder, that, to warrant a conviction, proof should be given of the death, by evidence of the fact, or the actual finding of the body. But although it be certain that no conviction ought to take place unless there be most full and decisive evidence as to the death, yet it seems that actual proof of the finding and identifying of the body is not absolutely essential. And it is evident that to lay down a strict rule to that extent might be productive of the most horrible con-consequences." [1] *Hindmarsh's Case* is then stated by him, thus illustrating the meaning of the expressions he has just employed, and the allowable exposition of the terms of Lord Hale's rule.

Having finished the discussion of the proof of the *corpus delicti*, he proceeds: "When it has been clearly established that the crime of willful murder has been perpetrated, the important fact whether the prisoner was the guilty agent is, of course, for the consideration of the jury, under all the circumstances of the case." [2] It is in this connection, and with reference, I think, mainly, if not exclusively, to this branch of the inquiry that he observes that "it is essential to the security of mankind that juries should convict, when they can do so safely and conscientiously, upon circumstantial evidence which excludes all reasonable doubt, and that it should be well known and understood that the secrecy with which crimes are committed will not secure impunity to the criminal." [3] Specifying, under this head, among the topics of circumstantial evidence pertinent to the inquiry, the conduct of the prisoner in seeking for opportunities to commit the offense, or in using means to avert suspicion and remove material evidence, he adds: "The case cited by Lord Coke and Lord Hale is a melancholy instance to show how cautiously proof arising by inference from the conduct of the accused is to be received, when it is not satisfactorily proved by other circumstances that a murder has been committed; and even when satisfactory proof has been given of the death, it is still to be recollected that a weak, inexperienced and injudicious person

1 2 Stark. Ev. 710.
2 *Id.* 719.
3 *Id.* 720.

will often, in hope of present relief, have recourse to deceit and misrepresentations."[1]

Having explained himself fully as to the proof of the *corpus delicti* in another place, it was not necessary, to avoid misconception, for him to inweave that distinction into this passage, and it ought not to be taken to qualify what has been before carefully stated. Indeed, his language, attentively considered, requires no modification, for he distinguishes between the proof of the murder — of both branches of the *corpus delicti* — and proof of the death alone.

In Russell on Crimes,[2] it is said: "It has been holden as a rule that no person should be convicted of murder, unless the body of the deceased has been found; and a very great judge says: 'I would never convict any person of murder or manslaughter, unless the fact were proved to be done, or at least the body be found dead.' But this rule, it seems, must be taken with some qualifications; and circumstances may be sufficiently strong to show the fact of the murder, though the body has never been found."

The rule which is thus qualified is that which prohibits a conviction unless the body be found, not the rule stated by Lord Hale. This appears by what immediately follows in illustration, a statement of *Hindmarsh's Case*, which the defendant's counsel admits to be correctly decided. In that case the violent noise which awakened the witness, the blood on the deck and the prisoner's clothes, the billet of wood lying by, and the actual casting into the sea, made a satisfactory case of proof under Lord Hale's rule.

Greenleaf says:[3] "It is seldom that either the *corpus delicti* or the identity of the prisoner, can be proved by direct testimony, and, therefore, the fact may lawfully be established by circumstantial evidence, provided it be satisfactory. Even in the case of homicide, though ordinarily there ought to be the testimony of persons who have seen and identified the body, yet this is not indispensably necessary in cases where the proof of death is so strong and intense as to produce the full assurance of moral certainty."

For this proposition, Wills on Circumstantial Evidence,[4] is referred to, and *Hindmarsh's Case* is cited as an example. Such judicial observations as are referred to, in the places cited in Wills, were made by judges with reference to the further proofs of crime, after the fact of death had been fully established by direct and unequivocal evidence. The only case cited in which any relaxation of the rule — that the body must be found — has taken place, is *Hindmarsh's*, and that, as we have seen, stands upon satisfactory grounds, there being direct and unequivo-

[1] *Id.* 720.

[2] vol. I., p. 473.

[3] 3 Greenl. Ev., sec. 30.

[4] pp. 157, 162.

cal proof of what was done with the man or his body. He proceeds: "But it must not be forgotten that the books furnish deplorable cases of the conviction of innocent persons, from the want of sufficiently certain proofs, either of the *corpus delicti*, or of the identity of the prisoner. It is obvious that, on this point, no precise rule can be laid down, except that the evidence 'ought to be strong and cogent,' and that innocence should be presumed until the case is proved against the prisoner, in all its material circumstances, beyond any reasonable doubt."[1]

"The *corpus delicti*, or the fact that a murder has been committed, is so essential to be satisfactorily proved, that Lord Hale advises that no person be convicted of culpable homicide unless the fact were proved to have been done, or at least the body found dead. Without this proof, a conviction would not be warranted, though there were evidence of conduct of the prisoner exhibiting satisfactory indications of guilt. But the fact, as we have already seen, need not be directly proved, it being sufficient if it be established by circumstances so strong and intense as to produce the full assurance of moral certainty."[2]

"§ 132. The most positive and satisfactory evidence of the fact of death is the testimony of those who were present when it happened, or who, having been personally acquainted with the deceased in his lifetime, have seen and recognized his body after life was extinct. This evidence seems to be required in the English House of Lords, in claims of peerage, and, *a fortiori*, a less satisfactory measure of proof ought not to be required in a capital trial.

"§ 133. But though it is necessary that the body of the deceased be satisfactorily identified, it is not necessary that this be proved by direct and positive evidence, if the circumstances be such, as to leave no reasonable doubt of the fact. Where only mutilated remains have been found, it ought to be clearly and satisfactorily shown that they are the remains of a human being, and of one answering to the size, age and description of the deceased; and the agency of the prisoner in their mutilation, or in producing the appearances found upon them, should be established."

The question will be found further discussed in Best on Presumptions,[3] Wharton's American Criminal Law,[4] Wills on Circumstantial Evidence,[5] and in Burrill on Circumstantial Evidence.[6] The last writer states, as his conclusion, that the fact of death, when the body can not be found, may be proved by circumstances. It may be inferred, says Mr. Wills, from such strong and unequivocal circumstances of pre-

1 3 Greenl. Ev., sec. 30.
2 3 Greenl. Ev., sec. 131.
3 pp. 271-276.
4 pp. 283-287.
5 pp. 156-170.
6 pp. 678-680.

sumption as render it morally certain, and leave no ground for reasonable doubt." In illustration *Hindmarsh's Case* is again referred to, and, it may be assumed, to show what is meant by the expression so constantly used, "such strong and unequivocal circumstances of presumption as render the fact morally certain, and leave no ground for reasonable doubt." He says, further: "A dead body, or its remains, having been discovered and identified as that of the person charged to have been slain, and the basis of a *corpus delicti* being thus fully established, the next step in the process, and the one which serves to complete the proof of the indispensable preliminary fact, is to show that the death has been occasioned by the criminal act or agency of another person. This may always be done by means of circumstantial evidence, including that of the presumptive kind; and for this purpose a much wider range of inquiry is allowed than in regard to the fundamental fact of death; and all the circumstances of the case, including facts of conduct on the part of the accused may be taken into consideration.[1]

If what is said by these writers is to be taken as intimating their opinion that Lord Hale's rule may be departed from, I find no judicial authority warranting the departure. The rule is not founded in a denial of the force of circumstantial evidence, but in the danger of allowing any but unequivocal and certain proof that some one is dead to be the ground on which, by the interpretation of circumstances of suspicion, an accused person is to be convicted of murder.

We are of opinion that the judge, at the trial, erred, and that he should have directed an acquittal.

ROOSEVELT, J., dissented.

*Judgment reversed and new trial ordered.*

---

## HOMICIDE — CORPUS DELICTI MUST BE PROVED — CONFESSIONS.

## STATE *v.* GERMAN.

[54 Mo. 526; 14 Am. Rep. 481.]

*In the Supreme Court of Missouri, 1874.*

1. **A Conviction of Murder** is not warranted when there is no proof of the *corpus delicti*, but the uncorroborated extra-judicial confession of the accused.

1 Burr. on Cir. Ev. 682; Best on Presum., sec. 205; Wills' Cir. Ev. 168.

2. **Defendant was Indicted** for the murder of C. who had disappeared some months before. No remains of C. were found, nor was there evidence of his death, other than a confession by the defendant that he killed C., alleged to have been made to the officer who arrested him. At the trial defendant pleaded not guilty. *Held*, that evidence of the confession was not admissible.

Indictment for murder. The opinion states the case.

*James F. Hardin* and *D. A. Harrison*, for plaintiff in error.

1. The court erred in admitting any evidence. There was no proof offered tending to prove that Canaday was dead, and without proof of the death, there could be no conviction.[1] The confession could not be used to prove the *corpus delicti*. See above cases.

2. The court erred in admitting the evidence of confessions testified to by the witness, C. W. Mallory.[2]

*H. Clay Ewing*, Attorney-General, for defendant in error.

WAGNER, J. The defendant was indicted in the Circuit Court for murder in the first degree, in killing one Canaday. On the first trial he was convicted of the offense with which he stood charged, but on his motion that conviction was set aside, and being again put upon his trial he was found guilty of murder in the second degree.

The testimony, as preserved in the bill of exceptions, shows, in brief, that the defendant and Canaday lived together, Canaday having married defendant's wife's mother; that on the day on which Canaday disappeared, the two started together in a wagon, to a corn field where they were working, about two miles distant. In the evening, when defendant returned, he was alone, and when inquired of concerning Canaday, he said that a couple of men came along where they were at work, and gave the old man a drink of whisky, and he went off with them. There was nothing unusual about defendant's actions and appearance, and he uniformly told the same story in reference to Canaday's absence.

After the lapse of several months, in the woods between the house where defendant lived and the field where he went to work when he was accompanied by Canaday, a pair of old boots and some other clothing were found and also some bones. An attempt was made to identify the boots and clothing as those belonging to and worn by Canaday, but the evidence only showed that they were similar, no witness swearing to a positive identification. Nothing was done toward arresting the defendant or fastening the alleged crime upon him, and in about

1 Whart. Am. Cr. L., secs. 745, 746; State *v.* Robinson, 12 Mo. 592; State *v.* Scott, 39 *Id.* 429; 1 Chit. Cr. L. 563; 3 *Id.* 736; 1 Russ. on Cr. 567, 568; 1 Greenl. Ev., sec. 217.

2 1 Greenl. Ev., secs. 213, 263; People *v.* Ward, 15 Wend. 231; State *v.* Hector, 2 Mo. 166; 1 Phil. Ev. 544 and cases there cited; Archbold's Cr. Pl. 125, 126; Roscoe's Cr. Ev. 34; Joy on Confessions, 38 Law Lib. 59, 61; 7 Ired. (N. C.) 239; 2 Humph. (Tenn.) 37; State *v.* Scott, 39 Mo. 424; State *v.* Robinson, 12 *Id.* 592; State *v.* Brockman, 46 *Id.* 566.

eight months after Canaday's disappearance he changed his residence, going into Kansas, forty miles distant from where he previously resided. A warrant was afterwards sued out against him, in Jasper County, charging him with the murder of Canaday, and an officer went and arrested him, in his own house. He accompanied the officer back to Jasper County, without any kind of assistance and on the way he was told by one of them that it would be better for him to confess.

After he was placed in prison, the officer who arrested him and was deputy sheriff had several conversations with him. The officer says that those conversations were confidential; and upon occasion he says that he had the prisoner completely "broke." At one of these conversations, and only one, the prisoner made the confession to him, which was given in evidence. From the officer's statement it seems that the prisoner labored under the impression that there were certain witnesses who were going to swear that he committed the crime. He evidently believed that they would convict him, and he told the officer that he had made up his mind not to put the county to any more expense, and that he would plead guilty, and that he killed Canaday. There was a mere admission of killing; no time, place, or circumstances were given. He wanted the officer to see the judge and use his influence to have his punishment as light as possible, and then to get up a petition to have him pardoned. The officer promised that he would get up the desired petition, and told him that he thought he could be got out of the penitentiary, after he had been there a reasonable time. At the time this confidential interview was had, it appears that this same officer was engaged with others in procuring counsel to assist in prosecuting the accused to a conviction, for the purpose of obtaining a reward that had been offered. It appears abundantly clear that, when the prisoner proposed to plead guilty and confessed the crime, he supposed that he could plead guilty of murder in the second degree, and that no higher punishment than imprisonment in the penitentiary could be inflicted upon him under the indictment. But when he afterward saw the indictment and became aware that it was for murder in the first degree, and that a conviction thereon might lead to an execution, he changed his mind, and declared that he would not plead guilty, but would stand his trial. Such is substantially the evidence as shown by the record. It will be observed that there was no evidence whatever that Canaday was murdered except the confession of defendant, and that was made under circumstances which rendered it inconclusive and questionable indeed whether it should have been admitted at all.

Confessions are divided into two classes, namely, judicial and extra-judicial. Judicial confessions are those which are made before the magistrate or in court, in due course of legal proceedings, and it is

essential that they be made of the free will of the party, and with full and perfect knowledge of the nature and consequences of the confession. Of this kind are the preliminary examinations, taken in writing by the magistrate, pursuant to statutes, and the plea of guilty made in open court to an indictment. Either of these is sufficient to found a conviction upon, even if it be followed by sentence of death, they being deliberately made, with the advice of counsel, and under the protecting caution and oversight of the judge. Extra-judicial confessions are those which are made by the party elsewhere than before the magistrate, or in court, this term embracing not only explicit and express confessions of crime, but all those admissions of the accused from which guilt may be implied.[1]

Whether extra-judicial confessions, uncorroborated by any other proof of the *corpus delicti*, are of themselves sufficient to found a conviction of the prisoner upon, has not only been doubted, but, in the best considered cases, denied. "In the United States," says Greenleaf, "the prisoner's confession, when the *corpus delicti* is not otherwise proved, has been held insufficient for his conviction; and this opinion certainly best accords with the humanity of the criminal code, and with the great degree of caution applied in receiving and weighing the evidence of confessions in other cases; and it seems countenanced by approved writers on this branch of the law."[2] Wharton, in his treatise on criminal law, lays down the doctrine in equally emphatic terms, and says that proof of the *corpus delicti*, by clear and satisfactory evidence, must always precede a conviction. He approvingly quotes the language of Lord Hale, where that great judge says: "I would never convict any person for stealing the goods of a person unknown, merely because he would not give an account how he came by them, unless there were due proof made that a felony had been committed. I would never convict any person of murder or manslaughter unless the fact were proved to be done, or at least the body found dead."[3] A writer of standard excellence has said: "It may be doubted whether justice and policy ever sanctioned a conviction where there is no other proof of the *corpus delicti* than the uncorroborated confession of the party."[4] In murder trials the rule laid down by Lord Hale has been generally followed, namely that the fact of death should be shown either by witnesses who were present when the murderous act was done, or by proof of the body having been seen dead; or if found in a state of decomposition, or reduced to a skeleton, that it be identified by tests of the most clear and cogent character. These authorities have frequently received the ap-

1 1 Greenl. Ev., sec. 216.

2 *Id.*, sec. 217.

3 1 Whart. Cr. L., secs. 745, 746.

4 Wills on Cir. Ev., sec. 6.

probation of this court. In *Robinson* v. *State*,[1] Judge Ryland, after examining many of the cases, laid it down as a settled rule, that the confession of a defendant, not made in open court, or on an examination before a committing court, but to an individual, uncorroborated by circumstances, and without proof *aliunde* that a crime has been committed, would not justify conviction. In the case of *State* v. *Scott*,[2] which was an indictment for robbery, while the evidence showed that the prisoner was riding in company with an old man, and he declared that he intended to get into a "fuss" with the old man and take his horse from him, and afterward he was seen riding the horse, and he said he had got into a "fuss" with the old man and took his horse, this was held to be insufficient evidence to warrant a conviction, because there was no corroborative testimony that a crime had been committed. This doctrine was also recognized in the case of *State* v. *Lamb*,[3] where a conviction for murder was sustained upon a judicial confession by the prisoner, which constituted the only actual proof of the commission of the crime. But there was a claim of corroborative circumstances from which the evidence of guilt was irresistible. In the case at bar there is an utter failure to prove the *corpus delicti*.

All the circumstances proved by the State, outside of the confession, may well exist, and still be entirely consistent with the fact that Canaday was never murdered, and that he is still alive; that a pair of coarse boots were found similar to his is really no evidence. All boots bought of the store as his were will look alike when worn; so with the clothes. The belt, which it was first thought was his, upon a close examination, proved not to be his. Mrs. Davis, the witness with whom he had lived when he was working on the railroad, and who had mended it for him, when she inspected it, said that his belt was lined by her with a piece from an old calico dress, and that the belt produced and found was lined with bed ticking and was not his. The confession was made out of court, and lacks the necessary corroboration.

It further appears that it was made under a misapprehension, and that the prisoner did not have a full knowledge of all the facts, and of the consequences that would result therefrom. It is undeniable that the officer to whom the confession was made was in the prisoner's confidence, and exerted a great influence over him, and it may be well doubted whether it was properly admitted in evidence.

I think that the demurrer tendered to the evidence by the defendant's counsel should have been sustained, and that the judgment should be reversed and the cause remanded.

The other judges concur.

*Judgment reversed.*

[1] 12 Mo. 592. [2] 34 Mo. 424. [3] 28 Mo. 218.

## HOMICIDE — INTENT TO CAUSE DEATH OR BODILY HARM ESSENTIAL.

## WELLAR *v.* PEOPLE.

[30 Mich. 276.]

*In the Supreme Court of Michigan, 1874.*

**In a Prosecution for Homicide,** where it appears that no weapon was used, but that death resulted from a blow or a kick not likely to cause death, the offense is manslaughter and not murder, although the assault be unlawful and malicious, unless the respondent did the act with intent to cause death or grievous bodily harm, or to perpetrate a felony, or some act involving all the wickedness of a felony.

ERROR to Saginaw Circuit.

*William H. Sweet* and *William A. Clark*, for plaintiff in error.

*Isaac Marston*, Attorney-General, for the People.

CAMPBELL, J. Plaintiff in error was convicted of the murder of Margaret Campbell, by personal violence committed on July 25, 1873. They had lived together for several months, and on the occasion of her death, she had been out on an errand of her own in the neighborhood, and on coming back into the house, entered the front door of the bar-room, and fell, or was knocked down upon the floor. While on the floor, there was evidence tending to show that Wellar told her to get up, and kicked her, and that he drew her from the bar-room, through the dining-room into a bed-room, where he left her, and where she afterwards died. The injury of which she died was inflicted on her left temple, and the evidence does not seem to have been clear how she received it, or at what specific time. It was claimed by the prosecution to have been inflicted by a blow when she first came in, and if not, then by a blow or kick afterwards. All of the testimony is not returned, and the principal questions arise out of rulings which depend on the assumption that the jury might find that her death was caused by some violent act of Wellar's; which they must have done to convict him. There can be no question but that, if she so came to her death, he was guilty of either murder or manslaughter. The complaint made against the charge is that a theory was put to the jury, on which they were instructed to find as murder what would, or at least might, be manslaughter.

There was no proof tending to show the use of any weapon, and, if we may judge from the charge, the prosecution claimed the fatal injury came from a blow of Wellar's fist, given as she entered the house. The judge seems to have regarded it as shown by a preponderance of proof, that the injury was invisible when she was in the bar-room, and that the principal dispute was as to how it was caused, whether by a blow, or

kick, or by accident. It also appears that, if inflicted in that room, it did not produce insensibility at the time, if inflicted before the prisoner dragged her into the bed-room. It does not appear from the case at what hour she died.

It may be proper to remark that, while it is not desirable to introduce all the testimony into a bill of exceptions, in a criminal case, it is important to indicate in some way the whole chain of facts which the evidence tends to prove. Without this, we can not fully appreciate the relations of many of the rulings, or know what instructions may be necessary to be sent down to the court below. The bill before us is full upon some things, but leaves out some things which it would have been better to include.

Upon any of the theories presented, there is no difficulty in seeing that if Wellar killed the deceased, and if he distinctly intended to kill her, his crime was murder. It is not claimed on his behalf that there was any proof which could reduce the act to manslaughter, if there was a specific design to take life. Upon this the charge was full and pointed, and is not complained of. There was no claim that he had been provoked in such a way or to such an extent as to mitigate the intentional slaying to anything below one of the degrees of murder.

But it is claimed that although the injury given was fatal, yet, if not intended to produce any such results, it was of such a character that the jury might, and probably should, have considered it as resting on different grounds from those which determine responsibility for acts done with deadly weapons used in a way likely to produce dangerous consequences. But the charge of the court did not permit them to take that view.

It will be found, by careful inspection of the charge, that the court specifically instructed the jury, that if Wellar committed the homicide at all, it would be murder, and not manslaughter, unless it was committed under such extreme provocation as is recognized in the authorities as sufficient to reduce intentional and voluntary homicide, committed with a deadly weapon, to that degree of time. And in this connection, the charge further given that, if the intent of the respondent was to commit bodily harm, he was responsible for the result, because he acted willfully and maliciously in doing the injury, necessarily led to a conviction of murder, because there was no pretense of any provocation of that kind.

Manslaughter is a very serious felony, and may be punished severely. The discretionary punishment for murder in the second degree comes considerably short of the maximum punishment for manslaughter. But the distinction is a vital one, resting chiefly on the greater disregard of human life shown in the higher crime. And in determining whether a

person who has killed another, without meaning to kill him, is guilty of murder or manslaughter, the nature and extent of the injury or wrong which was actually intended must usually be of controlling importance.

It is not necessary in all cases that one held for murder must have intended to take the life of the person he slays by his wrongful act. It is not always that he must have intended a personal injury to such person. But it is necessary that the intent with which he acted shall be equivalent in legal character to a criminal purpose aimed against life. Generally the intent must have been to commit either a specific felony, or at least an act involving all the wickedness of a felony. And if the intent be directly to produce a bodily injury it must be such an injury as may be expected to involve serious consequences, either periling life or leading to great bodily harm. There is no rule recognized as authority which will allow a conviction of murder where a fatal result was not intended, unless the injury intended was one of a very serious character, which might naturally and commonly involve loss of life, or grievous mischief. Every assault involves bodily harm. But any doctrine which would hold every assailant as a murderer, where death follows his act, would be barbarous and unreasonable.

The language used in most of the statutes on felonious assaults is, an intent to do "grievous bodily harm."[1] And even such an assault, though "unlawfully and maliciously" made, is recognized as one where, death followed, the result would not necessarily have been murder.[2] Our own statutes have made no provision for rendering such assault felonious, unless committed with a dangerous weapen, or with an intent to commit some felony.[3]

In general, it has been held that where the assault is not committed with a deadly weapon, the intent must be clearly felonious, or the death will subject only to the charge of manslaughter. The presumption arising from the character of the instrument of violence is not conclusive in either way, but where such weapons are used as do not usually kill, the deadly intent ought to be left in no doubt. There are cases an record where death by beating and kicking has been held to warrant a verdict of murder, the murderous intent being found. But where there was no such intent, the ruling has been otherwise. In *State* v. *McNab*,[4] it is held that unless the unlawful act of violenee intended was felonious, the offense was manslaughter. The same doctrine is laid down in *State* v. *Smith*[5]. That is the statutory rule in New York and in some other States.

1 Carr. Sup. 237.
2 *Id.*
3 Comp. L., ch. 244.
4 20 N. H. 160.
5 32 Me. 369.

The willful use of a deadly weapon, without excuse or provocation, in such a manner as to imperil life, is almost universally recognized as showing a felonious intent.[1] But where the weapon or implement used is not likely to kill or to maim, the killing is held to be manslaughter, unless there is an actual intent which shows a felonious purpose.[2] In *Darry* v. *People*,[3] the distinctions are mentioned and relied upon, and in the opinion of Parker, J., there are some remarks very applicable. In the case of *Commonwealth* v. *Webster*,[4] the rulings of which have been regarded as going beyond law in severity, this question is dealt with in accordance with the same views, and quotations are given from East to the same purport.

The case of death in a prize fight is one of the commonest illustrations of manslaughter, where there is a deliberate arrangement to fight, and where great violence is always to be expected from the strength of the parties and the purpose of fighting till one or the other is unable to continue the contest. A duel with deadly weapons renders every killing murder; but a fight without weapons, or with weapons not deadly, leads only to mahslaughter, unless death is intended.[5]

The case of *Commonwealth* v. *Fox*,[6] is one resembling the present in several respects, in which the offense was held manslaughter.

The jury were sufficiently and rightly charged upon the extent of the respondent's liability for any intended killing. And if respondent willfully and violently kicked the deceased in such a way as he must have known would endanger her life, and her life was destroyed in that way, an actual intention of killing would not be necessary, as in such case the death would have been a result he might fairly be held to regard as likely. But it was certainly open to him to claim that whatever may have been the cause of death he did nothing which was designed to produce any serious or fatal mischief, and that the injury from which the deceased came to her death was not intentionally aimed at a vital spot, or one where the consequences would be probably or manifestly dangerous. We have no right to say that there was no room for a verdict of manslaughter, and the effect of the charge was to deny this.

[Omitting rulings on other points.]

[1] See Bish. Cr. L., secs. 680, 681.

[2] See Turner's Case, 1 Raym. 144, where the servant was hit on the head with a clog; State *v.* Jarrott, 1 Ired. 76, where the blow was with a hickory stick; Holly *v.* State, 10 Humph. 141, where a boy threw a stone; Rex *v.* Kelly, 1 Moo. C. C. 113, where it was uncertain whether a person was killed by a blow with the fist, which threw him on a brick or by a blow from a brick, and the court held it a clear case of manslaughter.

[3] 10 N. Y. 120.

[4] 5 Cush. 295.

[5] 1 East's P. C. 270; Murphy's Case, 6 C. & P. 103; Hargrave's Case, 5 *Id.* 110.

[6] 7 Gray, 585.

The judgment must be reversed, and a new trial granted. The respondent to be remanded to the custody of the sheriff of Saginaw County.

COOLEY and CHRISTIANCY, JJ., concurred.

GRAVES, C. J., did not sit in this case.

---

MURDER BY POISON — KNOWLEDGE — CIRCUMSTANTIAL EVIDENCE.

## PEOPLE v. STOKES.

[2 N. Y. Crim. Rep. 382.]

*In the Court of Oyer and Terminer — Jefferson County, June, 1882.*

1. **To Convict of Murder** by poisoning, there must be shown knowledge by defendant of the poisonous character of the poison which produced the death. Knowledge of defendant that the article was not entirely harmless, is not sufficient.
2. **To Justify a Conviction** upon circumstantial evidence, not only must the facts proved, be consistent with and point to the defendant's guilt beyond a reasonable doubt, but they must be inconsistent with his innocence.
3. **Where the Case Depends** on circumstantial evidence, which points to a particular person as the criminal, a motive on the part of that person to commit the crime, much fortifies the probabilities created by the other evidence.

Motion by defendant William Stokes for a new trial under section 465.[1]

The defendant was indicted with one, Martha Hovey, for murder in the first degree, in poisoning his wife, on March 27, 1882. He pleaded not guilty, and was brought to trial at the June Oyer and Terminer, held in Jefferson County, Justice MERWIN presiding.

The evidence showed that the defendant, his wife, a half-witted son and Martha Hovey resided together in an old store house at Sackett's Harbor, and they were all much addicted to the use of intoxicating liquors, and that on various occasions the defendant had been seen whipping his wife and dragging her outdoors by her hair, and also chasing her in the streets, her face being more or less covered with blood. On several occasions, when under the influence of liquor, the defendant had threatened to kill his wife. On the evening of March 25, defendant's wife was heard in the house, screaming that he would kill her. She arose on the morning of March 27, in her usual health and commenced to wash. About two o'clock in the afternoon defendant went to Dr. Tyler, and reported that his wife was very sick. Dr.

[1] Subd. 6, 7, Code of Cr. Pr.

Tyler immediately called, and found her vomiting almost constantly, and holding her hand to her throat. She complained of a burning pain in her throat, stomach and bowels. The doctor observed that her throat was very red, and asked her what she had been taking. She replied she had taken nothing except what they (meaning defendant and Martha Hovey) had given her. The defendant then stated to the doctor that he had given her a drink of whisky in the morning, and that after she was taken sick, he gave her two or three slings with milk and castor oil. The doctor further observed that her mouth frothed and that she vomited a mucous substance; that her skin was cold, pulse rapid, respiration frequent, face bloated, and that she complained of great thirst. She grew rapidly worse, and died the same afternoon.

A coroner's jury was impaneled, before which the defendant testified that his wife was well in the morning; that he gave her some whisky before breakfast; that she had breakfast about nine o'clock; that she was taken sick about eleven o'clock; that he was out in his shop talking with a man, and Martha Hovey called to him that his wife was sick; that she called three times before he went to see her; that he went into the house and gave her a hot whisky; that she complained of severe pain in her stomach and bowels: that he then got some milk and gave her a sling with milk, castor oil and black pepper; that she continued to get worse, and he called Dr. Tyler. The evidence showed that about two o'clock the defendant went down to a ship-yard and told his son if he wanted to see his mother alive he must come up at once to the house. That he called on one Robbins about noon, and complained that the tenant's in Robbin's block had been throwing water upon his premises, and wanted Robbins to call at once at his house. After the death of his wife, the defendant repeatedly stated that he desired an investigation. A *post mortem* examination was made, and œsophagus was found very red and much inflamed. The stomach was also much inflamed, and of a dark red color, filled with dark spots. About half a pint of fluid was found in the stomach, of a darkish color, filled with mucous and light flakes. The throat was very red from irritation; the piloric orifice and the duodenum were also very red. The other organs were healthy, and the body well nourished. The doctors testified that, in their judgment, death was caused from swallowing some corrosive substance. A chemical analysis showed the stomach to contain a quantity of nitrate of mercury, which was proved to be a deadly poison. A pint whisky bottle was found in defendant's house the next day after she died with a liquid substance in it, which upon analysis proved to be nitrate of mercury. Defendant said he didn't know what it was or where it came from. He afterwards testified before the coroner's jury that it was a preparation for silver washing one Crouch had brought to his

house some time before. Stokes was a tinsmith, and it was shown that he was present when Crouch prepared the mixture. It smoked so that he declared himself afraid of it.

Martha Hovey was a married woman who did not live with her husband. She had resided with Stokes some time. She had had difficulty with Mrs. Stokes on several 'occasions. On one occasion she was out with the defendant and introduced him as her brother. Deceased had in bank at the time of her death $4,600 recently received from the estate of a deceased relative.

The jury found the defendant guilty of murder in the second degree.

The defendant's counsel thereunpon made this motion for a new trial under subdivision 6, section 465, Code of Criminal Procedure.

*E. C. Emerson*, District-Attorney, and *P. C. Williams*, for People.

*W. F. Porter* and *Watson M. Rogers*, for defendant.

MERWIN, J. On the part of the defendant it is claimed among other things that the verdict is clearly against the evidence, and that, therefore, under the provisions of subdivision 6, section 465. of Code of Criminal Procedure a new trial should be granted.

Upon this proposition it is suggested that there is no evidence that the defendant knew that the mixture which apparently operated to produce the death was poisonous. In Wharton's Criminal Evidence,[1] it is laid down that in order to convict of murder there must be a knowledge of the dangerous character of the poison. Very evidently this is necessary in order to show an intent to kill. In the present case there is no evidence that defendant knew that the mixture was poisonous. He did not buy it himself; he is not shown to have known of what ingredients it was composed. A recipe was referred to on the trial, but it was not in evidence or shown to be in defendant's possession. The mixture was prepared by Crouch and used by him for an honest purpose, and for the same purpose which he stated to the druggist. It was used in December previous to the death, and what was then done with it or who had it, does not appear, except that it was found the day after the death in the room in which the *post mortem* had been held. Assuming that defendant knew that in the mixture there were mercury and nitric acid, it is not shown that he knew the dangerous character of these elements or of the compound. It is said he was a tinsmith, and therefore must have known it. That sequence does not follow. It is not shown that as a tinsmith he dealt in those articles or had any occasion to use them. This can not be inferred. He was present when Crouch made up the compound. The packages which Crouch had received of the druggist were not marked by the druggist as poisonous.

1 (8th ed.), sec. 794.

The particular manifestations at the time they were mixed would indicate that the articles were not entirely harmless. It would also indicate that a change then took place; and whether the compound was dangerous or not, a person unskilled or unacquainted would not be expected to know. A knowledge that the compound might not be entirely harmless might be reasonably inferred, but the character or extent of the harm would be entirely a matter of speculation.

In cases of this kind the purchase or possession of poison under false pretenses and a knowledge of its properties are deemed among the most, if not the most material circumstances.[1] Their absence in this case is a matter to be seriously considered.

As bearing upon the knowledge of the defendant of the character of the mixture as well as upon his connection with the act itself, it is said that defendant stated differently about his knowledge of the mixture at the time of its discovery and at the time he testified before the coroner a few days after its discovery. At the time of its discovery he said he did not know what was in the bottle or where it came from or anything about it. Before the coronor he testified that he didn't know what was in the bottle; that it came from Camp's; that Crouch got it for silver washing. The variance will be noticed. If it be true that nothing had been done about this mixture by the defendant after the experiments of Crouch in December, then it would not be strange for the defendant to fail to identify it at the time when first suddenly called on about it, and then afterwards before testifying have ascertained or recalled to memory the fact that it was got by Crouch at Camp's for silver washing. In other words, the variance may be accounted for consistently with defendant's innocence. Whether it can be done so reasonably, depends largely upon what other circumstances there may be in the case that are of doubtful construction and which may raise grounds for suspicion. A single circumstance involving a slight suspicion may be worthless and deserve no consideration, while several of that kind, based on distinct evidence, may lead the mind far toward the presumption of guilt.

We come, then, to the consideration of other circumstances which are claimed to be suspicious. It is said that when he was informed of the sickness of his wife he delayed to give her attention and delayed sending for the doctor; that he was too ready in his explanations to the doctor; that he knew her fatal condition before he saw the doctor, as indicated by his remark to his son in the presence of Clifton; that he saw Robbins about noon too ostentatiously; that after the death he was too ready for investigation. As to these matters, I have carefully con-

[1] 1 Archb. Cr. Pr. & Pl. (8th ed.) 856; 3 Whart. Cr. L. (7th ed.), sec 3494, a.

sidered the evidence, and I find nothing which can not be explained consistently with innocence. She had previously been troubled with indigestion and had bad spells sometimes, and was generally costive. She was on the morning in question as well as usual, and insisted upon going to work. The information given the defendant by Mrs. Hovey as to her being sick might fairly be attributed to one of her usual spells, and would not require him to drop everything in order to see to her. How long the delay was does not appear. It was not long. He then gave her the usual remedies, so far as it appears; they not giving relief he went for the doctor. His manner then was natural for an innocent man. When the doctor came he asked the deceased what she had been taking. This might refer either to what she had taken to relieve her sickness, or to what she had taken that produced it. The doctor did not ask her what brought on or caused her sickness. She replied to the doctor's question that she had taken nothing but what they had given her. The defendant then stated what he had given her; no part of his statement was contradicted by other evidence.[1] He was certainly called on to state what he had given. Had he refused or stated untruly or hesitated, it would have been much more suspicious. The time of day in which he spoke to the boy in presence of Clifton is concededly so uncertain upon the evidence that no particular weight is to be given to it. So the occurrence testified to by Robbins looks to me as quite insignificant, as well as uncertain in time, with reference to the time that the wife was sick. The distance to the defendant's store to where Robbin's was, was short. The act of defendant was brief, and it might readily have happened before the sickness of the deceased assumed apparently a dangerous form. The readiness of defendant to have an investigation looks to me far from having a guilty tendency. In weighing these circumstances the question is not whether they are consistent with his guilt. If there were other circumstances which authorized the presumption of his guilt, then the question would be whether there was anything else in the case that was inconsistent with his guilt; but when we weigh the circumstances themselves from which the guilt is sought to be inferred, we must assume and start with the presumption of innocence. If all the circumstances shown are consistent with innocence, then there can be no conviction. If they are not, then the question is whether they point to guilt so clearly and distinctly as to satisfy the mind beyond a reasonable doubt. The facts proved must all be consistent with and point to the defendant's guilt not only, but they must be inconsistent with his innocence.[2] If equally susceptible of two inter-

[1] Rex v. Jones, 2 C. & P. 629.

[2] Per Church, C. J., in People v. Bennett, 49 N. Y. 144.

pretations, one innocent and one not, the innocent one must be taken.[1] So, it is said that if it be shown that either the defendant or a third person committed the deed, but it can not be distinctly ascertained which one, the defendant can not be convicted.[2] The same author[3] lays it down as established by many adjudications that the test of the sufficiency of circumstantial evidence is that the facts proved can be reasonably accounted for on no hypothesis which excluded the defendant's guilt; that with the theory of his guilt they are harmonious and consistent, and that they point to it so clearly and distinctly as to satisfy the jury of it beyond a reasonable doubt.

The trouble in this case is, to be able to say that the facts proved are inconsistent with defendant's innocence; that they can not be accounted for reasonably on any hypothesis which excludes the defendant's guilt. The question in my mind is whether. upon the evidence here, there are not two hypotheses which at least are as reasonable as that of defendant's guilt.

I have thus far not referred to the evidence on the subject of motive. There is much in the case on that subject. Motive, however strong, does not prove the crime. Its office is to aid in the application of other circumstances that point toward guilt. It is said to be a minor or an auxiliary fact from which, when established in connection with other necessary facts, the main or primary fact of guilt may be inferred.[4] When the case depends upon circumstantial evidence, and the circumstances point to any particular person as the criminal, the case against him is much fortified by proof that he had a motive to commit the crime; and where the motive appears, the probabilities created by the other evidence are much strengthened.[5]

In the present case the evidence discloses a very unpleasant state of things in the family of the defendant. I have no doubt the situation in this regard has had a tendency to his prejudice. Quarrels between husband and wife are said to be entitled to but little weight unless connected in some way with the fatal wound.[6] That probably, however, depends upon the intensity and permanency of the feeling engendered in such quarrels. The evidence here does not show any permanent feeling in the defendant against his wife, herself, nor any feeling at all against her upon the day in question. The question for the court to determine on this motion is whether the evidence pointing to the guilt of the defendant was sufficiently strong to authorize the jury to say that he was guilty. Does the evidence authorize that finding? If it does, then the

1 Pollock v. Pollock, 71 N. Y. 137; Schultz v. Hoagland, 85 N. Y. 464.

2 1 Bish. Cr. Pr. (3d ed.), sec. 1106.

3 sec. 1079.

4 Pierson v. People, 18 Hun, 253.

5 Earl, J., in Pierson v. People, 79 N. Y. 436.

6 Whart. Cr. Ev., sec. 786.

verdict must stand, although the court might have to come to a different conclusion. If it does not, then the verdict would be clearly against evidence, and should be set aside. In the case of *People* v. *Bennett*,[1] cited by the counsel for the People, the ill-treatment by the defendant of his wife was connected with the occurrence of the fatal wound. There was evidence that she could not have inflicted it herself. He knew of her bleeding profusely, but did nothing to help her. In that case the court were divided on the question whether the verdict was against evidence, but it was set aside on another ground.

Having in view the proposition laid down in the *Bennett Case*, that the facts proved must all be consistent with and point to his guilt not only, but they must be inconsistent with his innocence, or as it is put in *Poole* v. *People*,[2] be inexplicable upon the theory of innocence; and having in view the want of connection shown between the defendant and the poison producing the death, I am of the opinion that the verdict is not authorized by the evidence.

*Motion granted.*

---

## HOMICIDE — POISONING — INTENT TO TAKE LIFE ESSENTIAL.

### ANN *v.* STATE.

[11 Humph. 159.]

*In the Supreme Court of Tennessee.*

1. **On an Indictment for the Murder** of an infant by the administration of laudanum, the judge charged the jury, that "if Ann, a slave, without authority, administered laudanum to the infant, with the intent to produce unnecessary sleep, and contrary to her expectations it caused death, she would be guilty of murder." *Held*, erroneous. If an act unlawful in itself be done with a deliberate intent to effect mischief, and death ensues, though against the intention of the party, it will be murder; if the act be done heedlessly and incautiously without such intent, it will be manslaughter only.
2. **The Administration of Laudanum** was not *per se* unlawful, and the charge excluded from the jury the consideration of the facts, whether the defendant intended serious mischief to the infant or not, and whether the offense amounted to murder or manslaughter.

This indictment was prosecuted in the Circuit Court of Williamson County. The defendant was found guilty and appealed, MANEY, Judge, presiding.

*Marshall & Figures*, for the plaintiff in error.

*Attorney-General*, for the State.

MCKINNEY, J., delivered the opinion of the court.

1 49 N. Y. 137.

2 80 N. Y. 645.

The plaintiff in error was indicted jointly with another slave named Tom, in the Circuit Court of Williamson, for the murder of Mary E. B. Marr, the infant child of their master and mistress. The jury acquitted Tom, and found the plaintiff in error guilty as charged in the indictment. The court refused to grant a new trial, and pronounced judgment of death upon the prisoner, from which an appeal in error has been prosecuted to this court. It is not necessary, in the view we have taken of the case, to state the evidence in detail; a mere outline will be sufficient to raise the questions of law presented for our determination, except the question in relation to the admissibility of the prisoner's confession. The infant, of whose murder the prisoner stands convicted, was of extremely tender age, only five weeks old; and the death was caused by an overdose of laudanum administered by the prisoner, without the knowledge of any one, and contrary to the general command, not to give the child anything whatever.

The prisoner is of immature age, being at the time of the alleged murder, not over fifteen years. A day or two preceding the death of the infant, the prisoner was taken from the negro quarter on the plantation and put in the house to serve in the capacity of nurse. On the day of the infant's death, Mrs. Marr went into another room to attend to some of her domestic affairs, leaving the child asleep in the cradle in care of the prisoner. She remained absent about fifteen minutes as she supposes, during which time the laudanum was administered. The child survived about four hours. A physician was immediately sent for but did not arrive until about two hours after the laudanum was given, and his efforts to counteract its effects were unavailing. He states, that the death was caused by an overdose of laudanum and that half a drop was as large a dose as the infant could have borne.

The prisoner for some time denied having given laudanum to the infant. Her master was much excited; inflicted blows with his hand upon the prisoner; threatened to shoot her, but was induced to desist by the persuasion of his wife, and sent her off to the quarter, where she was put in chains around her body and neck. On Saturday evening after the death of the child, which happened on the preceding day, Nichols, the overseer of Marr and Giles, the overseer of Perkins, who lived on an adjoining farm, went together after night to the house where the prisoner was confined. Giles states, that she was asked by him, "how she came there," seemed slow in speaking. Nichols told her to speak. She then said she had given laudanum to the baby and it had killed it. He then asked her how she came to do it? She said Tom had been at her to meet him out at night, and told her if she would give it laudanum it would sleep until she could get back; that she had asked him if it would hurt; he said no, he had given it many

times to his wife Eliza, and it never hurt her. She was told, she had better come out and tell the truth — it would be better for her. She was asked if she would make the same statement before Tom, that she had made to witness and Nichols; she said she would. Witness and Nichols then went to Tom's house and took him into the house where prisoner was, and told her to tell her tale again. She said Tom had recommended her to give it, and it would make the baby sleep till she could get back; and she asked him if it would hurt. Tom denied all this. She said she thought she would try and see if it would make it sleep, and had poured some in her hand and given it. That since she had been chained Tom had been there and told her she had given it wrong; that she ought to have put some brandy in it, and sweetened it, and warmed it, and then the child would not have died in several days; that he told her she must admit she had given it, but not to call his name, or he would shorten her days. Tom denied all this. Witness further stated that "in the first talk with her he told it would be better for her to come out and tell the truth." Nichols' statement of the prisoner's confession is somewhat different from that of Giles; but we have thought proper to take the latter as probably the more correct and reliable statement.

There is proof in the record of an improper intimacy having existed between Tom (who was of mature age) and the prisoner for some weeks previous to the removal of the latter from the quarter to the house. The witness, Nichols, speaks of one occasion when he detected them, but he says "he passed on and said nothing, as it was no business of his, and he did not care what he did."

Judging from the avowal of the overseer, the morals of the slaves under his dominion were in bad keeping; and it is not much to be wondered at that the prisoner — who was brought up at the quarter — had a more imperfect sense of the obligations of morality and common decency than is even usual among those of her own caste and social condition.

The circuit judge, in his introduction to the jury — after stating the general definition of murder and malice, and laying down some general principles, the correctness of which is not questioned — said: "If Ann, the prisoner, by force poured laudanum into the mouth of Mary E. B. Marr, such act, unless excused or justified by the evidence, would amount to a battery, and she would be responsible in law for the natural effects of the laudanum, although they may have been more serious than she designed or expected.

"If Ann was the slave of Nichols Marr, the witness, and was employed by him to attend to Mary E. B. Marr; and if she was ordered by her master not to administer anything to the said Mary E. B. Marr;

if she, without authority, willfully administered laudanum to said Mary, intending thereby to produce unnecessary sleep, and, contrary to her expectations, it caused death, she would be guilty of murder."

The first question for our consideration is, was the confession of the prisoner, which was objected to, properly admitted as evidence to the jury? This is a question which admits of no discussion. All the authorities concur, that a confession, to be admissible as evidence, must have been freely and voluntarily made, and not under the influence of promises or threats. As to what is such a promise or threat as will exclude a confession, it is laid down, that saying to a prisoner it will be worse for him if he do not confess; or that it will be better for him if he do, is sufficient to exclude the confession.[1] So where a surgeon called to see a prisoner charged with murder, said to her, "you are under suspicion of this, and you had better tell all you know," the confession was held inadmissible.[2] So, where it was said to the prisoner, "it would have been better if you had told at first," the confession was rejected.[3] It would be a useless labor to multiply authorities upon a point in respect to which there is no substantial disagreement to be found in the books. Nor would it be more profitable to indulge in speculation as to the probable influence of such a promise or threat in a particular case; certainly not in the case of a timid girl, of tender age, ignorant and illiterate, a slave and in chains, whose life had been threatened by her master, and against whom the hand of every one, even those of her own color and condition, seem to have been raised. In such case, and in all cases, the law presumes, and conclusively presumes, that an influence was exerted upon the mind of the prisoner, and, therefore, all inquiry upon the subject is precluded.

2d. The next question is, was the law correctly stated to the jury? We think not. The errors of the charge will be obvious from the mere statement of a few plain elementary principles.

To constitute the crime of murder by the common law, and by that law this case is to be governed, the killing must be with malice aforethought; no matter by which of the thousand means adequate to the destruction of life, the death may have been effected.

Malice, in its legal sense, is the sole criterion by which murder is distinguished from every other species of homicide. The malice essential to constitute the crime of murder, however, is not confined to an intention to take away the life of the deceased; but includes an intent to do any unlawful act which may probably result in depriving the party of life. It is not, in the language of Blackstone, so properly spite or malevolence to the individual in particular, as an evil design in general,

[1] 2 East's P. C. 659. [2] 4 C. & P. 387. [3] 6 C. & P. 175.

the dictate of a wicked, depraved, and malignant heart; and it may be either express or implied in law.[1]

If an action, unlawful in itself, be done deliberately and with intention of mischief, or great bodily harm, to particulars, or of mischief indiscriminately, fall where it may, and death ensue, against or beside the original intention of the party, it will be murder, But if such mischievous intention do not appear (which is matter of fact to be collected from the circumstances), and the act was done heedlessly and incautiously, it will be manslaughter only.[2] But if the death ensue in the performance of a lawful act, it may amount either to murder, manslaughter, or misadventure, according to the circumstances by which it is accompanied.[3]

These general principles apply as much to a case where death ensues by means of a medicine of poisonous qualities, as to any other species of homicide. It is true, that where one willfully poisons another, from such deliberate act, the law presumes malice, though no particular enmity can be proved.[4] But this presumption may be displaced in a case of death from poison, as in other cases, by direct proof, or by the circumstances of the particular case.

If, as Blackstone says, the poison were willfully administered, that is, with intent that it should have the effect of destroying the life of the party; or if, in the language of Foster, the act were "done deliberately and with intention of mischief, a great bodily harm," and death ensue, it will be murder. But if it were not willful, and such deliberate mischievous intention do not appear; and the act was done heedlessly and incautiously, it will be only manslaughter at most.

Testing the charge by these familiar principles, it is manifestly incorrect in several respects. It assumes, that if the prisoner administered the laudanum in violation of her master's order, for the purpose of "producing unnecessary sleep," and death ensued, contrary to her intention, she is guilty of murder. This is not law. In the first place, the charge puts the disobedience to the master's order, on the same footing with a violation of a command or prohibition of the law. This is a great mistake. Such violation of the master's order, is not an "unlawful act" in the sense of the rule above stated.

It is no offense against the law of the land; nor is it cognizable by any tribunal created by law. It is an offense simply against the private authority of the master and is cognizable and punishable alone in the domestic forum. Again; the criminality of the act is made to depend upon an intent, with reference to the deceased infant, which may be in law, if not positively innocent, at least comparatively so.

[1] 4 Bla. Com. 199, 200.

[2] Fost. 261.

[3] *Id.* 262; 1 Hale, 472; 4 Bla. Com. 192.

[4] 4 Bla. Com. 199.

The laudanum may have been given by the prisoner in utter ignorance of the fact that it possessed any poisonous quality; and there may have been a total absence of any intention to do serious injury, or indeed injury of any sort, much less to destroy the life of the child. If the prisoner's purpose really was, to superinduce a state of temporary quietude or sleep, without more, in order to afford better opportunity, or greater facility, for carrying on her own illicit intercourse with Tom, this, however culpable in morals, would not involve her in the guilt of murder. The tenderest of mothers might administer laudanum to her infant incautiously, in order to be enabled to attend to some pressing call of her household affairs, which admitted of no delay; or a gay and thoughtless matron, devoted to the pursuit of pleasure, though not devoid of natural affection for her infant, might give a similar dose in order to have opportunity to attend the theater or ball-room for a time. And although in both the latter cases the motive, so far as respects the actors, is different, and less offensive to morals or propriety, yet the purpose or intention, with reference to the effect to be produced upon the child, is the same in kind at least, that is, in the language of the charge, to "produce unnecessary sleep." And yet, perhaps, no one would contend that, had death ensued, in either case, the mother would have been guilty of either murder or manslaughter.

In the case of the prisoner, her relation as a slave, taken in connection with her disregard of her master's positive direction, and the gross heedlessness and incautiousness of the act, might constitute her offense manslaughter, but certainly nothing more.

The charge of the court then, is not only erroneous in excluding from the jury the questions of fact, whether or not the prisoner had knowledge of the poisonous quality of laudanum, and whether or not there exisited in the mind of the prisoner an intent to kill, or to do serious injury to the deceased; but likewise, in not submitting it to the jury to determine the grade of offense, whether murder or manslaughter.

If the offense amounted to no more than manslaughter, as we hold to be clear, then the Circuit Court had no jurisdiction of the case.

[Omitting another point.]

*Judgment reversed.*

## HOMICIDE BY POISONING — PROOF — SYMPTOMS.

## JOE v. STATE.

[6 Fla. 571; 65 Am. Dec. 579.]

*In the Supreme Court of Florida, 1856.*

**Symptoms of Themselvee are Insufficient** to sustain a conviction for administering poison. The indirect proof considered satisfactory in such cases is that of chemical analysis and tests of the contents of the stomach and bowels.

Indictment for administering poison. The facts are stated in the opinion.

*A. L. Woodward*, for the appellant.

*M. D. Papy*, Attorney-General, for the State.

*By the court*, BALTZELL, C. J. This is an appeal from a conviction and sentence of death passed upon the prisoner Joe, on a charge of having administered poison and white arsenic to a negro woman, Rebecca. She did not die from the alleged effects, but is examined as the only witness to the facts of the case, excepting the medical attendant. But little complaint is made of the instructions given to the jury which seem to have been drawn with exceeding care and caution on the part of the judge below, and are on the whole, liberal to the prisoner. Reliance is placed in this court on a motion for a new trial, presented to and overruled by the court below, and the broad position assumed that the facts of the case do not establish a case of guilt.

It is rather a singular circumstance that new trials were never granted until within a recent period, in England, in cases of felony, this object being in some degree attained by the judge, reserving a point of difficulty for the decision of the court above. The courts of this country have maintained a different practice, even granting a new trial where the case was either against the weight of the evidence or not sustained by it. Appeals are not often allowed in criminal cases, and if permitted, the assignment of error is usually confined to questions of law. In this State the appeal is not only allowed, but the duty is imposed upon the court of examining into the correctness of the ruling, as to the refusal of a new trial.

The crime of poisoning is of so shocking a character, so revolting to every sentiment of our nature, so far exceeding all others in atrocity, that we have not been able to yield a willing ear to the accusation or to admit it with ready facility. If true, the punishment of the law would not be by any means too severe. With a due sense of its importance, as well to the public as to the prisoner, not at all diminished by the fact that the individual implicated is a free man of color, we approach

the consideration of the subject. The cases to be found in the books, both medical and legal, exhibit abundant evidence of the absence of proper skill and acquaintance with the subject, creating the fearful impression that many, very many, innocent persons have been sacrificed to prejudice and ignorance rather than to actual guilt.

Modern science, with its pervading power, has removed this difficulty by substituting certainty in place of the obscurity that has so long prevailed. To the philosopher, the man of science, and physician, the world is indebted for important aid in judicial investigations through means of chemical tests applied to matter ejected from the stomach and bowels, and to the different parts of the body. A remarkable instance of the certainty attending such an examination is given in the Edinburgh Medical Journal of Science as having occurred in Paris. The head, trunk, and two lower extremities of a man were found in different and distant parts of the city, and were subjected to the scrutiny and examination of physicians, who, applying to them the results of science and skill, came to the conclusion that the individual was killed during sleep, a sleep induced by artificial means; that this was the result of drunkenness or the effect of some narcotic; that the throat must have been cut, and an immense quantity of blood lost; that the decapitation and cutting off of the limbs must have been immediately performed by a person accustomed to such operations; that the instrument was sharp-edged and long; that the person committing the act must have been a vigorous person and the incisions made by the same hand, but the murderer became nervous at the close of the deed. They then examined the internal parts, and came to the conclusion that the deceased labored under no disease. In examining the contents of the stomach, they found a small quantity of alcohol and prussic acid. A few weeks afterwards the murderer delivered himself up and confessed, confirming in a remarkable degree these various opinions of the physicians.[1] The German and French authors on medical jurisprudence hold that poisoning can never be completely established unless the particular poison be found, a doctrine not adopted in English jurisprudence.[2] Yet this accomplished author says: "Upon general principles, it can not be doubted that courts of law would require chemical evidence of the poisoning whenever it was attainable, and it is believed that no modern case of satisfactory conviction can be adduced where there has not been such evidence, or in its absence the equivalent of confession."[3] "The most decisive and satisfactory evidence of poisoning," says this author, "is the discovery by chemical means of the existence of poison in the body, in the matter ejected from the stomach, or in the food or

1 Wills. on Cir. Ev. 244.

2 *Id.* 215, 216.

3 *Id.* 221.

drinks of which the sufferer has partaken."[1] "It is even maintained that conviction can not be considered satisfactory where circumstances of suspicion even are blended with the scientific testimony, unless the crime be established by adequate evidence independently of moral circumstances."[2]

In the case before us there was no examination of any kind made. The contents of the stomach and bowels were not even noticed until a day afterwards, and this material part of evidence, so important to the ascertainment of truth, is wholly wanting. In the symptoms, and these alone, is there evidence of guilt. Before noticing these it is proper to revert to the weight and consequence assigned to such evidence in books of authority, legal as well as medical. "Medical writers appear to be agreed in opinion, that the symptoms and *post mortem* examination, which are commonly incident to cases of poisoning, are such as in general may be produced by other cases."[3]

The Penny Cyclopedia,[4] in an elaborate article containing a review of the subject says: "It is evident from these circumstances that in a fatal case of suspected poisoning by an irritant subject, it will seldom be possible to decide upon the evidence of the symptoms alone. When poison has actually been taken, the symptoms are sometimes so modified by circumstances peculiar to the case, that even where they have been carefully observed, much doubt has remained respecting their cause; and, on the other hand, the symptoms of naturally excited disease, often too closely resemble those of poison, to permit a positive conclusion being arrived at. The circumstances that usually first excite suspicion of poison having been taken are, that the person affected is suddenly attacked by symptoms of severe illness, which come on soon after eating or drinking, without any premonitory indications, which regularly increase in severity without undergoing any important change in the character, and which rapidly prove fatal All these, however, are far from affording sufficient evidence of poisoning. Suddenness of attack is common to many disorders, as cholera, whether ordinary or Asiatic, plague, perforating ulceration of the digestive canal, apoplexy and epilepsy; and even in some cases of fever the premonitory symptoms are too slight to attract the attention of the patient."

Whilst, then, symptoms, as a general rule, may not be relied on, as giving satisfactory evidence of the use or presence of poison, the question yet arises: May not symptoms, in the specific case of poisoning by arsenic, by irritant subjects, when applied to those proved to exist

[1] *Id.* 215.

[2] *Id.* 233, 234.

[3] Wills. on Cir. Ev. 211; Whart. Cr. L. (3d ed.) 391.

[4] vol. 18, p. 307.

in the case under consideration, sustain the conviction and establish the guilt of the prisoner? It is much to be regretted, that in the solution of these important questions, we have not the aid of the intelligent physicians who gave to the jury a description of the symptoms usual in cases of poisoning by arsenic, their statement not being fully incorporated in the record, and only a few symptons described by one of them; and thus, we are necessarily thrown upon our own imperfect knowledge and researches in prosecuting our investigation upon the authorities cited in the brief of the prisoner's counsel, the positions assumed, and the views presented in his argument. It is true, the attending physician expresses his opinion that the case exhibited specific symptoms of poisoning by arsenic, yet, with all respect for his intelligence and learning, we should not deem that we had discharged our duty, in relying upon that alone, without a more extended examination. It must be remembered, too, that his evidence is necessarily imperfect, as he saw none of the symptoms of the first day, nor noticed the appearances of matter ejected from the stomach and bowels at this period, most important and interesting of all others to the true understanding of the subject. The witness speaks also of symptoms not specified in the record, from which we infer that some possibly essential to the formation of a right judgment, are omitted. If this be so, it is deeply to be regretted, as the court must decide the case upon the facts set forth in the record, and are not permitted to presume any not presented.

Let us now refer to the facts developed by the evidence in the case under consideration. "The prisoner and the person complaining of being poisoned, a slave named Rebecca, were at work at Mrs. Gerard's in Tallahassee, both engaged in getting breakfast — the woman for the white family. The prisoner handed Rebecca some cow haslet which he had been cooking in an iron pot, asking her to eat. She ate about six mouthfuls, and immediately felt a pain in the heart — can not express the rest of her feelings; felt as if she wanted to throw up, but could not just then. Commenced vomiting about eleven o'clock of that day; was blind when the misery was on; had great pain in breast, then all over. For two or three months was unable to work much at anything; had not been sick before eating the haslet; felt effects immediately after eating, felt as if going to die; had painful and bloody discharges." This is the statement of Rebecca herself. A physician was not called in until the second day; he speaks of the appearance of the patient as follows: "There was frequent vomiting and discharges from the bowels, both tinged with blood; legs partially paralyzed; great tenderness about the stomach; patient a week under treatment."

Do these facts, as detailed by the witnesses, of themselves afford

sufficient and satisfactory evidence of poisoning? and are they such as to remove all reasonable doubt that poisoning, and nothing else, produced the symptoms exhibited? Could not the animal food itself, especially this particular kind, in any supposable case of imperfect cookery, the article itself perhaps unfit to be eaten or in a bad state of preservation, possibly eaten in a disturbed condition of the stomach, have produced such effects? Could they not have existed as the consequence of some other cause than arsenic or poison of any kind? Are they indeed attributable to no other cause; and must they be necessarily ascribed to arsenic, or some deadly and destructive thing alone?

Medical writers give the following as the usual symptoms in cases of poisoning: "The chief symptoms caused by the internal administration of irritant poisons are those of severe irritation of some or all parts of the alimentary canal. They generally excite burning, heat, redness and swelling, and sometimes ulceration of the lining of the throat, mouth and tongue, difficulty of swallowing, burning pain of the stomach, with nausea, retching and vomiting, tenderness on pressure, and tension of the upper part of the abdomen. The matters vomited consist, first, of the food or other contents of the stomach, and afterwards of tough mucous, with more or less of blood and bile; the sickness is almost incessant, and is usually accompanied by severe suffering. The pain commonly extends from the stomach along a part or the whole of the digestive canal, with tenderness on pressure, and usually constant and painful diarrhea of mucous and loss of blood. The pulse is quick and feeble; there is great prostration of strength, excessive burning, thirst, cold and damp skin, extreme anxiety of countenance and manner, and often considerable difficulty of breathing."

The most general effect of irritant poisoning is acute inflammation of the stomach, and its administration may therefore be regarded as highly probable in any case in which a competent observer finds the signs of an acute inflammation of the stomach during life, and its effects after death. "In most cases of this kind of poisoning a burning sensation in the throat is perceived directly after the poison is taken, being the effects of its contact during or soon after the act of swallowing."[1]

Beck represents the symptoms of poisoning by arsenic, "as so remarkable as not to be confounded with natural diseases." He states them to be, "marks of irritation extending from the throat to the rectum, the difficulty in swallowing, the pains of the bladder in passing water, the affections of the genitals, the vomiting and bloody diarrhea, extreme weakness."[2] The same writer gives us the earliest symptoms,

1 Penny Cyclopedia, Poison, 307.

2 2 Beck's Med. Jur. 417.

sickness or faintness, succeeded by pain, in the region of the stomach, most commonly of a burning kind, much aggravated by pressure, dryness, heat, and tightness in the throat creating an incessant desire for drink, hoarseness and difficulty of speech, matter vomited greenish or yellowish, but sometimes streaked or mixed with blood. The burning of the throat not always present, sometimes so severe as to be attended by fits of suffocation and convulsive vomiting. Diarrhea generally, not always; when this is severe, the rectum is excoriated, and burning heat felt there and along the whole of the alimentary canal; mouth and lips inflamed, and present dark specks and blisters, lungs affected, shortness of breath, tightness across the chest, and in a few cases actual inflammation, etc.[1] When life is prolonged several days or saved, the early symptoms are of the inflammatory variety as just described. The subsequent ones are referable to nervous irritation. They vary from coma to an imperfect palsy of the arms and legs, and between these extremes are observed epileptic fits or tetanus. Among occasional results where life is saved are irritability of the stomach, attended with constant vomiting of food, loss of the hair, and desquamation of the cuticle, soreness and inflammation of the eyes, etc.[2]

It will be clearly perceived, we think, that the case before us is defective in many of the most prominent distinctive symptoms described by the authors above quoted as most reliable in discriminating cases of poisoning by arsenic from those of disease produced by other causes. The symptoms exhibited in the present case are very few, and by no means create the clear and distinct impression upon the mind which is made by those described by authors on medical jurisprudence as peculiar to this particular kind of poisoning.

Passing this branch of the subject, we next proceed to the inquiry whether there are other circumstances in the case regarded as giving weight and force to the accusation. "There are particulars of moral conduct," says the writer so often quoted, that "by writers on circumstantial evidence are considered as leading to important and well grounded presumptions as motives to crime, declaratious indicative of intentions, preparations for the commission of crime, possession of the fruits of crime, refusal to account for appearances of suspicion, or unsatisfactory explanation of such appearances with evidence indirectly confessional." [3] If it be proved that a party charged with crime has been placed in circumstances which commonly operate as inducements to commit the act in question; that he has so far yielded to the operation of those inducements, as to have manifested the disposition to commit the particular crime; that he has possessed the requisite

1 *Id.* 370. 2 *Id.* 372. 3 Wills. on Cir. Ev. 55.

means and opportunities of effecting the object of his wishes; that recently after the commission of the act in question he has become possessed of the fruits or other consequential advantages of the crime; if he be identified with the *corpus delicti* by any conclusive mechanical circumstance, as by the impression of his footsteps, etc., if there be relevant appearances of suspicion connected with his conduct, etc.; such as he might reasonably be presumed to be able to account for, but which he will not and can not explain, etc. — the concurrence of all or many of these urgent circumstances naturally, reasonably, and satisfactorily establishes the moral certainty of his personal guilt, if not with the same degree of assurance as if he had been seen to commit the deed, at least with all the assurance which the nature of the case, and the vast majority of human actions admit.[1]

Now, this part of the case is not only deficient and wanting in everything to create a presumption unfavorable to the prisoner, but the proof of the person alleged to be poisoned removes and prevents a supposition of this, even. "She and the prisoner never had a falling out, and were always on good terms." She was a slave, too; had no money to tempt her destruction. There was nothing to gain; no fear of loss.

Having thus considered the facts of the case, and the law connected therewith, it may aid in the consideration of cases depending upon circumstantial evidence to refer to the rules and maxims which philosophic wisdom and judicial experience have laid down as safeguards of truth and justice with respect to evidence in general, and which apply with peculiar force to cases of the present character.

"The facts alleged as the basis of the inference must be strictly connected with the *factum probandum*."[2] The circumstances proved must lead to and establish to a moral certainty the particular hypothesis assigned, to account for them. In other words, the facts must be of such a nature that their existence is absolutely inconsistent with the non-existence of their alleged moral cause, and that they can not be explained upon any other reasonable explanation. The conclusion drawn from the premises assigned as its basis must satisfactorily explain and account for all the facts to the exclusion of every other reasonable solution."[3] "If the circumstances are equally capable of solution upon the hypothesis of innocence as upon that of guilt, they ought to receive a favorable construction, and to be discarded as presumptions of guilt."[4] "If there be any reasonable doubt as to the proof of the *corpus delicti*, or as to the reality of the connection of circumstances of evidence with the *factum probandum*, or as to the proper conclusion to be drawn from

1 *Id.* 250.
2 Wills. on Cir. Ev. 177.
3 *Id.* 187.
4 *Id.* 187, 188.

these circumstances, it is safer, and therefore better, to err in acquitting than in convicting." [1]

These rules are not needed to the conclusion we have arrived at in the present case.

It has been seen very clearly that there is no direct proof of poison traced to the prisoner from the beginning to the end of this transaction, none of the fact of poisoning; that the indirect proof considered satisfactory in such cases — that of chemical analysis and tests applied to the matter ejected through the influence of the poison from the stomach and bowels, and of all moral circumstances, is wanting; that the only fact relied upon, that of symptoms admitted in cases of this nature, to be unsatisfactory and unreliable, in this case is particularly defective and unsatisfactory. Where, then, is there ground for conviction? Without saying that there is none, we are clearly of opinion that there is not sufficient to justify the conviction, and that the prisoner is rightfully entitled to a new trial.

The judgment will be reversed, and the cause remanded for a new trial, and other proceedings to be had.

---

## HOMICIDE — INTENT TO COMMIT MISDEMEANOR ONLY — MANSLAUGHTER AND NOT MURDER.

## SMITH v. STATE.

[33 Me. 48; 54 Am. Dec. 607.]

*In the Supreme Court of Maine, 1851.*

1. **Where an Act is Done with Intent to Commit a Misdemeanor** and death ensues it is not murder.
2. **An Indictment Alleged** that the prisoner caused the death of a pregnant woman by an operation performed by him with intent to procure a miscarriage. The prisoner was convicted of murder. *Held*, error as the intent was not to commit a felony.

Indictment for murder.

*Clifford*, for the plaintiff in error

*Tallman*, for the State.

TENNEY, J. The record shows that the jury found a verdict of guilty of murder in the second degree against the prisoner upon the third count of the indictment. Thereupon judgment was rendered and sentence that he be punished by confinement to hard labor for the term of his natural life, in the State prison, was pronounced.

[1] *Id.* 189, 190.

The seventeenth, eighteenth and nineteenth causes of error assigned are that the charge in the third count of the indictment is manslaughter and not murder in the second degree and that the judgment and sentence thereupon are erroneous.

The third count in the indictment charges the prisoner with having feloniously, willfully, knowingly, and inhumanly forced and thrust a wire up into the womb and body of one Beringera D. Caswell, she being then pregnant and quick with child, with a wicked and malicious and felonious intent to cause and procure her to miscarry and bring forth a child, of which she was then pregnant and quick.

And it is charged that by means of forcing and thrusting the said wire into her womb and body, she did bring forth the said child of which she was pregnant and quick, dead. And it is further charged that by the forcing and thrusting of the said wire by defendant into her womb and body, she afterwards became sickened and distempered in her body and by the same means so used she suffered and languished and afterwards by reason thereof she died. And it is averred in the same count of the indictment, that the defendant in manner and form as aforesaid, feloniously, wickedly and of his malice aforethought, did kill and murder, contrary to the form of the statute, etc.

It is important to decide, whether in this count the prisoner is directly accused of having inflicted violence upon the mother, and thereby caused her death, or whether in putting into execution an unlawful design, death took place collaterally or beside the principal intention.

If medicine is given to a female to procure an abortion which kills her, the party administering it will be guilty of her murder.[1] This is upon the ground that the party making such an attempt with or without the consent of the female is guilty of murder, the act being done, without lawful purpose and dangerous to life, and malice will be imputed.[2]

When death ensues in the pursuit of an unlawful design, without any intention to kill, it will be either murder or manslaughter, as the intended offense is felony or only a misdemeanor.[3] Thus if a man shoot at poultry of another with intent merely to kill them, which is only a trespass, and slay a man by accident, it will be manslaughter; but if he intended to steal them when dead, which is felony, he will be guilty of murder.[4]

At common law it was no offense to perform an operation upon a pregnant woman by her consent, for the purpose of procuring an abortion, and thereby succeed in the intention, unless the woman was quick

1 2 Ch. Cr. L. 729; 1 Hale's P. C. 429.

2 Com. *v.* Parker, 9 Metc. 263 (43 Am. Dec. 396); 1 Russ. on Cr. 454.

3 Foster, 268.

4 Rex *v.* Plummer, Kel. 117; 2 Ch. Cr. L. 729.

with child.[1] And under the ancient common law, if a woman be "quick with child, and by a potion or otherwise, killeth it in her womb; or if a man beat her whereby the child dieth in her body, and she be delivered of a dead child, this is a great misprison, but no murder."[2] In both these instances the acts may be those of the mother herself, and they are criminal only as they are intended to affect injuriously, and do so affect the unborn child. If before the mother has become sensible of its motion in the womb, it was not a crime; if afterwards, when it was considered by the common law that the child had a separate and independent existence, it was held highly criminal.

Similar acts with similar intentions by another than the mother were precisely alike criminal or otherwise, according as they were done before or after quickening, there being in neither the least intention of taking the life of the mother. If in the performance of these operations and with these designs an abortion took place, and in consequence of the abortion the mother became sick and death thereupon followed, it was not murder, because the death was collateral and aside of the principal design, and success in the principal design did not constitute a felony. This distinction is very clearly expressed in the case of *United States* v. *Ross.*[3]

"If a number of persons conspire together to do any unlawful act, and death happen from anything done, in the prosecution of the design, it is murder in all who take part in the same transaction. If the design be to commit a trespass, the death must ensue in prosecution of the original design to make it murder in all. If to commit a felony, it is murder in all, although the death take place collaterally or beside the principal design. More especially will the death be murder, if it happen in the execution of an unlawful design, which if not felony, is of so desperate a character that it must ordinarily be attended with great hazard to life; and *a fortiori*, if death be one of the events, within the obvious expectation of the conspirators."

In the third count of the indictment, the prisoner is charged with no assault upon the mother of the child. There is therein no allegation that any wound of any description had been inflicted upon her, or any injury done, suited of itself to cause death. It is manifest that of whatever he is accused in reference to the intention of causing miscarriage, and the measures employed to carry out that intention, and the success attending it, it was by the consent of the mother, if not by her procurement.

This count alleges the design to cause the miscarriage by means of the forcing and thrusting up into the womb of the wire, and the subse-

1 Com. *v.* Bangs, 9 Mass. 387; Com. *v.* Parker, before cited.

2 3 Inst. 50.

3 1 Gall. 624.

quent miscarriage; also the sickness and distemper ensuing immediately afterwards, followed by the death of the mother. It is alleged that the means used to procure the miscarriage were the cause of death, but it was evidently intended to be charged as the remote cause. The charge substantially is, that the miscarriage was the proximate cause of the death.

In the case of *Commonwealth* v. *Parker*, the indictment is in very nearly the same language as that employed in the count we are now considering, as touching the charge of the subordinate offense, excepting in that there was no allegation that the mother was "quick with child," whereas in this it is so alleged. By reason of that omission it was held, and we think properly, that no offense at common law was charged. Consequently in this, so far as it regards the subordinate offense, the defendant is charged with what at common law was an offense, by causing the abortion of a child so far advanced in its uterine life that it was supposed capable of an existence separate from the mother; and not with any crime arising from an injury to the mother herself.

The conclusion is, therefore, that in this count the defendant is accused of causing death in the pursuit of an unlawful design, without intending to kill; and that the death was not in the execution of that unlawful design, but was collateral or beside the same.

That part of the indictment upon which the judgment and sentence against the prisoner is based is for a violation of the statute, which has in this respect essentially changed the common law. There is a removal of the unsubstantial distinction, that it is no offense to procure an abortion before the mother becomes sensible of the motion of the child, notwithstanding it is then capable of inheriting an estate; and immediately afterwards is a great misdemeanor. It is now equally criminal to produce abortion before and after quickening. And the unsuccessful attempt to cause the destruction of an unborn child is a crime, whether the child be quick or not.[1]

We now come to the consideration of the question whether the subordinate offense, as charged in the third count in the indictment, is a felony or otherwise, under the statute.

By the Revised Statutes,[2] the term "felony," when used in any chapter in the title of "Crimes and Offenses," etc., shall be construed to include murder, rape, arson, robbery, burglary, maims, larceny, and every offense punishable with death or by imprisonment in the State prison.

Every person who shall use and employ any instrument with intent to destroy the child of which a woman may be pregnant, whether such child be quick or not, and shall thereby destroy such child before its

[1] Rev. Stats., ch. 160, secs. 13, 14.

[2] ch. 167, sec. 2.

birth, shall be punished by imprisonment in the State prison, not more than five years, or by fine, etc.[1]

It is obvious if the prisoner be charged with the murder of the mother in proper form, in the commission of the subordinate crime, and the subordinate crime is such as is described in the statute referred to, and that is properly charged, the judgment and sentence upon this count is authorized, and there is no error therein. But if the subordinate offense as charged, does not constitute a felony under the statute, the judgment and sentence are erroneous.

The offense described in the statute,[2] is not committed unless the act be done with an "intent to destroy such child" as is there referred to, and it be destroyed by the means used for that purpose. It is required by established rules of criminal pleading that the intention which prompted the act that caused the destruction of the child, as well as the act itself, and the death of the child thereby produced, should be fully set out in the indictment in order to constitute a crime punishable by imprisonment in the State prison, under the statute. The allegation that a certain instrument was used upon a woman pregnant, and that the use of that instrument caused her to bring forth the child dead, is not a charge that the one using the instrument intended to destroy the child. The inference of such design, from the use of the instrument and its effect, is by no means necessary.

The third count in the indictment alleges the act to have been done with the intent to cause and procure the deceased to miscarry and bring forth the child of which she was then pregnant and quick; and that by means of that act she brought forth the child dead. But there is no allegation that the act was done with the intention that she should bring forth her child dead, or with an intent to destroy it, unless the words "miscarry" and "bring forth the child" necessarily include its destruction.

"The expulsion of the *ovum* or embryo within the first six weeks after conception is technically miscarriage; between that time and the expiration of the sixth month, when the child may be positively alive, it is termed abortion; if the delivery be soon after the sixth month it is termed premature labor. But the criminal attempt to destroy the fœtus at any time before birth is termed in law a miscarriage, varying, as we have seen, in degree of offense and punishment, whether the attempt were before or after the child had quickened."[3] Other writers on the subject give a similar definition of the term "miscarriage."[1]

1 Rev. Stats., ch. 160, sec. 13.

3 Chit. Med. Jur. 410.

2 ch. 160, sec. 13.

1 Hoblyn's Dictionary of Terms Used in Medicine and other Collateral Sciences.

The converse of the last proposition can not be true, as there are undoubtedly many miscarriages involving no moral wrong.

If the term "miscarriage" were to be understood in the indictment in its most limited sense, it can not be denied that in effect it must be identical with the destruction of the fœtus. But this indictment itself has given to the word "miscarriage" the more general signification. It charges that the miscarriage was of the woman who was pregnant and "quick with child." The term "quick with child" is a term known to the law, and courts are presumed to understand its meaning. A woman can not be "quick with child" until a period much later than six weeks from the commencement of the term of gestation. The more general meaning of the word "miscarriage" must, therefore, be applied. The indictment charges no time, after the quickening, when the miscarriage took place. It may have been at any period when the birth would have been premature. The language of the indictment, when taken together, construed in the ordinary or in its technical and legal signification, does not forbid this. And labor is premature if it take place at any period before the completion of the natural time.

It is admitted by Dr. Paris, a writer of high repute on medical jurisprudence, from the number of established cases, it is possible that the fœtus may survive and be reared to maturity, though born at very early periods. Many ancient instances are stated of births even at four months and a half with a continued life even till the age of twenty-four years. And the Parliament of Paris decreed that an infant at five months possessed the capacity of living to the ordinary period of human existence; and it has been asserted that a child delivered at the age only of five months and eight days may live; or according to Beck and others, if born six months after conception.[2] Many of the facts upon which the opinions of writers upon medical jurisprudence are founded may be erroneous and the opinions incorrect. We can not take judicial notice of either. But it is not too much to say that a child may be born living, when its birth may be so soon after conception, that it is premature. The fœtus may be expelled by unlawful means so soon after conception that extra uterine life can not continue for any considerable length of time, and yet after birth it may once exercise all the functions of a living child. We have found no authority that this may not be termed a miscarriage, if the word is not confined to its most limited meaning. And if it be so, it is not perceived that it ceases to be correct, if the life of the child prematurely born is further prolonged. It is quite clear, therefore, that the word "miscarriage" in its legal acceptation, and as used in this indictment, does not, nec-

[2] Chit. Med. Jur. 410, 411.

essarily include the destruction of the child before its birth; and a design to cause its miscarriage is not the same thing as a design to destroy the child.

The other term used in the indictment "to bring forth said child," does not imply even a premature birth. Consequently it gives no additional strength to the charge.

It follows that the indictment, not containing an allegation of a design which is an essential ingredient in the offense first charged in the third count to make it a felony, the subsequent, and principal accusation, is that of manslaughter only; and the seventeenth, eighteenth and nineteenth errors are well assigned.

Many other errors are assigned and relied upon. In the discussion of the principles involved in the question raised, the counsel for the plaintiff in error and the attorney-general have exhibited great research, learning and ability.

It might be desirable to the profession, and particularly to those interested in criminal pleading, that there should be an opinion upon each of the errors assigned, but it is unnecessary for a disposition of the case.

Judgment reversed and the court order that the prisoner be discharged from his imprisonment and go thereof without day.

---

## MURDER — PRESUMPTION OF MALICE.

## State v. Coleman.

[6 Rich. (S. C.) 185.]

*In the Supreme Court of South Carolina, 1875.*

1. **Where there are Sufficient Facts** before the jury to enable them to infer malice, or the want of it, as a fact, directly from the evidence, recourse should not be had to any legal presumption of malice which may arise, in the absence of direct proof, from the fact of homicide.
2. **Where there is full Evidence as to the Surrounding Circumstances,** this presumption can not be allowed to deprive the prisoner of the benefit of any reasonable doubt, but the jury should find the malice as an inference from the facts, if at all. It was erroneous, therefore, to charge "that all homicide is presumed to be malicious, and amounting to murder until the contrary appears from circumstances of alleviation, excuse or justification, and that it is incumbent upon the prisoner to make out such circumstances to the satisfaction of the court and jury, unless they arise out of the evidence produced against him."

Willard, A. J. The prisoner was convicted of murder. The circuit judge charged as follows: "That all homicide is presumed to be mali-

cious, and amounting to murder until the contrary appears from circumstances of alleviation, excuse or justification, and that it is incumbent upon the prisoner to make out such circumstances to the satisfaction of the court and jury, unless they arise out of the evidence produced against him."

The authorities, undoubtedly, support the proposition that the law presumes malice from the mere fact of homicide.[1] But this presumption is not applicable where the facts and circumstances attending the homicide are disclosed in evidence, so as to draw a conclusion of malice, or want of malice, as one of fact from the evidence. Presumption of this class are intended as substitutes in the absence of direct proofs, and are, in their nature, indirect and constructive.

The best evidence of the state of mind attending any act is what was said and done by the person whose motive is sought for.

The motive that impels to the taking of human life is no exception to this rule, and the importance of the consequences that depend upon the accurate ascertainment of its nature in such cases, affords the strongest ground for limiting indirect and constructive proofs to the narrow grounds within which they belong,

In the present case, the evidence disclosed the fact that the deceased came to his death by a blow, from a stick in the hands of the prisoner, falling upon the back of his neck.

It appears from the record before us, that the proofs embraced a statement of the origin of the difficulty between the parties; their conduct towards each other down to the time of the killing, and to some extent, the subsequent conduct of the prisoner. When the evidence is of such a character; it must be presumed sufficient to enable the jury to draw from it a conclusion of fact one way or the other. Under such circumstances, there was no necessity, and, therefore, no propriety, in resorting to any general presumption arising by operation of law. If the evidence did not warrant the conclusion of malice, the jury should have so found, uninfluenced by any presumptions from the naked facts of a homicide. If an obscurity as to the motive of the party arose from the circumstances detailed in the evidence, it was not competent to resort to the presumptions in order to solve the obscurity.

It was material to the solution of the question of malice, as one of fact under the evidence, to ascertain whether the stick employed was a deadly weapon.

In determining this fact, regard should be had to the character of the weapon, the mode of its use, and the strength and position of the person against whom it was used. If, considering all these circumstances,

1 4 Bla. Com. 201; State v. Toohey, MSS.

death was a consequence reasonably to be apprehended, then the jury are warranted in drawing the inference of malice, if that inference be in harmony with the other proofs.

The size, form and weight of the stick, and the amount of force employed by the prisoner, in giving the blow, do not appear by the record, but it is to be presumed that some evidence on these points was submitted to the jury.

The charge of the judge, quoted above, failed to present to the jury the nature of their duties as to the issue of fact involved, and may have led them to conclude that they might disregard uncertainties in the evidence, and place their conclusions on the ground of the legal presumptions alone. Although the charge allows them to seek for ground for rebutting such presumptions in the evidence of what took place, still it left their minds in a position to conclude that the benefit of a reasonable doubt arising from the evidence ought to be given to the State instead of the prisoner.

Where the circumstances preceding and attending an act of this character are full, as in the present case, the prisoner is entitled to the benefit of any doubt that may arise, and can not be deprived of such benefit by any presumption of guilt arising by operation of law from the naked fact of a homicide.

A charge may be erroneous, although the propositions of which it is composed may severally be conformable to recognized authority, if in its scope and bearing in the case it was likely to lead to a misconception of the law.

An objection was taken, on the argument, to the panel of grand and petit jurors, but it does not appear that such question was raised, or an exception taken upon it in the court below. We are not called upon to decide, at the present time, whether matters can be alleged as grounds of appeal in circumstances that were not the subject of except tion in the Circuit Court, for under no circumstances would this courpass upon a question that was not raised in the Circuit Court, where such question was not indispensable to the appeal. It appearing that the prisoner is entitled to a new trial on the ground of a misdirection, the object of the appeal is accomplished, and it is not essential that the question as to the legality of the panel should be considered.

There should be a new trial.

MOSES, C. J., and WRIGHT, A. J., concurred.

## HOMICIDE — FELONIOUS HOMICIDE — NO INTENT TO TAKE LIFE — WANTONNESS.

## DARRY v. PEOPLE.

[10 N. Y. 120.]

*In the Court of Appeals of New York, 1854.*

**Under a Statute Defining the Crime of Murder** and enacting (among others) that killing should be murder "when perpetrated by any act imminently dangerous to others and evincing a depraved mind, regardless to human life, although without any premeditated design to affect the death of any particular individual," a killing without premeditated design to take life, though perpetated by such acts as are imminently dangerous to the person killed, and evince a depraved mind, regardless of the life of the deceased, is not murder.

WRIT OF ERROR to the Supreme Court, sitting in the Eighth District, where a conviction of the plaintiff in error, of the murder of his wife, in the Court of Oyer and Terminer of Erie County, had been affirmed, on *certiorari*, and sentence of death pronounced upon him. The Governor respited the execution, to enable the prisoner to have a review in this court.

The indictment contained five counts, charging the killing to have been effected by the prisoner, by striking and beating the deceased, with his hands and feet, and with a chair, and by kicking her; the first two charged the murder to have been committed with malice aforethought, in the common-law form; the others alleged that it was done, with a premeditated design to effect the death of the deceased.

On the trial, the prosecuting attorney gave evidence tending to prove that the deceased died on the 14th August, 1852, of injuries and bruises inflicted upon her by the prisoner, a few days previously. It also appeared, that the prisoner, during a portion of the time in which the injuries were inflicted, was partially under the influence of liquor. No provocation on the part of the deceased was shown, but on the contrary, she made little or no resistance to the attack of the prisoner, save by way of expostulation. The prisoner had several times threatened to kill his wife; and they were alone together in their room, when the injuries were inflicted; but her parents and brother who occupied another part of the house, heard her cries, and had witnessed many of his acts of violence.

The dying declarations of the deceased were given in evidence by the prosecution, to the effect, that on the 8th of August, after she and the prisoner had retired to bed, he commenced striking her in the pit of the stomach with his fist, and that he repeated it, on the two following nights; that he struck her upon the head with his fists, and on one

of these nights, with a chair. A surgeon, who had examined the body, testified, that in his opinion, her death was caused by the blows upon her stomach, but that those on her head were not mortal.

The prisoner's counsel maintained that the evidence did not prove a premeditated design on the part of the prisoner to effect the death of the deceased, and that he was not guilty of murder.

The statute defining the crime of murder, provides as follows: —

§ 4. The killing of a human being without the authority of law, by poison, shooting, stabbing, or any other means, or in any other manner, is either murder, manslaughter or excusable or justifiable homicide, according to the facts and circumstances of each case.

§ 5. Such killing, unless it be manslaughter, or excusable or justifiable homicide, as hereinafter provided, shall be murder, in the following cases: —

1. When perpetrated from a premeditated design to effect the death of the person killed, or of any human being.

2. When perpetrated by any act imminently dangerous to others, and evincing a depraved mind, regardless of human life, although without any premeditated design to effect the death of any particular individual.

3. When perpetrated, without any design to effect death, by a person engaged in the commission of a felony.[1]

The court charged the jury, *inter alia*, that, in order to convict the prisoner of the crime of murder, it was not necessary that they should be satisfied that the prisoner, at the time of inflicting the injuries upon the deceased, entertained a premediated design to effect her death by means of those injuries; according to the first subdivision of section 5 of the title of the Revised Statutes respecting crimes punishable with death; but that if they should find, upon the evidence, that the prisoner designedly inflicted the injuries, that they were inflicted, without provocation, and not in the heat of passion, but were perpetrated by such acts as were imminently dangerous to the life of the deceased, and evincing, on the part of the prisoner, a depraved mind, regardless of human life, although without any premeditated design to effect the death of the deceased; that then the offense would come within the statute defining the crime of murder. The prisoner's counsel excepted to this portion of the charge.

The prisoner was found guilty of murder, and the cause having been removed to the Supreme Court, by *certiorari*, on a certificate of probable cause made by the presiding judge, was there argued on the bill of exceptions, and judgment rendered in favor of the People; whereupon,

[1] 2 Rev. Stats. 656, 657.

the prisoner sued out this writ, and the Governor respited the execution. On the first argument, in 1853, the members of the court were equally divided in opinion; and a reargument was ordered.

*Hill*, for the plaintiff in error.[1]

*Sawin*, District-Attorney, for the People.

SELDEN, J. The substitution of new and original phraseology in our statute defining the crime of murder,[2] was the result of an effort to clear the subject of the obscurity which grew out of the inaccurate use of some of the terms of the common law. To render this effort successful, it is necessary so construe the new terms used according to their natural import. A resort to the rejected terms, in order to interpret those newly adopted, would obviously reinvest the subject with much of the previous uncertainty, and render abortive this attempt at elucidation. When, therefore, it is said, as has been said by several of our judges, that the first subdivision of section 5 of our statute was intended to define murder from express, and the second and third, from implied malice, no light whatever is thrown upon the true interpretation of the section.

A glance at the law of murder, as it existed prior to the Revised Statutes, make it evident, that the terms express and implied malice, and malice aforethought, used so copiously in every definition of murder at common law, must have been intentionally excluded from the statute; and I think it equally clear, in view of the great looseness and inaccuracy with which these terms had been used, that this exclusion was wise. There is no difference in the nature or degree of the malice intended, whether it be called express or implied, when these terms are used in their most appropriate sense. If properly applied, they refer only to the evidence by which the existence of malice is established. Both alike, the one no less than the other, mean actual malice, malice shown by the proof to have really existed. It is called implied malice, when it is inferred from the naked fact of the homicide, and express, when established by other evidence. That this is the true original meaning of these terms, when used in connection with this crime, is apparent, I think, from the natural import of the words themselves, as well as from their accustomed use in other branches of the law. They are appropriate terms to express different modes of proof, and are habitually used for that purpose, but are not adapted to the description of different degrees of malicious intent. The phrase, "implied malice," is properly applied to a case where the evidence shows that the accused did the act which caused the death, but where there is no other proof going to show the existence or want of malice.

1 This case was also reported in 2 Park.

2 2 Rev. Stats., p. 651, sec. 5.

In such cases, the law does not impute a malicious intent, irrespective of its real existence, but it presumes, in accordance with the settled rules of evidence, that such an intent did actually exist.

*York's Case*[1] was a case of this description, and the rule, as well as the reason upon which it rests, are there stated by Chief Justice Shaw. In speaking of the mere act of destroying life, he says: "The natural and necessary conclusion and inference from such an act, willfully done, without apparent excuse, are, that it was done *malo animo*, in pursuance of a wrongful, injurious purpose, previously, though perhaps suddenly, formed, and is, therefore, a homicide with malice aforethought, which is the true definition of murder; and it appears to us, that this is not a forced, arbitrary, technical or artificial presumption of law, but a natural and necessary inference from the fact." Again, he says: "A sane man, a voluntary agent, acting upon motives, must be presumed to contemplate and intend the necessary, natural and probable consequence of his own act."

This case and this reasoning afforded a clear illustration of what is properly meant by the term implied malice. But the same term has also been, frequently, but as I maintain, inappropriately, used, to express a different meaning. It has been extensively applied to cases of constructive murder, that is, to those cases where, although the want of any actual intent to take life is conceded, yet the law, in view of some other malicious or criminal intent, punishes the offense as murder; and to cases of death produced through an utter wantonness and recklessness as to life in general, as well as to cases where the life of an officer is unintentionally taken, when engaged in the performance of his duty.[2]

Now, what is meant by this application of the term implied malice, indiscriminately, to all cases arising under either of these several cases? It is apparent, that, so far as any actual criminal intent exists, it may be expressly proved in these cases, as well as any others. It follows, therefore, that in cases where such proof is given, implied malice, if it means anything, must mean malice which has no existence in fact, but which the law imputes to the guilty party. This implication of a species of malice which did not exist, seems to have been invented for the purposes of bringing cases of constructive murder, so-called, within what was supposed to be the legal definition of the crime. It was evidently supposed, that the word malice meant, in all cases, ill-will toward some person or persons, and hence, that the phrase, malice aforethought, used in indictments for murder, necessarily imputed a charge of premeditated design to kill. To meet this averment, which, in cases of constructive murder, was not required to be proved, the law was said

1 9 Metc. 93.

2 15 Viner's Abr., title "Murder," E; Rex *v.* Oneby, 2 Ld. Raym. 1488; People *v.* Enoch, 13 Wend. 159, per Nelson, J.

to imply, that is, to supply by mere fiction, the requisite degree of malice. There was, however, in truth not the slighest necessity for this fiction; the interpretation of the word "malice" on which it was founded, being entirely erroneous.

The idea that the term "malice" necessarily imports ill-will towards another, when used in a legal sense, is abundantly refuted by Mr. Justice Bayley, in the case of *Bromage* v. *Prosser;*[1] he says: "Malice, in common acceptation, means ill-will against a person, but in its legal sense, it means a wrongful act, done intentionally, without just cause or excuse. If I give a perfect stranger a blow, likely to produce death, I do it of malice, because I do it intentionally, and without just cause or excuse. If I maim cattle, without knowing whose they are, if I poison a fishery, without knowing the owner, I do it out of malice, because it is a wrongful act, and done intentionally. If I am arraigned of felony, and willfully stand mute, I am said to do it, of malice, because it is intentional and without just cause or excuse."

This passage is cited and approved by Chief Justice Shaw in *York's Case*,[2] and there are many other authorities to the same effect. To show that the view here presented is in entire accordance with the ancient law, I will quote a passage or two from Foster, one of the earliest and clearest writers on criminal law.[3] He says: "When the law maketh use of the term malice aforethought, as descriptive of the crime of murder, it is not to be understood in that narrow, restrained sense to which the modern use of the word malice is apt to lead one, a principle of malevolence to particulars; for the law, by the term malice, in this instance, meaneth that the fact hath been attended with such circumstances as are the ordinary symptoms of a wicked, depraved, malignant spirit." Again, he says: "And I believe that most, if not all, the cases which in the books are ranged under the head of implied malice, will, if carefully adverted to, be found to turn upon this single point that the fact hath been attended with such circumstances as carry in them a plain indication of a heart regardless of social duty, and fatally bent on mischief."

This is a precise doctrine for which I contend. It shows that the resort to a fictitious imputation of a species of malice, having no existence in fact, called implied malice, was gratuitous and unnecessary; and being so, it could hardly fail to be pernicious. It tended to introduce confusion, through the indiscriminate use of the word implied in two conflicting sentences; one importing an inference of actual malice from facts proved, the other an imputation of fictitious malice, without proof.

[1] 4 B. & C. 255. [2] 9 Metc. 93. [3] Fost. Cr. L. 256, 257.

In putting a construction, therefore, upon our statute, we should lay aside entirely the common-law terms of express and implied malice, as calculated to mislead and to engender false ideas, and interpret the phraseology, as before insisted, according to its ordinary import.

Looking, then, at the statute itself, and construing it in this spirit, what is its real scope and meaning? In endeavoring to answer this inquiry, it is important to keep in view certain rules, which reason and experience have established, as calculated to aid in the just interpretation of statutes.

If the enactment be subdivided, each subdivision should be construed so as to provide for a separate and distinct class of cases, and so as to include all the cases it is intended to embrace, and to exclude all others. Each clause is also to be construed in the light of all the rest, and so as to give force and effect to every sentence and word; and such a construction is to be put upon the whole, if possible, that no case or class of cases will fall within more than one branch of the act. These rules are necessary in order to attain that precision and certainty which is the object of the subdivision.

There is, I believe, no great contrariety of opinion as to the meaning of the first subdivision of section 5 of the statute in question. If there is any difficulty in this respect, it is in ascertaining whether the last clause of that subdivision, viz., "or of any human being," was intended to provide solely for cases where the premeditated design, although not aimed at the person actually killed, was nevertheless directed to some particular individual; or, whether it also includes cases where it was aimed indiscriminately at a multitude of persons, or at human life in general. That the former is the true interpretation was insisted by the prisoner's counsel, upon the argument, for several reasons. He urged, first, that upon comparison of section 5 of our statute with the description of murder from malice aforethought express, as given in East's Pleas of the Crown,[1] and considering that the revisors in their note to section 5, expressly say, that it was compiled partly from East, it is apparent, that the two first subdivisions of section 5 were copied substantially from the definition given by East; the only material difference being, that the two first subdivisions of East are, in our statute, condensed into one, and that as both subdivisions of East are plainly and expressly confined to cases of malice to a particular individual, the corresponding subdivision in our statute should receive the same construction. Again, he contended, that, as the first clause of this subdivision was clearly confined to cases of particular malice, the last, being directly connected with it, should be held to be-

[1] p. 223, sec. 10.

long to the same class, agreeable to the maxim *noscitur a sociis.*[1] I have very little hesitation in adopting the construction of this subdivision thus contended for, not only for the reasons given by the counsel, but for others which will appear when we take into consideration the second subdivision.

This brings us to the difficult part of our task — that of interpreting the second subdivision of the section in question. This subdivision was incidentally and partially considered in *People* v. *Rector*,[2] and in *People* v. *White.*[3] But the examination given to it in those cases was cursory merely, and no attempt was made to subject it to that rigid analysis which is indispensable to the development of its true meaning. It becomes necessary, therefore, in my view, to look at the subject as an original question. In doing so, I shall inquire, first, whether an actual intent to destroy life is, in all cases, essential to constitute the crime of murder, under this subdivision.

The affirmative of this question was very strenuously contended for by the counsel for the prisoner upon the argument, and great learning and ability were displayed in the efforts to maintain it. He contended that there was a substantial identity of design and object between our statute and that of Pennsylvania passed in 1794; and that as the latter statute had been construed to limit murder, to those cases in which an actual intent to take life exists, ours should receive the same construction; and insisted, that the first subdivision of section 5 being intended to provide for all cases where the hostile intent was specially aimed at the life of some one individual, the second subdivision was designed to embrace only those cases excluded from the first, where the intent, although deadly, does not single out its object.

But there are serious objections to taking this view of the latter subdivision, conceding the construction thus put upon the first to be, as I think it is, correct. Of what use, upon this supposition, are the words "imminently dangerous to others?" Are they not rendered mere unmeaning verbiage, by assuming that an actual intent to take life is essential to the crime under this subdivision? Again, if such an intent is necessary, the requirement must be found in the definition of the crime given by the statute. The only affirmative words indicative of the intent required are these, "a depraved mind, regardless of human life." These words describe the state of mind which must accompany the act; do they express a formed intent to destroy life? Clearly not; no sound reason can be given, why the Legislature should have resorted to such equivocal and circuitous phraseology, to express that simple intent. Such an intent is expressed in clear terms, in the subdivision

1 Broom's Leg. Max. 294; Evans *v.* Stevens, 4 T. R. 225.

2 19 Wend. 569.

3 24 *Id.* 520.

which precedes, as well of that which follows, the one under review; would they not have expressed the same intent in the same way in this, if that was what was meant? Would they have resorted to phraseology, not only peculiar, but such as does not import what, upon this supposition, they intended? It seems to me, not.

But this is not all: The phraseology of the subdivision is taken substantially from the writers upon the common law. An absolute intent to take life was not necessary, at common law, to constitute the crime described by this phraseology; as to this, there is no room for doubt. The first general division of homicide, as given by East, is as follows: "From malice aforethought, express; where the deliberate purpose of the perpetrator was to deprive another of life, or to do him some great bodily harm."[1] This general division of homicide is again divided by East into three subdivisions, in the next section, as follows: 1. From a particular malice to the person killed. 2. From a particular malice to one, which falls by mistake or accident on another. 3. From a general malice or depraved inclination to mischief, fall where it may. Now, as this third subdivision is obviously a specification of the nature of the cases falling within the last clause of the previous general division, it is entirely clear that it was intended to describe a class of cases in which a deadly intent is not required to make out the crime.

It has been already intimated that the first subdivision of section 5 of our statute appears to be a virtual transcript of the first two subdivisions just given from East. It is, I think, equally apparent that the second subdivision in our statute was taken substantially from the third subdivision of East, although not a literal transcript of it. The inference from this is very strong that it was intended to describe the same class of cases; and if so, then it follows, from what has already been said, that a deadly intent is not necessary to constitute the crime of murder under it.

But there is an important clause added to the second subdivision in our statute which does not appear at all in East; and it becomes indispensable to ascertain its design and object. If we can discover the true object of introducing this clause, we have a key to the interpretation of the whole section. The words are, "although without any premeditated design to effect the death of any particular individual." These words must have been introduced for some purpose; what was it?

I remark, first, that they were not designed to show that a particular deadly intent is not essential to constitute the crime, because they could not have been deemed at all necessary for that purpose. The idea of such a necessity seems, as we have already shown, to be excluded by

[1] 1 East's P. C. 222, sec. 9.

the whole phraseology of the subdivision. No corresponding language is contained in East's definition of this class of murders; he evidently considered the definition complete and perfect without it. Besides, if this clause was introduced for that purpose the plain implication would be, that a general deadly intent, not aimed at any particular individual, is necessary. This would be repugnant to all our previous reasoning, and would exclude from the operation of the subdivision the very cases which, at common law, marked the class. This view of the clause would also effectually exclude the case at bar from the subdivision. But I consider it clear, from what has been heretofore said, that this could not have been the object of the clause.

There is but one other purpose which this clause could have been intended to subserve. Although the terms of the second subdivision do not require a deadly intent, to make out the crime, yet, independent of the clause in question, they do not exclude it. Hence, the second subdivision might be construed to embrace most, if not all, the cases provided for in the first. This would defeat the very object of the classification, which was, to draw a clear line of distinction between the different classes, and prevent confusion by their merger.

The plain object, therefore, of the last clause of the second subdivision, and the only conceivable object, I hold to have been, to mark the distinction between that subdivision and the first, by at once excluding from the former all cases of particular, and at the same time stating that it was not intended to exclude cases of general deadly intent. Assuming this to have been its object, it is apparent, that force and significancy is given to every word of the clause in question; and that each of these subdivisions is made to stand out, isolated and distinct, with boundaries clearly marked, and with no tendency to fusion with each other.

It will be seen that this view necessarily limits the first subdivision to cases of particular malice, from the antithetical relation between that subdivision and the last clause of the second. This will be made more apparent, by reading the two clauses in connection, omitting the intermediate significant words, thus: "when perpetrated from a premeditated design to effect the death of the person killed, or of any human being; or when perpetrated" (in a certain way), "although without any premeditated design to effect the death of any particular individual." I doubt, whether any other reading can be adopted, which will at once give scope and meaning to every word of both subdivisions, and at the same time accomplish the object of drawing a definite and clear line of demarcation between the two. We have, then, the precise classification of East; the only difference being that in our statute it is simplified, by reducing the first two subdivisions into one, and rendered

a little more definite by the express exclusion from the last subdivision of all cases embraced in the first.

What, then, are the cases which, upon this construction, were intended to be included in the second subdivision? In considering this question it is clearly proper, in the first place, to inquire what kind of cases were embraced in the corresponding class, as defined by East. The words in East are: "From a general malice, or depraved inclination to mischief, fall where it may." The word "general" here used and the last words of the sentence, leave no doubt as to the nature of the cases contemplated by this subdivision; they were cases of depraved and reckless conduct, aimed at no one in particular, but endangering indiscriminately the lives of many, and resulting in the death of one or more.

If this be not clear upon the words themselves, the comments of Mr. East upon this subdivision would seem to put the matter at rest.[1] In illustrating this subdivision, he says: "The act must be unlawful, attended with probable serious danger, and must be done with a mischievous intent to hurt people, in order to make the killing amount to murder in these cases;" and the instances he gives are as follows: "If a person breaking in an unruly horse, willfully ride among a crowd of persons, the probable danger being great and apparent, and death ensue from the viciousness of the animal, it is murder." Again, "so, if a man, knowing that people are passing along the street, throw a stone likely to create danger, or shoot over the house or wall, with intent to do hurt to people, and one is thereby slain, it is murder." These are the only examples given, and they accord perfectly with the language of the subdivision, and show that the latter was intended to embrace those cases of general malice only where the lives of many were or might be in jeopardy. The inference is very strong that the subdivision of our statute which we are considering was intended to provide for the same cases as that of East, from which it was substantially taken. But the argument in favor of this construction is by no means confined to this inference.

It is clear, I think, from what has been already said that the subdivision in question does embrace those cases where an intent to take life exists, which is not directed to any particular individual, but is general and indiscriminate. The language of the subdivision, however, at the same time, shows that it was not intended to be confined to those cases, but was designed to include another class closely akin to and almost identical with those in which death is produced by acts putting the lives of many in jeopardy, under circumstances evincing great depravity and

[1] 1 East's P. C. 231, sec. 18.

fire into a crowd with the view of destroying life, and he may do so for the mere purpose of producing alarm, although at the imminent hazard, as he knows, of killing some one. Again, he may open the drawbridge of a railroad with intent to destroy the lives of the passengers, or he may do it for the sole purpose of effecting the destruction of the property of the railroad company. The subdivision in question was intended to provide for all these and similar cases indiscriminately, putting them upon the same footing, without regard to the particular intent. The phrases "imminently dangerous to others," and "depraved mind, regardless of human life," have an apt and intelligible meaning when used in regard to such cases.

If, then, the subdivision was intended to include cases of this description, it would seem to follow, upon the plainest principles of construction, that cases of death produced by acts affecting a single individual only are excluded. It would be repugnant to all sound rules of interpretation to associate under the same clause of a statute groups of cases so dissimilar as those, examples of which I have just given, and ordinary homicides; especially where, as in the present instance, an attempt has been made, in framing the statute, at a precise classification of the cases arising under it.

The examples which I have given as falling within the provision, belong to a class having marked features, easily distinguishable from all others; and there is no difficulty in so construing the subdivision in question as to exclude cases not belonging to this class, and at the same time so as to include all cases falling properly within it. For these reasons I am entirely satisfied that this subdivision was designed to provide for that class of cases and no others, where the acts resulting in death are calculated to put the lives of many persons in jeopardy, without being aimed at any one in particular, and are perpetrated with a full consciousness of the probable consequences. Such acts may well be said to evince that reckless disregard of and indifference to human life which is fully equivalent to a direct design to destroy it. The moral sense of mankind distinguishes between acts of this sweeping and widely dangerous character and ordinary cases of individual homicide, and so, in my judgment, does the statute.

But there is an additional reason for putting this construction upon the subdivision in question. If it can be so construed as to include the case at bar and others of a similar description, we are left wholly without any line of distinction between murder and manslaughter except the loose and uncertain opinion of a jury as to whether the act which produced death did or did not evince a "depraved mind, regardless of human life." There is scarcely a case of manslaughter which, upon

utter recklessness in regard to human life. For instance, a man may this construction, may not be brought within the definition of murder and punished as such, provided a jury can be found to say that the act which produced death evinced a "depraved mind, regardless of human life;" because the other clause, to wit, "imminently dangerous to others," if it can apply to this, would apply to every case of homicide, as the result would always prove the imminently dangerous nature of the act; and because, upon this construction, cases of homicide committed unintentionally, in the heat of passion, would not be excluded, as such a case might very well evince a depraved mind, regardless of human life, in the opinion of a jury. This construction then would throw us upon that sea of uncertainty which it was the special object of the revisers, in framing, and of the Legislature, in adopting, the section in question to avoid.

My conclusion, therefore, is that the only construction which is consistent with the language of the section as a whole, with the object aimed at in its adoption, with the precision and certainty of the law, and with the convenient and safe administration of justice, is that which I have already given.

I omit to express any opinion as to the particular degree of manslaughter within which this case is embraced, it being unnecessary to the decision of the cause. The question was somewhat agitated upon the argument, but ought, perhaps, to be more fully discussed, and more deliberately considered, before it is definitely settled.

It follows, from what has been said, that the judge erred upon the trial, in submitting the case to the jury under the second subdivision of the section of the statute in question; and, consequently, that there must be a new trial.

Denio, J. The offense of murder, though the most heinous crime which can be committed against an individual, had not, either in England or in this State, been subjected to a legislative definition, until it was done in the enactment of the Revised Statutes, in the year 1830. By the ancient common law, the distinction, in felonious homicide, between a killing with or without malice was merely nominal, both being indiscriminately punished with death. It was said, that, although the malice made the fact more odious, yet it was nothing more than the manner of the fact, and not the substance; and the term manslaughter was used to defined the offense in both cases. But when the benefit of clergy was, by statute, taken away from murderers with malice prepense, the more modern distinction between the most aggravated form of homicide, and the inferior grades came to be recognized, so that, at the period when we succeeded to the English common law, the legal defini-

tion of murder was well established.[1] The act concerning murder, in the revision of 1813, did not attempt a definition of the offense, but was limited to the re-enactment of several English statutes providing for a few particular cases of homicide, bringing them within, or exempting them from, the penalties of murder.[2]

The description of the offense, then, which had prevailed for several centuries prior to 1830, was this: "Where a man of sound memory, and of the age of discretion, unlawfully killeth any reasonable creature, with malice prepense (or aforethought)." [3] The words malice pretense acquired a peculiar significance on account of their use in the statute 23 Henry VIII.[4] That act provided, that if any, not actually in holy orders, should be found guilty (among other crimes) of "any willful murder, of malice prepensed," they should be utterly excluded from the benefit of their clergy, and suffer death in such manner and form "as if they were no clerks." From that time, the words referred to became indispensable in the definition of the offense, as only a nominal punishment could be inflicted, if malice were not established by the verdict; and from thence, also, the inferior grades of felonious homicide came to be called manslaughter, while the capital offense was denominated murder. And where a capital conviction was sought, it was said to be indispensable that the indictment should contain the words "*ex malitia sua præcogitata, interfecit et murdravit.*"

Though the words, in their ordinary sense, conveyed the idea of deadly animosity against the deceased, and, by a strict interpretation, would, perhaps, only embrace cases of a killing from a motive of revenge, they were not so limited by the construction of the courts. All homicides, for which no excuse or palliation was proved, and a large class where there was no actual intention to effect the death of the person killed, were held to be murder. To justify these convictions, an artificial meaning was attached to the words malice prepense, by which they were made to qualify the taking of human life, in all cases where sound policy, or the demerits of the offender, were supposed to require that he should be capitally convicted.

Hence, the definitions of murder to which I have referred contain the addition that the malice may be express or implied; but in drawing the distinction between the two classes, great confusion was introduced. Coke, for instance, classes among instances of implied malice, the case of poisoning, and all cases of the killing of another, without any provocation in him that is slain; though it would seem, that a willful poison-

[1] 4 Reeves' Hist. Eng. Law, 393, 534 to 536; 5 *Id.* 220 to 223; Fosters' Crown Law, 302 to 306; 4 Bla. Com. 201.

[2] 1 R. L. 66.

[3] Coke's 3d Inst. 47; 1 Hale's P. C. 449, 450; 4 Bla. Com. 195.

[4] ch. 1.

[5] 1 Hale's P. C. 450.

ing afforded the strongest evidence of deliberate malice, while in the other case, supposing no explanatory evidence to be given, actual malice ought to be found as a matter of fact upon the evidence.[1] Hale includes in the class of malice in fact, the case of killing from a deliberate compassing and design to do some bodily injury, and instances *Halloway's Case*, where the prisoner tied a lad, who was found trespassing, to his horse's tail, and he was dragged till his shoulder was broken, whereof he died.[2] So, he says, if a master designeth an immoderate and unreasonable correction of his servant, either in respect to the measure or the instrument, and death ensues, it is murder from express malice; and so of a schoolmaster toward his scholar.[3] This author, in his chapter of "murder by malice implied, or malice in law," includes in that class, cases where the homicide is committed without provocation, where it is upon an officer or minister of justice, and where by a person that intends theft or burglary, etc.

In the first division (murder without provocation), the cases present merely a rule of evidence. As the law holds that a man intends the natural consequences of his own acts, it determines, that where there is no provocation, or where there has been time for the blood to cool, the killing must be designed and intentional. As was said by Coleridge, J., in *Regina* v. *Kirkham*:[4] "Every one must be presumed to intend the natural consequences of his acts. If you throw a stone at a window, it must be taken that you intend to break it, because it is a brittle substance. That being so, if you had heard nothing more than simply that the prisoner, taking a knife in his hand, had stabbed his son, that would have put it on him to clear himself from the charge of murder." In cases of this kind, if the prisoner could show, positively, that his intention was not to kill the deceased, he would, of course, be acquitted. In the other instances, on account of the intention to do some other illegal act, not touching life, the presumption is *juris et de jure*, and the most conclusive evidence that death was not intended, would not help the prisoner. Take, for example, the case of a homicide, by one engaged in committing a burglary; the party killed may have been a stranger, or even the nearest friend of the prisoner, and he may be able to show in the most conclusive manner that lucre was his only object, and that murder was not in all his thoughts; still, he was, by law, guilty of murder with malice aforethought.

These references are sufficient to show, that the term malice prepense had been made the subject of much and not always perfectly intelligent refinement. Malice in law, or implied malice, was simply a conclusion

[1] 3 Inst. 52.

[2] 1 Hale's P. C. 451, 454; Halloway's Case, Cro. Car. 131.

[3] p. 454.

[4] 8 C. & P. 115.

from the facts, and liable to be overcome by the proof of other facts, and at other times, it was an irresistible legal inference which could not be rebutted. So far from being a descriptive term, to be applied as a test to cases as they should arise, it had become simply a part of the name to be given to the offense, when its existence had been ascertained by other tests. It was, probably, for this reason, that the expression was wholly omitted in the revised code. The object of the revisers and of the Legislature was, to define the offense, by the use of language, in its ordinary sense, omitting a phrase which, though it had become technical, tended to mislead rather than to instruct. The provision respecting murder, as proposed by the revisers, was as follows:—

Sec. 4. The killing of a human being, without the authority of law, by poison, shooting, stabbing, or any other means, or in any other manner, is either murder, manslaughter, or excusable or justifiable homicide, according to the facts and circumstances of each case.

Sec. 5. Such killing, unless it be manslaughter, or excusable or justifiable homicide, as hereinafter provided, shall be murder in the following cases: 1. When perpetrated from a premeditated design to effect the death of the person killed, or of any human being. 2. When perpetrated by an act imminently dangerous to others, and evincing a depraved mind, regardless of human life, although without any premeditated design to effect the death of any particular individual. 3. When perpetrated without any design to effect death by a person engaged in the commission of any felony: 4. When perpetrated from a premeditated design to do some great bodily injury, although without a design to effect death.[1]

The Legislature was at the same time, informed by the revisers that a lamentable uncertainty prevailed in regard to the distinction between murder and manslaughter, that nothing was so much needed as a settled line of distinction between them, and that the first step to such a distinction was the definition of murder.[2]

These provisions were enacted precisely as reported, except the fourth subdivision of the fifth section, which was rejected.[3] It thenceforward became the duty of the courts by an attentive consideration of the language of these enactments, to ascertain, in each case presented for adjudication, whether the alleged offense came within the statute. The case of the plaintiff in error would have been of easy solution, as the law stood before the revision. The deceased died by his hands, and the bill of exceptions states that there was no evidence given to show any provocation on her part. It was a homicide, wholly unexplained; it was also a case of cruel and inhuman violence, unrelieved by provocation or the heat of passion, and of a design to do some great

[1] 3 Rev. Stats. (2d ed.) 808. [2] *Id.* [3] 2 Rev. Stats. 656.

bodily harm, from which death resulted, possibly, without its being contemplated by the accused. In either case, as a homicide unexplained, or a killing by cruel violence, unprovoked, it was murder by the common law. Whether, under the statute, the jury would have been authorized to find a premeditated design to effect her death, within the meaning of the first subdivision of the fifth section, is a question not before us, and upon which it would be improper to express an opinion; that question was not presented to the jury.

The precise question is, whether the second subdivision embraces the case of killing by an unprovoked and cruel beating, the accused not intending to take life. Had the fourth subdivision, as reported, been enacted, it would precisely have met the case. I do not rely very much upon its having been reported and rejected by the Legislature. It may have been, because they did not intend to punish such a case, as murder, and it may have been, because it was considered as embraced in the prior provisions. It is, however, a circumstance of some moment, as it would rather be presumed, that where a case of frequent occurrence was well described in the projected law, the provision would have been adopted, instead of leaving it to be dealt with by a construction upon other provisions less accurately adapted to the case. This consideration is strengthened by the circumstance, that a homicide committed in the attempt to do a great bodily injury, short of death, without, or on insufficient, provocation, formed a distinct head of the law of murder by the common law.[1]

In ascertaining the meaning of the second subdivision, upon which the plaintiff in error was convicted, it is necessary to look into other instances of murder at the common law, where it is not necessary that there should be any intention to take the life of the person killed. I refer to cases where death was the collateral consequence of the act, which itself was highly criminal. Foster says, that "if an act, unlawful in itself, be done deliberately and with intention of mischief, or great bodily harm to particulars, or of mischief indiscriminately, fall it where it may, and death ensue, against, or beside, the original intention of the party, it will be murder."[2] One branch of the offense here referred to is, in a modified form, provided for in the first subdivision. A premeditated design to effect the death of "any human being," is made murder, though the person killed was not at all within the intention of the offender.[3] Then, as the intent to do mischief indiscriminately, by which is meant such as is deadly or very dangerous; almost every writer on criminal law has a division of murder from general mal-

[1] See in addition to the books referred to, Fost. Cr. L. 262, 291, 296; 4 Bla. Com. 199; Rex v. Reason, 1 Str. 500; Archb. Cr. Pl. 394.

[2] p. 261.

[3] See Queen v. Saunders, Plowd. 473.

ice or a depraved inclination to mischief, fall where it may.[1] The act must be itself unlawful, attended with probable serious danger, and must be done with a malicious intent to hurt people.[2]

The instances given are, riding an unruly horse among a crowd of people, the probable danger being great and apparent; throwing a heavy stone into the street, when multitudes are passing; firing a gun into a crowd, and the like. No one will deny but that the second subdivision of the fifth section very accurately describes the particular instance of murder just referred to; but the question is, whether it is not limited to that, and whether it fairly extends to cases where the intention and the act refer only to the person killed; where the evil intention, whether more or less wicked, has for its object the party who ultimately becomes the victim. The language does not seem to be designed to embrace the last mentioned case. In the first place, the act causing death must be one imminently dangerous to others. Why should the greater or less degree of danger be an ingredient, when the case supposes that the party against whom it was directed, and for whom it was intended, was killed by it? It must be dangerous to others. The plural form is used; and though I am aware that, by a general provision of the Revised Statutes, the plural may be construed to include the singular, I conceive, that where a precise definition was intended, and where the distinction between general and particular malice must have been in the mind of the Legislature, the case of imminent danger to the person killed would have been specified, had it been intended to embrace it.[3] The act must evince a depraved mind, regardless of human life. These words are exactly descriptive of general malice, and can not be fairly applied to any affection of the mind, having for its object a particular individual; they define general recklessness, and are not pertinent to describe cruelty to an individual. The act by which the death is effected must evince a disregard to human life. Now, a brutal assault upon an individual may evince animosity and hate towards that person, and a cruel and revengeful disposition, but it could not properly be said to be evidence of a recklessness and disregard of human life, generally. Take the case of death ensuing from an intentional immoderate punishment of a servant; the act would be evidence of a disregard of the life of the servant, but not of human life in a general sense. The life of every one, we know, is a human life; but the words are used in this enactment, in a general sense, as clearly as when we speak of the uncertainty of human life, or the miseries, the pleasures, or the vanity of human life. Again, the

1 1 East's P. C. 231; Hale, 476; 4 Bla. Com. 200; 1 Hawk., ch. 29, sec. 12, and ch. 31, sec. 61.

2 East, *supra*.

3 2 Rev. Stats. 778

killing must be without any premeditated design to effect the death of any particular individual. Why did not the Legislature say, of the person killed? or, if it were intended to embrace both general and particular malice, of the person killed, or of any particular individual? The first subdivision presented an example, in immediate proximity, of the phraseology suggested, where it was intended to provide, as well for the case of particular malice effecting its object, as for malice taking effect in a manner collateral to the intention. Upon the most careful and anxious examination of the provision, I am entirely satisfied, that it can not, without violence to the intention of the Legislature, as evinced by the language, be applied to the case of homicide resulting from a direct assault by one person upon another.

It is not necessary to maintain, that homicide from a cruel assault, without a design to effect death, could be adequately punished, under the provisions respecting manslaughter. It may be, that the failure to enact the provision in the revisers' report, rendered a change necessary in the enactment respecting manslaughter, which was omitted through inadvertence. If so, it is a *casus omissus* which the Legislature is alone competent to supply.

I have not overlooked the opinions incidentally expressed by Chancellor Walworth and Mr. Justice Bronson, in *People* v. *White*[1] and in *People* v. *Rector*.[2] In neither of these cases, was this question presented; and in both of their opinions, those learned judges were dissentients from the judgment of the court upon the points decided in those cases. The judgments of the courts below should be reversed, and a new trial ordered in the Court of Oyer and Terminer.

Parker, J. As it appeared that the injuries upon the head of the deceased had no part in causing her death, we may lay them entirely out of view in considering this case; the whole case, then, is this: the prisoner made three several assaults upon the deceased, and beat her with his fists, in the pit of the stomach, which caused her death. The fact that the prisoner had threatened to kill the deceased, certainly made the case a proper one in which to submit to the jury the question, under the first subdivision of the definition of murder, whether the act was done from a premeditated design to effect death. But the judge charged that the prisoner might be convicted, under the second subdivision of the definition of murder, which applies to a killing "perpetrated by an act imminently dangerous to others, and evincing a depraved mind, regardless of human life, although without a premeditated design to effect the death of any particular individual.

I think, that subdivision was designed to cover a very different class of cases; such as, where death is caused by firing a loaded gun into a

[1] 24 Wend. 520.

[2] 19 *Id.* 569.

crowd, by poisoning a well from which people are accustomed to draw water, or by opening the draw of a bridge, just as a train of cars is about to pass over it. In such, and like cases, the imminently dangerous act, the extreme depravity of mind, and the regardlessness of human life, properly place the crime upon the same level as the taking of life by premeditated design. But these expressions are not applicable, and can not be made so, to a mere case of the commission of a battery with the fists, without a design to effect death, but from which death ensues. In this opinion, I concur with Senator Wager, in *People* v. *White*,[1] and with Justice Cowen, in *People* v. *Rector*,[2] and differ from other judges who expressed different opinions in those cases, as well as from the *dicta* in *People* v. *Enoch.*[3]

If the judge was right in his charge in this case, there is no security against a conviction for murder, in every case where a person intends merely to beat with his fists, and accidentally causes death, and in every other case of manslaughter, caused by personal violence, because the accused could hardly deny, that the act was imminently dangerous, when it proved so, by causing death; and every beating with the fist evinces a certain depravity of mind, because there is a design to do wrong to the extent, at least, of committing a misdemeanor, and to some extent, there may be considered a regardlessness of human life in such case, because such a beating might cause death. If such a construction is admissible, the absurdity is presented, of putting the offense of killing without design, by a person engaged in the commission of a misdemeanor, on the same level with a killing without design, by a person engaged in the commission of a felony, and punishing both with death; thus, restoring the law as it stood before the adoption of the Revised Statutes, when it is the plainly expressed intention of the revision, to mitigate the former offense by reducing it to manslaughter.

A careful examination of the section defining murder, and the sections defining manslaughter, will show, I think, very clearly the erroneousness of the charge in this respect. The section defining murder declares, "such killing, unless it be manslaughter," etc., "shall be murder in the following cases." This qualification is made applicable to each of the three following subdivisions. If it is not manslaughter, it is murder, "when perpetrated by any act imminently dangerous to others," etc. If it is manslaughter, that is, if the facts proved bring the case within either of the descriptions of manslaughter, it can, in no case, be murder. Now, in the case before us, if there was no premeditated design to take life, so as to bring it within the first subdivision, and it was upon that supposition, that the charge was made, the

1 24 Wend. 583. 2 19 *Id.* 591. 3 13 *Id.* 159.

case falls precisely within the definition of manslaughter in the first degree. It was the killing of a human being, without a design to effect death, by the act of a person engaged in the perpetration of a crime or misdemeanor, not amounting to a felony, in a case where such killing would have been murder at the common law; and being within the description of manslaughter, it could not be murder. To be murder, a case must not only fall within one of the three subdivisions, defining murder, but it must not fall within any of the definitions of manslaughter. If full effect be thus given to the words, "unless it be manslaughter," in the preliminary part of the section defining murder, the second subdivision of that section will only be applicable to the class of cases above indicated. All others, growing out of personal rencontres, and confined generally to two persons only, will be found to fall within some of the definitions of manslaughter and, of course, without the second definition of murder.

With this construction, crimes will also be properly graduated, according to the intention of the revisers. If A. attempts to cowhide B., for having libelled him, and death accidentally ensue, the crime will be manslaughter in the first degree, because the assailant was engaged in committing an assault and battery only. But if A. attempts to cut off the hand that wrote the libel, and death accidentally follow, the crime will be murder, because A. was engaged in the commission of the felony of mayhem.

It is evident, that the presiding judge, in charging the jury, had in his mind the idea, that the case, to be murder, must not fall within the definition of manslaughter, for he made it a condition to bringing the case within the latter, that the jury should find the injuries "were inflicted without provocation, and not in the heat of passion." But he overlooked the definition of manslaughter that was alone applicable. He should have specially called their attention to the definition of manslaughter in the first degree, and if he alluded to the second subdivision of the definition of murder at all, he should have told them, it could not fall within that, if it was a case of killing, without a design to effect death, while engaged in committing an assault and battery only. If there was a design to effect death, it would, of course, have fallen under the first subdivision of the definition of murder. If there was any question on that point, it should have been submitted to the jury, to find whether it was murder, under the first subdivision, or manslaughter in the first degree.

If this case was properly submitted to the jury, as falling under the second subdivision of murder, so might a case be thus admitted, where death was caused without design, by a person engaged in a felonious assault upon the person killed, which is one of the cases expressly pro-

vided for in the third subdivision. But the construction I have put on the second subdivision confines each subdivision to a distinct class of cases, and renders it entirely inapplicable to any other.

But it has been said,[1] that the sixth section of the statute defining manslaughter in the first degree, is not applicable to a case where the party causing death without design, is engaged in an assault and battery. I find no warrant for such a position; no exception of that offense is made in the statute. The language is, "the killing of a human being, without a design to effect death, by the act, procurement, or culpable negligence of any other, while such other is engaged: (1) in the perpetration of any crime or misdemeanor, not amounting to a felony; or, (2) in an attempt to perpetrate any such crime or misdemeanor, in cases where such killing would be murder at the common law, shall be manslaughter in the first degree." This section is thus made expressly applicable to all crimes and misdemeanors, not amounting to felony, and it is certain, an assault and battery is one. The statute nowhere confines this section and the third subdivision of the section defining murder to other offenses than those of intentional violence.

It is said, that this plain construction of the act would make every case murder, because being engaged in an assault, and death ensuing, it becomes felony of manslaughter, and being engaged in such felony, and death ensuing, it is murder; but it leads legitimately to no such result. The intent regulates the crime, unless otherwise provided. If the party intends an assault and battery, and death ensues, without design, he is guilty of manslaughter; if he intends a mayhem or other felony to the person, and death ensues, without design, it is murder. The law makes a person responsible for consequences not designed, in proportion to the grade of offense designed. This construction supposes an attempt, coolly and deliberately made, to commit a battery, and the offense of unintentionally causing death, in such a case, is the first degree of manslaughter. If there is the excuse, that the act was done in the heat of passion, though in a cruel or unusual manner, or with a dangerons weapon, it is mitigated by the tenth and twelfth sections, to manslaughter in the second degree; and if done in the heat of passion, but not in a cruel or unusual manner, and not with a dangerous weapon, it is reduced by the eighteenth section to the fourth degree.

It may be that these respective crimes are not properly graduated, or punished in proportion to the moral delinquency; but the disproportion would be much greater, if we held, that death ensuing, without design, from the commission of a battery, is not manslaughter in the

1 People v. Rector, 19 Wend. 608.

first degree, within the description of the sixth section. With such a construction, and with a construction of the second subdivision of the definition of murder, like that adopted at the trial, the question for the jury would not be, whether the crime was murder or manslaughter in the first degree, but it would be, whether it was murder or manslaughter in one of the lower grades, thus making a leap from murder to manslaughter in the fourth degree; from a crime punishable with death, to one punishable in a county jail, with but a shade of difference between them. The very case before us falls at once to manslaughter in the fourth degree, if excluded by such a construction from the first degree.

It is objected, that, if my construction of the first degree of manslaughter is correct, it would cover every other degree of manslaughter for, in every case provided for in the lower degrees, there is also an assault and battery, and death ensues. I answer, the general description in the first degree can not be considered as applicable to cases particularly described in the lower degrees. The first degree gives the general description; the lower degrees, the exceptions, as where the act is done in the heat of passion, etc. It is far more consistent, to hold, that the description in the first degree, does not apply to cases described in the second and third degrees, than to hold, it is not applicable to any case of assault and battery, where death ensues. There is much less violence done to the language of the section, by my construction, than by that against which I contend. There is reason in holding that the first section, being in general terms, is not applicable to cases specially described. Though within the general language, it may well be supposed, the Legislature did not intend to include them, because they are provided for specially in other sections. But it seems to me, it is refusing obedience to the statute, to say, that it is not intended to be applied to any case of assault and battery, when no exception of that offense is made. But whatever may be the true construction of the sixth section, defining manslaughter in the first degree, I am clearly of the opinion, that the court below erred in attempting to bring the case within the second subdivision of the section defining murder. The offense was either murder by design, under the first subdivision, or manslaughter in some degree.

If I were sitting in the Oyer and Terminer, and, perhaps, if sitting in the Supreme Court, I should feel bound by the opinions expressed on these points by the learned judges who constituted a majority of the court in deciding the *Rector Case*. But in this court, where this question has not been decided, and where we are bound by no such opinions expressed in an inferior tribunal, I think it is our duty, to settle the construction of these sections of the statute, by giving to them the effect which must have been originally intended, and thereby

placing the different statutory provisions more in harmony with each other.

My conclusion is, therefore, that the Court of Oyer and Terminer erred in its charge to the jury, and that the judgment of that court, and of the Supreme Court, should be reversed.

*Judgment reversed, and new trial awarded.*

GARDINER, C. J., and RUGGLES, J. dissented.

---

## MURDER IN FIRST DEGREE — SPECIFIC INTENT TO KILL ESSENTIAL.

### BRATTON *v.* STATE.

[10 Humph. 103.]

*In the Supreme Court of Tennessee, 1849.*

**A Statute Declares** that "all murder which shall be perpetrated by means of poison, lying in wait or any other kind of willful, deliberate, malicious and premeditated killing, or which shall be committed in the perpetration of or attempt to perpetrate any rape, arson, burglary, or larceny, shall be deemed murder in the first degree," *held*, that to constitute murder in the first degree, there must exist, in the mind of the person who slays another, a specific intention to take the life of the person slain, and that if he, with premeditated intent to slay one person, against his intention slay another, it will not be murder in the first degree.

Bratton was indicted for murder, in the Circuit Court of Giles, and was tried by Judge DILLAHUNTY and a jury; found guilty of murder in the first degree, and judgment entered accordingly. He appealed.

*Nicholson* and *Jones*, for the plaintiff in error.

*Attorney General* and *Wright*, for the State.

MCKINNEY, J., delivered the opinion of the court.

The plaintiff in error, was indicted in the Circuit Court of Giles County for the murder of Mary Jane Wilsford; and was found guilty, by the jury, of murder in the first degree, as charged in the indictment. The jury also found that there were mitigating circumstances in the case. The prisoner moved the court for a new trial; but the motion was overruled, and judgment pronounced, that he undergo confinement in the jail and penitentiary house of this State, for and during the period of his natural life. A bill of exceptions, setting forth the proof in the case, was signed and sealed and an appeal in error prosecuted to this court.

Upon a careful consideration of the proof, we feel constrained to say, that the facts of the case, as presented in the record before us, furnish

no sufficient ground, in our judgment, for disturbing the verdict of the jury. It, therefore, only remains to inquire, whether or not the legal principles applicable to the facts of the case, were correctly stated to the jury, in the charge of the court.

The deceased was the wife of the prosecutor, and her death was caused by a pistol shot, discharged by the prisoner. It seems to have been a question, earnestly discussed on the trial in the Circuit Court, as well as in the argument here, whether the shot which resulted in the death of Mrs. Wilsford, was intended by the prisoner, to take effect upon her or the prosecutor. In reference to this question the judge instructed the jury, that "if the defendant intended to kill the husband of the deceased, and undesignedly killed the deceased, the offense would be the same as if he had killed the husband; that is, if the defendant had killed the husband of the deceased, and such killing would have been excusable homicide in self-defence, as already explained to you, then you should acquit the defendant; and so, if he had killed the husband of the deceased under such circumstances, as would make the offense manslaughter or murder in the first or second degree, as already explained to you; then, though he undesignedly killed the deceased, it would be the same offense as if he had killed the husband of the deceased, and you should fix the punishment of the defendant accordingly."

The only question presented upon the record is, whether the principle announced in the foregoing instruction is applicable to the crime of murder in the first degree, as defined in the third section of the penal code of 1829. That this principle is correct in reference to murder at the common law, is conceded, and that it is equally so, as respects murder in the second degree, and all the inferior grades of homicide, under the statute, is not to be questioned. But that it is wholly inapplicable and directly opposed to both the letter and spirit of the statute as regards murder in the first degree, we think is clear beyond all doubt.

In order to a correct determination of this question, we are to inquire, what was the intention of the Legislature? What change of the existing law, upon this subject, was contemplated by the statute? What particular evil was designed to be obviated or at least alleviated? The common law, which was in force here, prior to the statute of 1829, recognized no distinction in respect to felonious homicide, except that between murder and manslaughter; the distinctive difference between which two offenses is, that malice aforethought either expressed or implied, which is of the essence of murder, is presumed to be wanting in manslaughter; the act, in the latter offense, being rather imputed to the infirmity of human nature.

In regard to the latter crime, a distinction, certainly reasonable and

just in itself, was also taken between voluntary and involuntary manslaughter. But in relation to the higher crime of murder, the common law made no discrimination; all murders, irrespective of their greater or less malignity and atrocity, were, so far at least as respects the punishment, on the same footing. And, without regard to the intrinsic nature of the case, or circumstances tending to enhance or extenuate its legal, as well as moral, guilt, the uniform and indiscriminate punishment was death. With a discrimination more conformable to the dictates of reason, justice and humanity, as well as to the spirit of the age, the penal code of 1829, had in view, among other objects, the admeasurement and adaptation of punishment to the different degrees of crime, according to their different degrees of malignity, as far as comported with the public safety and policy. In the accomplishment of this purpose, the crime of murder (the definition of which, contained in the second section of the statute is borrowed in exact terms from the common law), is divided into two grades, with a view solely to the graduation of the punishment. The third section enacts that, "all murder which shall be perpetrated by means of poison, lying in wait or any other kind of willful, deliberate, malicious and premeditated killing; or which shall be committed in the perpetration of, or attempt to perpetrate any arson, rape, robbery, burglary, or larceny, shall be deemed murder in the first degree; and all other kinds of murder shall be deemed murder in the second degree." In this general definition, and enumeration of specific instances constituting murder in the first degree, there is a classification of various kinds of homicide, which it may be of some importance to notice, with a view to the question under consideration. In cases of murder by means of poison, or lying in wait, the most atrocious and detestable of all kinds of homicide, and the least to be guarded against, either by resistance or forethought, the crime is made to depend exclusively upon the "means" causing death. So, likewise, in respect to cases of murder committed in the perpetration of, or attempt to perpetrate arson, rape, robbery, burglary or larceny; a class of felonies most dangerous in their consequences to public safety and happiness, which may be most frequently and easily committed, and to which there are the strongest temptations. In all these cases, the mode or "means" of destroying life, supplies a conclusive legal presumption of malice and guilty intention; the crime, as well as the legal guilt of the agent, is made to depend alone upon the fact of taking life in either of the specified modes. In such cases, the question of malice or intention, as a matter of fact, is wholly irrelevant; it need not be proved, and can not be controverted by the accused. But the remaining species of murder defined in the statute, namely, murder, "by any other kind of willful, deliberate, malicious and premeditated

killing," falls within the operation of a directly contrary principle. Here, the character of the crime and guilt of the agent, are made to depend exclusively upon the mental *status*, at the time of the act, and with reference to the act which produces death.

This accumulated definition of murder in the first degree, takes in all the ingredients of crime descriptive of the utmost malignity and wickedness of heart, as well as of the highest and most aggravated species of homicide. If the universal principle of construction is to be regarded, that every word in a statute is to have meaning and effect given to it, if practicable, it results of necessity, by force of the terms employed in the definition of the crime, that to constitute murder in the first degree, it must be established, that there existed in the mind of the agent, at the time of the act, a specified intention to take the life of the particular person slain. The characteristic quality of this crime and that which distinguishes it from murder in the second degree, is the existence of a settled purpose and fixed design on the part of the assailant, that the act of assault should result in the death of the party assailed; that death, being the end aimed at, the object sought for and wished.[1] The "killing" must be willful; "that is, of purpose, with intent that the act, by which the life of a party is taken, should have that effect."[2] "Proof must be adduced to satisfy the mind, that the death of the party slain was the ultimate result which the concurring will, deliberation and premeditation of the party accused sought."[3] If, then, by misadventure or other cause, a blow, directed at a particular person and designed to take his life, take effect upon and cause the death of a third person, against whom no injury was meditated, can it be said, that the will concurred with the act, which resulted in the accidental death of such third person; or that there existed a specific intention to take his life. A grosser absurdity can not be conceived. The hypothesis that the killing was undesigned, concedes that the will did not concur with the act; that in point of fact, no such specific intention existed; no such result was either contemplated or designed. And upon what principle is it, that this would be murder at common law? Simply upon the principle of implied or imputed malice and intention. In such case, all the essential elements of murder at the common law concur. A homicide has been committed with deadly weapon, in the attempt to perpetrate a felony, by taking the life of another person, without legal justification or excuse; and in such case, from the circumstances and deadly weapon, the law conclusively presumes malice and the intent to murder; and, in like manner, the law conclusively presumes that the party contemplated the probable consequences of his own act.

[1] 4 Humph. 136, 139. [2] 10 Yerg. 551. [3] 1 Leigh's Rep. 611.

There is another principle applicable in such case, namely: the law by imputation, so to speak, refers the act of murder to the felonious intent existing in the mind of the agent towards the particular object of his revenge. "Thus," says Blackstone,[1] "if one shoots at A. and misses him, but kills B., this is murder, because of the previous felonious intent, which the law transfers from one to the other."

But we have seen that murder in the first degree, as constituted by our statute, depends upon the existence of a specific intention to take the life of the particular person slain; and that the existence of such intention, as a matter of fact, must be satisfactorily established. Hence, it is clear to a demonstration that all legal implication or imputation of such intention is excluded in reference to this particular species of murder. It is equally clear that all cases of homicide not falling within the principles here announced properly belong to that comprehensive class included in the statute, of "all other kinds of murder," and which are declared to "be deemed murder in the second degree." To murder of this class, as well as to all inferior grades of homicide, the common-law principle asserted in the charge of the circuit judge is still clearly applicable.

We are aware that in Pennsylvania, upon a statute almost identical in its terms with our own, a different construction has prevailed. In the case of the *Commonwealth* v. *Dougherty*, it appears from the note of the case, to which only we have had access, that the prisoner aimed a blow with an axe at his wife, and it fell on the head of a child which lay on her shoulder, and inflicted a mortal wound, of which it died. And it was held by the court that if the prisoner's "intent was to kill his wife, and killing her would have been murder in the first degree, killing his child will also be murder in the same degree." With deference to an authority so respectable, we think it very clear, that no such conclusion can be legitimately deduced from the premises. We regret, that we have not seen the opinion at length, in the case above mentioned. The brief extract before us, merely asserts the proposition we have quoted; the process of reasoning by which the conclusion is supposed to be maintained, is not given in the note. We confess ourselves at a loss to understand in what sense it can be predicated of the act of the prisoner in "killing his child," that it was "willful, deliberate and premeditated," and more especially how it can be made out, that the will concurred with the act in such case.

The contrary construction, we think, is alone compatible with the terms of the statute, whether we regard their proper or popular acceptation; with the obvious spirit of the statute which was to alleviate the punishment of murder, except in cases of the greatest enormity; with

[1] 4 Bla. Com. 201.

the benignant principle of interpretation, that in favor of life, a statute is to be construed most favorably in behalf of the accused, and most strictly against him; and finally with that intrinsic and fundamental distinction, in respect to the relative guilt of human actions, dependent upon the concurrence or non-concurrence of the will, which we trace as far back as the "Jewish dispensation," under which cities of refuge were provided to the end, "that every one that killeth any person unawares may flee thither, and be secure from the avenger of blood."[1]

The result is, that from the foregoing error in the charge of the court, and alone upon that ground, the judgment must be reversed.

---

## HOMICIDE — MURDER BY POISON — NOT PER SE MURDER IN FIRST DEGREE.

## LANE v. COMMONWEALTH.

[59 Pa. St. 371.]

*In the Supreme Court of Pennsylvania, 1868.*

**On a Trial for Murder** by poison, the court below charged, "the life or death of this man is in your hands; there is no middle course, he must be convicted of murder in the first degree or acquitted of everything. If your verdict is guilty of murder, you must state of the first degree. If not guilty you say so and no more." *Held*, to be error.

November 4th, 1868. Before THOMPSON, C. J., AGNEW, SHARSWOOD and WILLIAMS, J.J. READ, J., absent.

Error to the Court of Oyer and Terminer of Allegheny County.

Lewis Lane was indicted for the murder of his wife, Henrietta Lane.

The indictment was tried June 17, 1868, before STERRET, P. J. and STOWE, J.

The Commonwealth gave evidence that the deceased died by means of poison, and that it had been administered to her by the prisoner.

The jury was charged by STOWE, J., who amongst other things, said to the jury: "The life or death of this man is in your hands. There is no middle course. If he is guilty of murder, he must be convicted of murder in the first degree or acquitted of everything. * * * If your verdict is guilty of murder, you must state of the first degree; if not guilty, you say so and no more." On the 18th of June the jury returned a verdict of "guilty of murder in the first degree." The prisoner was sentenced September 12th, 1868.

[1] Num., ch. 35.

By virtue of a special allocatur, a writ of error was taken out October 12th, 1868. The above portion of the charge was assigned for error.

*W. T. Haines*, for plaintiff in error.

*L. B. Duff*, District Attorney, for Commonwealth.

The opinion of the court was delivered, November 18th, 1869, by —

THOMPSON, C. J. The prisoner, Lewis Lane, was charged and tried at the JuneTerm of the Court of Oyer and Terminer of Allegeheny County, for the murder of his wife, by administering poison to her; and the question now for our consideration is whether the court below erred in the portions of the charge to the jury excepted to and assigned for error, which are as follows: —

"First. The life or death of this man is in you hands; there is no middle course; he *must* be convicted of murder of the first degree, or acquitted of everything."

"If your verdict is guilty of murder you must state of the first degree. If not guilty you say so, and no more."

The objection to these portions of the charge is, that they were peremptory, and took from the jury their exclusive right and duty to find the degree, in case of a conviction of murder. It was contended on argument, that in all trials for murder, by whatever means perpetrated, it is always the province and duty of the jury, if they convict, to find in their verdict the degree, and that this being the requirement of the statute, a binding instruction from the court to find a particular degree, is an infringement of the duty intrusted alone to the jury and not to the court.

The seventy-fourth section of the act of 31st of March 1860, which is a transcript of the provision on the same subject of the act of 22d of April, 1794, enacts that, "all murder which shall be perpetrated by means of poison,or by lying in wait, or by any other kind of willful, deliberate and premeditated killing, or which shall be committed in the perpetration of or the attempt to perpetrate any arson, rape, robbery or burglary, shall be deemed murder of the first degree, and all other kind of murder shall be deemed murder of the second degree; and the jury before whom any person shall be tried shall, if they find such person guilty thereof, ascertain in their verdict, whether it be murder of the first or second degree."

It must be admitted, we think, that the act makes no distinction as to the requirement to find the degree of murder, between any of the modes by which it may be perpetrated, as defined in the statute. In all alike the requirement applies without any exception. Even in case of a confession of the crime and submission to the court, no matter by what means it may have been perpetrated, whether by poison, lying in

wait, or in an attempt to commit either of the enumerated crimes in which intention to kill is not a material inquiry, the court must, before sentencing, examine witnesses and determine the degree. The law is imperative, and it is indispensable in the trial of a homicide, that the degree of the crime be ascertained and appear on the record. This is to be done by the jury, where there is a trial, and by the court, where there is a sentence on a confession. It is as essential an element of the verdict as any other fact to be found by it. It is this which ascertains and fixes the penalty to be attached to the crime, and hence it must appear by the record.

Tilghman, C. J., in *White* v. *Commonwealth*,[1] speaking of the form of the indictment under the act of 22d April, 1794, said: "It has not been the practice, since the passage of the law, to alter the form of indictment for murder in any respect; and it plainly appears by the act itself, that it was not supposed any alteration would be made. It seems to be taken for granted that it would not always appear on the face of the indictment of what degree the murder was, because the jury are to ascertain the degree by their verdict, or in case of confession, the court are to ascertain it by the examination of witnesses." Notwithstanding what the Chief Justice said, indictments continued to be generally framed according to common-law precedents, in which was always set forth the kind of instrument and the means of the killing. Since the passage of the Criminal Procedure Act of 31st March, 1860,[2] it is not necessary that the "manner or the means by which the death of the deceased was caused," should be set forth, but only that it was done "feloniously, willfully and with malice aforethought." Hence it would seem to be more than ever material that the jury be charged with the responsibility and duty of finding the degree. That it is a material fact to be found is not to be denied or doubted. The statute makes it so, and with it all our decisions accord.

But it is argued that where the facts bring the case within either of the modes of killing declared murder in the first degree, it being the duty of the jury to find a verdict in accordance therewith, a peremptory direction to find that degree is proper and right. To admit this would be to determine that this portion of the verdict is matter of form, and to substitute a court to do that which the law says the jury shall, upon their oaths, do. They have undoubtedly the power to fix a lower degree to the crime than the statute provides. I say they have the power, for the act gives it to them, and no court can refuse their verdict if they do so, or set it aside, unless at the instance of the defendant. We need not speculate about why it was so provided. It is sufficient that it is so written, and we can not change, alter or depart from it. In *Rhodes* v.

1 6 Binn. 183. 2 sec. 20.

*Commonwealth*,[1] this was a subject of thought and comment. Woodward, C. J., said, in the opinion of the court: "No doubt cases of murder in the first degree have been found in the second, but this must have been anticipated when the statute was framed, and has certainly been allowed under its operation; and yet it has remained on the statute book since 1794, unaltered in this regard. Possibly the very distinction of degrees was invented to relieve such jurymen's consciences as should be found more tender on the subject of capital punishment than on their proper duties under the evidence. Many men have been convicted of murder in the second degree who, really guilty of the higher crime, would have escaped punishment altogether but for the distinction in degrees, so carefully committed to juries by the statute."

For myself, I have no doubt the object of establishing degrees was to affix to the more heinous murders the highest penalty. But as the penalty results from the degree, the responsibility and duty of fixing that was assigned to the deliberation of the jury. We need not speculate about the moving cause for this provision. It is enough that it is of the law, and its workings have been but little complained of after an experience of three-quarters of a century. We must administer it as it is, and in the spirit of the enactment, without altering or weakening it.

In *Rhodes* v. *Commonwealth* the theory of the prosecution was that the murder was committed by the prisoner, in perpetrating the crime of robbery, for the prosecutor's house was robbed that day. The effort was to identify him with the robbery, and the prosecution claimed a conviction so exclusively on that ground that the judge, in his charge to the jury, used almost the same language which the learned judge did in this case. The language was: "If you find the defendant guilty, your verdict must state guilty of murder in the first degree, in the manner and form as he stands indicted. If not guilty, your verdict will simply be, not guilty." The same reason was urged in justification of this instruction as was urged here, namely: That the evidence exhibited a case of robbery by the hands of the prisoner, and, therefore, it must be murder in the first degree if any thing. For so instructing, this court felt constrained to reverse the sentence. Woodward, C. J., after noticing the change made by the statute in the common law, in respect to degrees in murder, and the duty of the jury under the statute to find the degree, said: "Yet the judge assumed the province of the jury and ascertained the degree in this instance, though this was a case of conviction by trial, and not by confession. Nothing less can be made out of his words, 'If you find the defendant guilty, your verdict must state guilty of murder in the first degree.'" "Was that," he asks, "leaving the degree to the jury to find?" Most clearly not. It excluded all

[1] 12 Wright, 396.

chance of deliberation on the degree, and left to them only the question of "guilty or not guilty." "It is in vain to argue," he further remarks, "that the judge was more competent to fix the degree than the jury, or that the circumstances proved the crime to be murder in the first degree, if murder at all; for the statute is imperative that commits the degree to the jury. It was proper for the judge to advise them of the distinction between the degrees, to apply the evidence, and to instruct them to which of these degrees it pointed. But to tell them they must find the first degree was to withdraw the point from the jury and decide it himself."

It remains to inquire, in this case, whether the charge as made was peremptory, that their verdict must be murder in the first degree if anything. I will not analyze the charge to prove that this was meant, for in all its parts, wherever conviction is spoken of as possible, this is indicated almost as clearly as in the last paragraph. We have also the learned judge's interpretation of this, as the position assumed by him, in his opinion on the motion for a new trial. The authorities he cites are to prove this position, and in the concluding portion of it, he says, after reviewing the facts, and the absence of evidence to mitigate the crime from willful, intentional poisoning, he adds: "If such is the case we were right, and it was our duty to tell the jury that they could not, under the law and evidence in the case, render a verdict of murder in the second degree."

The charge being intended to be peremptory, as claimed by the prisoner's counsel, and thus shown, we think it infringed too strongly on the province of the jury. It did not leave them free to deliberate and fix the degree. The judge did, as was said in the case above referred to, decide it, and not the jury. If a verdict of murder in the second degree had been rendered, it would have been great error to have refused it, and yet this would be the legitimate consequence of a failure to observe the peremptory direction of the judge. It has never yet been decided in Pennsylvania that a verdict of murder in the second degree might not be given in a case of murder by poison. That it may be given is as unquestionable as the power of the jury is under the act to give it and impossible for the court to refuse it. We have no reference to the facts of the case in hand, as they appeared before the jury. We know nothing of them. It is only with the questions of law raised that we have to deal; and only in the particulars discussed do we see anything to be found fault with; nor are we to be understood as finding fault with a practice which is entirely proper, of judges freely advising juries as to the duty of ascertaining that degree of murder towards which the facts seem to point, always leaving them, however,

free to deliberate upon, and the duty and responsibility of finding the degree, if they convict.

For these reasons, the sentence in this case is reversed, and a *venire de novo* awarded.

---

## HOMICIDE — MURDER BY DROWNING — MURDER IN SECOND DEGREE.

## JOHNSON *v.* COMMONWEALTH.

[24 Pa. St. 387.]

*In the Supreme Court of Pennsylvania, 1855.*

1. **A Premeditated Intention** to destroy life is indispensable in order to constitute murder in the first degree.
2. **Murder by Drowning** is not, under the Act of 1794, necessarily murder in the first degree; it is not one of the modes of destroying life enumerated in the statute.
3. **The Act of 1794, Provides** that "all murder which shall be perpetrated by means of poison, or by lying in wait, or by any other kind of willful, deliberate, and premeditated killing, or which shall be committed in the perpetration or attempt to perpetrate any arson, rape, robbery, or burglary, shall be deemed murder in the first degee, and all other kinds of murder shall be deemed murder of the second degree," the jury, in case of conviction, to ascertain the degree. Under an indictment charging that the defendant feloniously, willfully and of his malice aforethought, cast a certain E. T. into a dam of water and held her in and under the water till drowned, he was found "guilty in manner and form as he stands indicted." *Held*, that the defendant was not convicted of murder of the first degree, but of murder of the second degree.
4. **The Sentence of Death was Reversed** and annulled, and the record remitted to pass such sentence as is authorized for conviction of murder in the second degree.

Error to the Court of Oyer and Terminer of Lancaster County.

A bill of indictment containing two counts was found against Samuel Johnson. In the first count it was charged that he, on the fifth day of October, 1854, with force and arms in and upon one Elizabeth Thomas, feloniously, willfully and of his malice aforethought, did make an assault, and then and there, feloniously, willfully and of his malice aforethought, did cast, throw and push her into a certain dam, wherein there was a great quantity of water, by means of which casting, etc., she was then and there suffocated and drowned. In the second count it was charged that he feloniously, willfully, and of his malice aforethought, did cast, throw and drag her into a certain dam, etc., and then and there feloniously, willfully, and of his malice aforethought did hold and restrain her in and under the water, by means of which throwing, etc., and holding and restraining, etc., she was then and there choked, suffocated and drowned and died.

The jury found the defendant guilty in manner and form as he stands indicted. The reason filed in arrest of judgment was that the judgment was that the jury had not in their verdict ascertained whether the murder, of which they had found the defendant guilty, was murder of the first or of the second degree, as they were required to do by the seventh section of the act of 22d of April, 1794.

The motion was overruled after argument, and the defendant was sentenced to be hanged.

It was assigned for error that the court erred in passing sentence of death, it not being warranted by the verdict.

*Brown* and *Atlee*, for plaintiff in error.

*Patterson*, *contra*.

The opinion of the court was delivered, May 24, 1855, by—

LEWIS, C. J. The plaintiff in error has been sentenced to suffer death; and the question is whether the record justifies the sentence. The second section of the act of 22d of April, 1794, declares that "all murder which shall be perpetrated by means of poison, or by lying in wait, or by any other kind of wiilfull, deliberate and premeditated killing, or which shall be committed in the perpetration, or attempt to perpetrate, any arson, rape, robbery or burglary shall be deemed murder of the first degree; and all other kinds of murder, shall be deemed murder of the second degree; and the jury before whom any person indicted shall be tried, shall, if they find such person guilty thereof, ascertain in their verdict, whether it be murder of the first or second degree."

The cases of the *Commonwealth* v. *Earle*[1] and *Commonwealth* v. *Miller*[2] show that where the indictment charges the murder to have been perpetrated "by means of poison," or "by lying in wait," a verdict of "guilty in manner and form, as the prisoner stands indicted," does "ascertain" the murder to be of the first degree. The reason of this is, that the indictment is thus referred to as forming part of the verdict and the latter thus "ascertains" the facts, which, in judgment of law, amount to murder of the first degree. On the same principle it may be conceded, for the purposes of the present case, that if the indictment had charged the murder to have been committed willfully, deliberately and premeditatedly, or in perpetrating or attempting to perpetrate either of the enumerated felonies, a similar verdict would also sufficiently "ascertain" the murder to be of the first degree. But the indictment under consideration is totally destitute of either of these averments. It merely charges that the murder was committed "feloniously, willfull, and of malice aforethought." This is the usual and proper description of the crime at common law, and the language applies as well to the second as to the first degree. It does not necessarily import an

[1] 1 Whart. 525.

[2] Lewis Cr. L. 398, 401.

intention to kill. It is applied by construction of law to murders committed without such intention. If death had ensued in the perpetration of any felony not enumerated in the section; or in an attempt to procure abortion; or been caused by purposely letting loose a beast known to be accustomed to destroy human life; or when the mind of the prisoner from intoxication, or other cause, was deprived of the power to form a design with deliberation and premeditation, the offense would be stripped of the malignant feature required by the statute to place it on the list of capital crimes. But in all these cases, although the prisoner, had no intention to kill, he is deemed guilty of killing "feloniously, willfully, and of malice aforethought." On the principle that every one is answerable for the necessary consequences of his unlawful acts, he is adjudged guilty at common law of constructive "malice aforethought." But constructive malice is not the "deliberate and premeditated killing" required by the statute to constitute murder of the first degree. A premeditated intention to destroy life is an indispensable ingredient in that offense. An unlawful killing may be presumed murder; but it will not be presumed murder of the first degree. The burden of proving it so lies on the Commonwealth. The evidence produced by the Commonwealth in the case of Bridget Harman[1] may have justified the instructions given to the jury in that case. But they were only advisory. There was no intention to take from the jury their right to fix the degree. It was their province to "ascertain" it in their verdict; and as murder by drowning was not necessarily murder of the first degree, it was required, even in that case, to ascertain the degree in the verdict.

We have said that murder by drowning is not necessarily murder of the first degree. It is not placed by the statute in the category with murder "by means of poison," or "by lying in wait," and the courts have no right to place it there. It is true that the indictment charges the prisoner with throwing the deceased into a dam, and holding her under the water until she was suffocated; but this may have been done in the pursuit of some unlawful object without an intention to take her life. It may have been done in mischievous and cruel sport; or it may have been done for the purpose of procuring abortion. For aught we know, the evidence given on the trial might have fully justified the jury in deciding that the crime was murder of the first degree. But, as they have not done so, the court can not look into the evidence for the purpose of ascertaining the character of the offense. This would be an infringement of the right of trial by jury. They have found the prisoner "guilty in manner and form as he stands indicted" without otherwise "ascertaining" the degree. They have thus made

[1] 4 Barr, 269.

the indictment a part of their verdict, and we are to consider the case as if they had found a special verdict, stating the facts precisely as they are set forth in the indictment. We have seen that the language of the indictment applies as appropriately to the second as to the first degree. If there was nothing else to restrain us from interpreting it to mean murder of the first degree, the rule of *mitiori sensu* would require us to adopt the milder construction. But the clear and positive provisions of the act of 1794 fix interpretation beyond a doubt. We have seen that the indictment is destitute of the averments required by the statute to constitute murder of the first degree. The case must therefore, of necessity, fall into the class provided for by the clause in the act which declares that "all other kinds of murder shall be deemed murder in the second degree." In this opinion we are unanimous. It follows that the judgment must be reversed, and record remitted for further proceedings according to law.

---

DEGREES OF MURDER—MURDER IN SECOND DEGREE.

## STATE *v.* MAHLY.

[68 Mo. 315.]

*In the Supreme Court of Missouri, 1878.*

**Where the Only Evidence** against the prisoner is that he was known to have habitually treated the deceased, an infant step-child, with shocking brutality, and that the child was found dead on his hearth; *held*, that he was either guilty of murder in the first degree, or not guilty; that it was error to charge the jury that they might find him guilty of murder in the second degree.

HENRY, J. The defendant was indicted for the murder of Barbara Citawatca, his step-daughter, a child about three years of age. He was found guilty of murder in the second degree, and sentenced to imprisonment in the penitentiary for a term of twenty-one years, and has appealed to this court from the judgment.

The evidence for the State consisted of threats made by the defendant against Barbara, and of a course of the most brutal treatment of the child by the defendant, extending through a period of several months. Finally, on the morning of October 17, 1876, Barbara was found lying on the hearth dead, with evidences on her body that her death was occasioned by burning.

There was evidence tending to prove that defendant was guilty of murdering the child.

If the witnesses for the State testified to the truth, he was guilty of a willful, malicious, premeditated and deliberate murder. There is not in the record a scintilla of evidence to authorize an instruction to the jury in regard to any crime except that of murder in the first degree.

The principal witness for the State, Jacinksy, testified to having seen defendant, on several occasions, hold the child, in a perfectly nude state, before a strong fire, until its skin was burnt red, and she writhed in her torture like a worm, and this in his presence, and in the presence of Barbara's mother, without so much as a word of remonstrance from either; that he had seen the defendant kick the child, beat her with sticks and throw her out of the house, and that, on one occasion, her nose was broken by the fall; this, too, in the presence of the mother. Shortly after the child was buried, the body was disinterred for examination, in consequence of rumors that Barbara had been murdered by the defendant, and yet the defendant remained quietly on his farm, living in harmony with his wife, the mother of Barbara, for twelve months before any steps were taken to bring him to justice for perpetrating so foul and unnatural a murder. We will not say what credit the jury should have given to the testimony of Jacinksy. That is not our province, but in considering the case, we may say that the evidence of the witness as to the conduct of the defendant, in connection with the conduct of the witness and Mrs. Mahly, Barbara's mother, as testified to by him, presents a shocking case of depravity in the defendant, and as singular an indifference to its exhibition by Jacinksy and Mrs. Mahly, as is to be found in the records of crime. According to his testimony, the child was starved, flogged, kicked, roasted by the fire day after day for months, and, finally, murdered by the incarnate fiend who was the husband of its mother, and yet the court instructed the jury that they might, and the jury did, find that he was only guilty of murder in the second degree.

If he killed the child under the circumstances detailed by Jacinksy, human language is inadequate to characterize the atrocity of the crime; and which, among the horrible details, the court regarded as authorizing an instruction as to murder in the second degree, we can not conjecture. Courts should not humor or encourage the sentimentalism of jurors who shrink from finding an accused guilty of the highest crime of which the evidence proves him guilty, by giving instructions authorizing them to find him guilty of a lower grade of which there is no proof of his guilt. If they have a reasonable doubt of his guilt of the only crime which the evidence tends to prove, they should acquit, and not compromise with that doubt by finding him guilty of a lower grade of offense.

Instructions in regard to the lower grades, not warranted by the evi-

dence, operate as persuasives to juries to convict of one of those grades when they should convict the accused of the highest, or acquit him altogether. The court erred in giving the instruction defining murder in the second degree, because there was no evidence to support it.[1]

Another complaint made by appellant is that the court permitted the prosecuting attorney, in his closing argument to the jury, to say: "Mahly was on the stand, why did he not tell us how the child was burned? It was incumbent on him to show how these things were. Did he tell us how she was hurt? It was incumbent on him to prove how she was hurt. The defendant was there, master of his own house, and it was incumbent on him to show that he did not inflict the burns." Again he said to the jury in that closing argument: "The preponderance of testimony was in favor of conviction and against the defendant, and upon such evidence they (the jury) must convict." Every one of these declarations was a gross misrepresentation of the law, and such conduct on the part of the prosecuting attorney has so often been condemned by this court that the hope was indulged that the admonitions given would be heeded. It is not for prosecuting attorneys to declare the law to the jury. That is the duty of the court, and the State's attorney is as much bound by the law, as declared by the court, as are the jury and the accused. The court declared the law, but the prosecuting attorney, not satisfied with the instructions given by the court, made declarations of law to the jury in conflict with those given by the court, and manifestly and palpably erroneous. Can we say that the prisoner was not prejudiced by this conduct of the State's attorney? If he knew the law, and made these declarations to the jury in order to procure a conviction, his conduct was very reprehensible. If he knew no better, he should have accepted the law as given by the court.

Persons accused of crime must be fairly tried, and when so tried we shall not interfere to prevent them from being punished; but it is not only the duty of this court, but every officer of the State who has duties to perform in regard to the trial of persons accused of crimes, to see that they have a fair and impartial trial. The Circuit Court should have rebuked the prosecuting attorney, and told the jury that the law was not as the attorney declared it to be, and for not having done so, the judgment should be reversed.

It was not error to permit the State to prove the conduct of the defendant toward the child, prior to the time of the commission of the murder, as alleged in the indictment.

1 State *v*. Schoenwald, 31 Mo. 152; State *v*. Starr, 38 Mo. 269; State *v*. Alexander, 66 Mo. 148.

It was admissible to show malice, premeditation and deliberation; malice may be proved by acts as well as by threats. All concurring, the judgment is reversed, and the cause remanded.

*Reversed.*

---

## DEGREES OF MURDER—HOMICIDE COMMITTED IN PERPETRATING ANOTHER FELONY.

## STATE v. SHOCK.

[68 Mo. 555.]

*In the Supreme Court of Missouri, 1878.*

**Under the Statute which Provides that** "every murder * * * which shall be committed in the perpetration or attempt to perpetrate any arson, rape, robbery, burglary or other felony, shall be deemed murder in the first degree," it is error to charge that, "if the jury believes, from the evidence, that it was not the intention of the defendant to kill the child Scott, by whipping him, but that he did intend to do him great bodily harm, and in so whipping him death ensued, he is guilty of murder in the first degree."

The words 'other felony' used in the first section, refer to some collateral felony, and not to those acts of personal violence to the deceased which are necessary and constituent parts of the homicide itself.

HOUGH, J. At the May term, 1878, of the Circuit Court of Callaway County, the defendant was indicted for murder in the first degree, for the killing of one Robert Scott. At the November term following, he was tried and found guilty, and sentenced to be hanged. Stay of execution was awarded, and the case has been heard here on appeal.

The evidence on the part of the State tends to show that, on the 6th day of March, 1878, the defendant beat the deceased, who was a boy between five and six years of age, with a piece of sycamore fishing-pole, about three feet long and one and a half inches in diameter, for some minutes, accompanying his beating with oaths; that he left the room in which he was beating the boy, went into the yard, procured a piece of grapevine about one and one-fourth inches in diameter, returned to the house and resumed the beating, which lasted in all about fifteen minutes. During the beating, the child did not scream or cry, but groaned and moaned, and, after several days, died of the injuries so received at the hands of the defendant. An inquest was held, at which the body was examined. The child's head was found to be covered with bruises, its back beaten to a jelly, and its skull fractured. On the part of the defendant evidence was introduced tending to show that the deceased was very weakly and sickly; that the defendant did not beat it on the day named, and that the wounds on its head were caused by its falling downstairs.

The deceased was a son of a cousin of the wife of the defendant and it appears that it had been at the house of the defendant for about two months, but whether as a visitor or otherwise, the record does not show.

In support of the motion for a new trial, an affidavit of one of the jurors was filed, which stated, in substance, that while the jury were considering their verdict, he was of the opinion that the case was not one in which capital punishment should be inflicted, but he was induced to believe that the court had the power to inflict a less degree of punishment; he and others of said jury were opposed to rendering a verdict in said case that would result in the death of the defendant. It will be sufficient to say on this point, that a juror will not be allowed to impeach his verdict on the ground that he would not have found the defendant guilty if he had known that the punishment fixed by law for the crime charged was death. The nature of the punishment had nothing to do with the guilt or innocence of the defendant.

The only question of importance presented for our determination arises upon the action of the court in giving, at the instance of the prosecuting attorney, the following instructions: —

"4. To constitute murder in the first degree, it is not necessary that the fatal beating, wounding or striking be given with the specific intent to kill; it is sufficient if it be given willfully and maliciously, and with intent to inflict great bodily harm, and death ensue."

"13. If the jury believes, from the evidence, that it was not the intention of the defendant to kill the child Scott, by whipping him, but that he did intend to do him great bodily harm, and in so whipping him, death ensued, he is guilty of murder in the first degree."

It is contended, on behalf of the State, that the foregoing instructions were fully warranted by the decision of this court in the case of *State* v. *Jennings*[1] and in *State* v. *Green.*[2] In the case first named, which was a most atrocious case of lynching, the infliction of which was continued for several hours, under circumstances of the greatest cruelty and brutality, there was no occasion for any effort on the part of the State to make a case of constructive murder in the first degree, as the facts of the case justified the jury in finding the defendant guilty of a willful, deliberate and premeditated killing.

The following instruction, however, was given in that case: —

"6. If the jury believe, from the evidence, that it was not the intention of those concerned in lynching Willard, to kill him, but that they did intend to do him great bodily harm, and in so doing death ensued, such killing is murder in the first degree by the statutes of this State." Judge Ryland, who delivered the opinion of this court, ap-

[1] 435. [2] 66 Mo. 651.

proved this instruction in the following language: "The sixth instruction is correct under the statutes of this State.[1] Homicide, committed in the attempt to perpetrate any arson, rape, robbery, burglary or other felony, shall be deemed murder in the first degree. The thirty-eighth section makes the person by whose act or procurement great bodily harm has been received by another, guilty of what is by our law called a felony; that is, guilty of such an offense as may be punished by imprisonment in the penitentiary."

There are two errors in the foregoing extract, which will be made patent by reciting the two sections of the statute referred to. Section 1 is as follows: "Every murder which shall be committed by means of poison, or by lying in wait, or by any other kind of willful, deliberate and premediated killing, or which shall be committed in the perpetration or attempt to perpetrate any arson, rape, robbery, burglary or other felony, shall be deemed murder in the first degree."

Section thirty-eight, now section thirty-three, is as follows: "If any person shall be maimed, wounded or disfigured, or receive great bodily harm, or his life be endangered by the act, procurement or culpable negligence of another, in cases and under circumstances which would constitute murder or manslaughter, if death has ensued, the person by whose act, procurement or negligence such injury or danger of life shall be occasioned shall, in cases not provided for, be punished by imprisonment in the penitentiary," etc.

It will be observed that the statute does not say that every homicide committed in the manner therein pointed out shall be murder in the first degree, but that every murder so committed shall be murder in the first degree. The object of first and second sections of the statute is to divide the crime of murder into two degrees, and they deal with that crime as it existed at common law. This is made manifest by the language of the second section, which is as follows: "All other kinds of murder at common law, not herein declared to be manslaughter, or justifiable or excusable homicide, shall be deemed murder in the second degree." So that in every case under the first section, the first, though not the sole, inquiry to be made is, whether the homicide was murder at common law. if not it can not be murder in the first degree under the statute:[2]

At common law, a homicide committed in the willful and malicious infliction of great bodily harm was murder, though death was not intended; but this was not so because such infliction of great bodily harm was in itself a felony, in the perpetration of which the homicide was committed, but because such infliction of great bodily harm was an

1 See Crimes and Punishments, R. C. 1845, secs. 1, 38.

2 Whart. on Hom., sec. 184.

act *malum in se*, and the party was, therefore, held answerable for all the harm that ensued.[1] But as such a homicide, death not being intended, is not a willful, deliberate and premeditated killing, and is not a murder committed in the perpetration or attempt to perpetrate any of the felonies specially designated in the first section, but a simple unintentional killing only, it has been universally classed as murder in the second degree, in those States having statutes identical with our own with the exception of the words "other felony."[2]

But as murder in the second degree with us comprehends only such homicides as are intentional, but without deliberation, it can not be so classed in this State.[3] How it shall be classed under our statute must depend upon the construction to be given to the words "other felony," in the first section. This brings us to the second error in the statement of Judge Ryland.

This error, which is the most important one, so far as the present case is concerned, consists in the declaration that the thirty-eighth (33) section makes the person by whose act or procurement great bodily harm has been received by another, guilty of felony. This is a very grave error. As before stated, the bare infliction of great bodily harm was not a felony at common law, and it is not made so by statute.

The statute says, if any person shall receive great bodily harm by the act, procurement or culpable negligence of another, "in cases and under circumstances which would constitute murder or manslaughter if death had ensued, the person by whose act, procurement or negligence such injury * * * shall be occasioned shall * * * be punished by imprisoned in the penitentiary," etc., that is, shall be guilty of a felony, and punished as therein prescribed, if death does not ensue.

Now, upon the supposition that this felony is one contemplated by the words "other felony," in the first section, let us add this qualification to the thirteenth instruction given in this case, and see what its legal effect will be. The instruction will then read as follows: "If the jury believe, from the evidence, that it was not the intention of the defendant to kill the child Robert Scott by whipping, but that he did intend to do him great bodily harm, under circumstances which would constitute murder or manslaughter if death ensued, and, in so whipping him, death did ensue, then he is guilty of murder in the first degree." Would not such an instruction as this present a palpable contradiction on its face?

If the circumstances under which the bodily harm was inflicted were such as to constitute the offense of manslaughter, if death ensued, by this instruction it is, nevertheless, declared to be murder in the first degree. The language adopted in the supposed instruction is, of

[1] Fost. 259. [2] Whart. on Hom., secs. 40, 190. [3] State *v.* Wilner, 66 Mo. 11.

course, not such as would be used to a jury, as it presents a question of law, but it is pertinent and proper thus to bring together the two provisions for the purpose of determining the construction of the statute. It would seem, therefore, that the offenses mentioned in the thirty-third section are not such as are meant by the words "other felony," in thefirst section.

We are of the opinion that the words "other felony," used in the first section refer to some collateral felony, and not to those acts of personal violence to the deceased which are necessary and constituent elements of the homicide itself, and are, therefore, merged in it, and which do not, when consummated, constitute an offense distinct from the homicide.[1]

Again, the first declares, that all murders committed in the perpetration or attempt to perpetrate arson, rape, robbery, burglary, or other felony, shall be murder in the first degree. As this section, as before shown, includes only such murders as were murders at common law, it may well be doubted whether the words "other felony" can be held to include offenses which were not felonies at common law. This point, however, we do not now decide, it being unnecessary in the present case.

But the statute evidently contemplates such "other felony" as could be consummated, although the murder should also be committed. It says murder "committed in the perpetration or attempt to perpetrate" any felony. It were absurd to say that there could be an attempt to perpetrate a felony which could not be perpetrated. The statute, therefore, must refer, to such felony as may be perpetrated, although the murder is committed. The arson, rape, robbery, burglary, may each be perpetrated, and the murder also be committed. But when great bodily harm has been inflicted, and death immediately or speedily ensues therefrom, what felony has been committed, either at common law or under our statutes, in addition to the murder? The infliction of great bodily harm is, by the statute, only made a felony when death does not ensue, and when, if it had ensued, the whole offense, including the infliction of the bodily harm, would constitute either murder or manslaughter; but whether murder or manslaughter, would have to be determined the circumstances of the case, as in other cases of violence terminating in death, when the same was not inflicted in the perpetration or attempt to perpetrate some collateral or independent substantive crime.[2]

If the instruction given in this case can be upheld, it will convert many cases of unintentional killing, which are manslaughter only under other provisions of the statute, into murder in the first degree.

[1] Whart. on Hom., secs. 56, 57, 58, 62.

[2] Kelly v. Com., 1 Grant's Cases, 487.

These views are in accordance with the construction placed by this court upon an analagous provision of the statute, relating to inferior grades of homicide. The statute defining manslaughter in the first degree is as follows: "Section 7. The killing a human being without a design to effect death by the act, procurement or culpable negligence of another, while such other is engaged in the perpetration or the attempt to perpetrate any crime or misdemeanor, not amounting to a felony, in cases where such a killing would be murder at the common law, shall be deemed manslaughter in the first degree."

It was held by this court, in the case of *State* v. *Sloan*,[1] that the foregoing section contemplates some other misdemeanor than that which is an ingredient in the imputed offense, otherwise that part of it relating to an attempt to perpetrate a misdemeanor would be wholly nugatory; that where an act becomes criminal from the perpetration or the attempt to perpetrate some other crime, it would seem that the lesser would not be a part of the greater offense.[2]

On the facts of this case, we think the jury might properly have been instructed as to the law of murder in the first degree, on the theory of a willful, deliberate and premeditated killing, and also as to the law of manslaughter in the fourth degree.

It was to be expected, of course, that the Circuit Court would, in passing upon the instructions presented at the trial of this case, be governed by the decision of this court in the case of the *State* v. *Jennings*; but the doctrine of that case and of the case of *State* v. *Nueslein*,[3] in so far as it conflicts with our opinion in this case, is overruled. There is no conflict between this case and the case of *State* v. *Green.*[4]

In the latter case the defendant, at the time of the homicide, was resisting an officer under circumstances which made such resistance a collateral felony, both at common law and under the statute. True, the *Jennings Case* was cited in support of instructions numbered three and four, given for the State in that case, which omitted the elements of deliberation and premeditation; but those instructions were unlike the sixth instruction in the *Jennings Case* and the thirteenth instruction in the case at bar, and are in conformity with this opinion. Neither of them declared that if the defendant did not intend to kill the accused, but did intend to inflict on him some great bodily harm, he was guilty of murder in the first degree. The person killed by Green was an officer who had a warrant for his arrest on a charge of felony, and instructions three and four, above referred to, were to the effect that if the deceased read such warrant to the defendant, or notified him of his

1 47 Mo. 604.

2 *Vide*, People *v.* Butler, 3 Park. Cr. Rep. 377; People *v.* Skeehan, 49 Barb. 217; People *v.* Rector, 19 Wend. 605.

3 25 Mo. 111.

4 66 Mo. 631.

authority to arrest him, and the defendant killed the deceased in resisting such arrest, he was guilty of murder in the first degree. Those instructions were undoubtedly correct, for the reason heretofore given. The difference between that case and the present one is apparent.

The judgment will be reversed, and the cause remanded.

NAPTON and HENRY, JJ., concur; SHERWOOD, C. J., and NORTON, J., dissent.

*Reversed.*

HENRY, J., concurring. The obvious meaning of section 1,[1] of the act in relation to crimes and punishments, is that every homicide committed in the perpetration, or attempt to perpetrate any arson, rape, robbery, burglarly, or other felony, which was murder at common law, should be deemed murder under that section, and classed with those murders committed by means of poison, lying in wait, etc. It was not intended to enlarge the class of constructive murders, but only to recognize those designated, and assign them their places in the classification made by that section. If the construction contended for by the State prevail, it will nullify many provisions of the criminal code. For instance: "Every person who shall administer to any woman, pregnant with a quick child, any medicine, drug or substance whatsoever, or shall use or employ any instrument, or other means, with intent thereby to destroy such child, unless the same shall have been necessary to preserve the life of such mother, or shall have been advised by a physician to be necessary for that purpose, shall, if the death of such child, or the mother thereof, ensue from the means so employed, be deemed guilty of manslaughter in the second degree."[2]

If one administer medicine or employ other means, with the intent to destroy the child, and the death of the mother ensue from the means so employed, the offense, by the express terms of the statute, is manslaughter in the second degree; yet under the construction placed upon the first section in the *Jennings Case*, as the homicide was committed in the perpetration of a felony, it would be murder of the first degree, notwithstanding the statute expressly declares that it shall be manslaughter in the second degree.

If one assault another with intent to kill, he is guilty of a felony under Wagner's Statutes.[3] If the assault be premeditated, but not deliberate, and death ensue, the offense would be murder of the second degree. If made in a heat of passion, it would be manslaughter, unless the doctrine of the *Jennings Case* be correct, under which it would, in either case, be murder in the first degree because the commission of the homicide was in the perpetration of a felony, thus making what was

[1] art. 2. [2] Wag. Stats., sec. 10, p. 447. [3] sec. 32, p. 449.

manslaughter at common law, and murder in the second degree under our statute, murder of the first degree, a result not to be thought of but with abhorrence

If, when great bodily harm is inflicted, under circumstances which, if death ensue, would constitute the offense of manslaughter, the offense is to be transformed into murder by construction, how is the thirty-second section to be distinguished from the thirty-third in the application of the construction placed upon the first and thirty-third sections in the *Jennings Case?*

Every assault with intent to kill, provided for in section thirty-two, if death ensue, must also be transformed into murder of the first degree, whether such killing would be murder of the second degree or manslaughter under other provisions of the statute.

I have selected these from many selections of the criminal code, which illustrates the force and conclusiveness of the argument of my associate who delivered the opinion of the court. If one be indicted under the thirty-third section for inflicting great bodily harm, it would be necessary for the jury to find whether, if death had ensued, the party would have been guilty of murder or manslaughter.

If the circumstances were such that, if death had ensued, the accused would have been guilty of either murder or manslaughter, it would be the duty of the jury to find him guilty of the felony defined by the section. If, however, death ensued, no case would exist for a prosecution under that section, because then the offense would be murder or manslaughter, or excusable or justifiable homicide, according to the circumstance under which the homicide was committed, without regard to the second subdivision of section one. Section thirty-three, by its very terms, recognizes the law to be, that one intentionally inflicting great bodily harm upon another may, if death result, be guilty of murder or manslaughter, the grade of the offense to be determined by the circumstances attending the act, yet the construction contended for utterly denies that, if one intentionally inflict great bodily harm upon another, and without intending it kill him, he can be guilty of any crime but murder of the first degree.

It is clear, from the whole scope and spirit of the act, that it was intended to mitigate the severity of the common law in regard to murder, but this construction of the first section would make our code more severe. The substitution of the words "neither excusable nor justifiable," for the words "which would constitute murder or manslaughter," in section thirty-three, perverts the meaning of the section and expunges that portion which brings it in conflict with section one. The words "neither justifiable nor excusable," are not equivalent to the words of the statute, "which would constitute murder or manslaughter,

if death had ensued,'' and such substitution is calculated to mislead and draw attention from the real question under discussion.

We have to deal with the section as it is, not as it might have been. The section does not make the infliction of great bodily harm a felony when not excusable or justifiable merely; but to constitute the offense a felony, it must also be inflicted "under circumstances which would constitute murder or manslaughter, if death had ensued.''

Section thirty-three not only contemplates cases where the infliction of great bodily harm would be neither justifiable nor excusable, but cases where, in the event of death the offense would be murder or manslaughter under some other section.

If the State had provided for cases where the infliction of bodily harm was neither excusable nor justifiable, and where it was not declared by any statute to be either murder or manslaughter, there would be no conflict. If section thirty-three refers to cases where the homicide would be murder of the first degree, by the circumstances of the killing, there is no occasion to resort to the first section to make a case of constructive murder. If it refers to cases which, by the circumstances, would be murder in the second degree, or manslaughter in any degree, a conflict arises which nullifies the express terms of the statute, and adds to the class of murders of the first degree almost as many constructive murders as there are sections of the statute defining manslaughter in the different degrees.

The *Jennings Case* has been acquiesced in for a number of years, and was expressly approved and followed in *Nueslein's Case*,[1] and this fact, if the doctrine were not clearly wrong, should make this court hesitate to overrule it; but the principle of *stare decisis* does not obtain in criminal to the same extent as in civil cases.

A number of adjudications one way indicates that the law is as they have adjudged it to be. In civil cases, where rights of property have been acquired under such decisions, they are adhered to, right or wrong. No such reason applies in criminal cases.

That there have been many adjudications announcing the same doctrine on a given subject, is of force an argument that they correctly declare the law, but I apprehend that men are not to be hanged or imprisoned in the penitentiary on a clearly erroneous construction of a statute because many others have been so hanged or imprisoned.

The doctrine of *stare decisis* has not always been reverently recognized by this court, even in civil cases.[2] Believing that the instruction given by the court, based upon the thirty-third section, is palpably erroneous, I concur in reversing the judgment.

[1] 25 Mo. 111.

[2] Proctor *v.* Hannibal & St. Jo. R. R. Co., 64 Mo. 112.

## MURDER—DEGREE OF OFFENSE WHEN PERPETRATED IN COMMISSION OF ANOTHER FELONY.

## PLIEMLING *v*. STATE.

[46 Wis. 516.]

*In the Supreme Court of Wisconsin, 1879.*

**On a Trial for Murder the Evidence** tended to show that a mother and her three children were killed at night, while being in separate beds, by having their skulls crushed with some blunt weapon, and that their house was then burnt. The evidence was circumstantial. The verdict was guilty of murder in the third degree, on the theory that the crime was committed in endeavoring to commit rape upon, or adultery with, the mother. The Wisconsin statute makes "the killing of a human being, without a design to effect death, by a person engaged in the commission of any felony" murder in the third degree. *Held*, that there is no such connection between rape or adultery and homicide as to make one the natural consequence of either of the others; and that as there was no evidence to show that the killing was without design to effect death, the verdict was wrong.

ORTON, J. This is an information of murder in the first degree, with five counts, stated in common-law form; the first count of which charges the murder of one Laura Van Vorhees, the mother; the second of Edward, her son; the third of Stella, her daughter; the fourth of Claudia, her female babe; and the fifth, the murder of all four together.

The verdict of the jury was, guilty of murder in the third degree, under the fifth count of the information.

The facts in brief were as follows: In the evening of the first day of November, 1877, the small house in which the Van Vorhees family lived was burned; in the smouldering ruins of which the partly burned remains of Laura Van Vorhees, the mother, of Edward, her son, of Stella, her daughter, and of Claudia, her female babe, were found. The mother was twenty-five years, Edward seven years, Stella four years, and Claudia seventeen months of age. They had evidently retired to rest for the night; the mother, Stella and Claudia side by side in a bed in one corner of the room, and Edward on a lounge or cot in another corner, their usual sleeping places; and their remains were found in the same position relatively as lying when asleep, with the bed and cot burned from under them. Parts of the cranium of each one was unconsumed by the fire; and the great preponderance of the medical testimony tended to show that the skull of each one of them had been broken and crushed in by the use of some blunt instrument with great violence, producing death before the burning.

Near some of the remains a hammer with a broken handle was found with which such wounds might have been made.

The verdict of the jury, convicting the defendant of murder in the

third degree of all of these persons together, rests wholly upon the assumption that he committed the deed substantially in the same manner and under the circumstances above stated.

The relationship, sex, age and condition of the persons killed; the time, place, and horrible circumstances of the deed; the mother with her little daughter and female babe by her side in the bed, it may be, and quite likely, asleep; and the little boy on his cot in a distant corner of the room, in the night time, with no appearances of struggle or resistance; their skulls crushed in with a blunt instrument, used with great violence, producing almost instant death; and the house set on fire to consume the bodies of the slain and to exterminate the evidence of the homicide — must all be considered in determining the character of the act, and the degree of guilt involved in its perpetration. There being no direct evidence whatever of the homicide, the case rested upon purely circumstantial evidence of the previous relations and conduct of the parties, and of subsequent discovery of isolated facts and circumstances tending to connect the defendant with the homicide, which it is unnecessary to notice. From the evidence and instruction of the learned judge to the jury, it is apparent that the case was tried and considered by the jury upon three suppositions or theories: first, that the deaths were produced by the burning building; second, that it was murder in the first degree; and third, that the defendant did the killing without any design to effect death, while engaged in the commission of rape upon, or adultery with, the deceased Laura Van Vorhees, and was therefore guilty of murder in the third degree. The verdict must have been rendered upon the last theory or finding.

We shall not inquire whether there was sufficient evidence to connect the defendant with the homicide, but assume that there was; and we shall at first consider the case conceding that there was sufficient evidence for the jury to find that the defendant, when he did the killing, was engaged in the commission of rape or adultery.

Murder in the third degree is "the killing of a human being, without a design to effect death, by a person engaged in the commission of any felony." [1]

The three degrees of murder by our statute were comprised in the general crime of murder at common law; and murder in the same degree must have the same requisites as murder at common law; and the degree established by the statute is based, not upon the fact that it is any the less murder, but upon the character of the homicide, and the punishment to be suffered for the homicide, committed under such conditions and circumstances as would be murder at common law.

The offense of murder in the three degrees, as defined by our statute,

[1] sec. 4345, Rev. Stats.

was so before the statute, and is but the adoption or introduction into the statute of the common-law description of the crime.[1]

It is sometimes stated that the object of this classification is to make a distinction between murder with express malice and murder with implied malice. In the killing, without the design to effect death, there can be no actual malice or intention in the act itself; and in murder in the third degree such malice and felonious intent, necessary to make it murder, is derived from the felony by the commission of which, the killing happens. In the State of Maine, murder in the second degree is the same as murder in the third degree by our statute; and in *State* v. *Smith*,[2] the court says: "The malice is implied when the killing is committed by a person when in the perpetration of a crime punishable in the State prison; and if in the perpetration of that offense a killing occurs, the malice making murder in the second degree may be implied." This is substantially the definition given to this particular kind of murder at common law.

"Such killing shall be adjudged murder which happens in the execution of an unlawful action principally intended for some other purpose, and not to do a personal injury to him in particular who happens to be slain;" or, "Such killing as happens in the execution of an unlawful action, whereof the principal intention was to commit another felony;" or, "Whenever a man happens to kill another in the execution of a deliberate purpose to commit any felony, he is guilty of murder." "And not only in such cases where the very act of a person, having such a felonious intent, is the immediate cause of a third person's death, but also when it in any way occasionally causes such a misfortune, it makes him guilty of murder." [3]

So, also, at common law, "if a person commit a criminal misdemeanor which is of such a sort as to endanger life, so that the element of danger occurs with the unlawfulness of the act, the accidental causing of death is murder" [4] and this latter killing is by our statute manslaughter in the first degree, and this explains what is meant by the clause in the section defining it, "in cases where such killing would be murder at common law." In the killing without design, while in the commission of a misdemeanor, which makes the crime manslaughter, precisely the same principle and evidence of similar effect, obtain as in murder in the third degree, the only difference being that between a felony and a misdemeanor, the felony imputing malice which makes murder, and the misdemeanor not; and in such case the "homicide which results from the perpetration of offenses below the degree of

1 People *v.* Enoch, 13 Wend. 159.

2 43 Me. 369.

3 1 Hawk. P. C. 86, 89, 100.

4 2 Bish. Cr. L., sec. 691.

felony, and without malice, is manslaughter."[1] The elements of the crime of murder in the third degree, and the proof necessary to convict in such a case, as above stated, at common law and by statute, are recognized fully by this court in *State* v. *Hammond*,[2] and by *Foster* v. *People*,[3] cited approvingly in that case by Mr. Justice Lyon.

It will be seen by the above authorities that, in order to make a killing without a "design or intention" murder in the third degree, the felony, committed or attempted, from which the implied malice necessary to murder must be derived, must at least have intimate relation and close connection with the killing, and must not be separate, distinct and independent from it; and when the act constituting the felony is, in itself, dangerous to life, the killing must be naturally consequent to the felony. In this case, the felony, being rape or adultery, has no such relation to the killing, as a consequence from it or in close connection with it, as to make it possible to impute the felonious intent of the act constituting the rape, to the killing in the manner shown by the evidence, and without design, the implied malice necessary to make it murder in the third degree.

The rape, or adultery, and the killing are so distinct and disconnected and independent from each other, in all the particulars of the killing proved, and all the possible particulars of the ravishment imagined or assumed, that the degree of homicide could not be mitigated or lessened but would rather be enhanced by the commission of the double crime.

But let it be assumed that the act of rape, or adultery, is, in itself, dangerous to life, and that the killing happened or occurred, without design, from the act of rape or adultery, or during its commission, so far as Laura Van Vorhees is concerned; yet by no possible construction of law, or mode of reasoning, could the killing, in the manner stated, of the little boy in a distant part of the room, of the little girl of only four years of age, and of the unconscious babe, be a consequence of, or have any connection or relation with, the ravishment of the mother, either as showing a killing without design, or to transfer the felonious intent of the act of ravishment to the unintentional killing of the three children.

But there are two other indispensable requisities, or elements of this crime: (1) The commission, or attempted commission of the felony, which, in this case, is supposed to be the crime of rape or adultery; and (2) the killing without design.

There may be some vague evidence of former improper relations between defendant and Laura, casting some suspicion, perhaps, upon the

[1] State *v.* McNab, 20 N. H. 160; Russ. on Cr. 527; 1 East's Cr. L. 218.

[2] 35 Wis. 315.

[3] 50 N. Y. 598.

chastity of both, and of some feeling of hostility and fear or dread upon her part, and some hostility or evil design upon his; but there is absolutely no evidence whatever of any rape, or attempted rape or adultery, at the time of the killing, or of any other felony than what is constituted by the killing itself. It is a mere supposition, guess, or theory of a ravishment or adultery, or attempted ravishment, predicated solely upon the previous relations of the parties, which do not naturally or logically, and by no means necessarily, form the premises of any such conclusion. The case is as barren of all evidence of the commission, or attempted commission of a felony, separate from the killing, as the above cases in 50 New York,[1] and 35 Wisconsin;[2] and the act of killing in both of those cases, in respect to the instrument used, and the deadly consequence, is very similar to that in this case, and the learned opinions, in both cases, upon the manner of the killing, would have been more pertinent and have greater emphasis in this case, where the conviction is for the killing of four persons instead of one, and those persons the mother and her children. In the first case above last cited, the court say: "The refusal of the court to charge that if the prisoner intended to maim and not to kill, the offense was murder in the second degree, was proper, for the reason that there was no evidence upon which the jury could have found that the prisoner intended to fracture the skull of the deceased, as distinguished from an intent to kill him, * * * and while it was for the jury to determine with what intent the blow was inflicted, we can not, without doing violence to common sense, say that the prisoner may have intended to break the skull without producing death." This court said, in the opinion in the *State* v. *Hammond*:[3] "So, in the present case, it was absurd for the jury to find that the defendant sent a bullet crushing through the head and brain of the deceased, without any design to kill him, but with a design to inflict upon him one of the specific injuries above mentioned, for which the perpetrator, on conviction, is liable to be punished by imprisonment in the State prison." That there was no evidence of the commission of a rape or adultery, or any other felony than the killing of the four persons in the manner above stated, and that such killing could not have been without design to effect death, is too clear for further argument or authority.

This being so, although the verdict is for an offense included in and less than murder in the first degree, for which the defendant might have been convicted under the information, upon sufficient evidence, if unsustained by the evidence and by facts necessary to constitute the offense of murder in the third degree of which he was convicted, the ver-

[1] p. 598. [2] p. 315. [3] *supra.*

dict is erroneous, and the judgment must, for that reason alone, be reversed.[1]

As to the evidence connecting the defendant with the homicide, we shall say nothing; but if the jury were satisfied beyond a reasonable doubt, as they should have been in order to convict him at all, that the defendant was convicted of this horrible deed, then it is quite evident that the verdict was a compromise of the most unjustifiable, if not reprehensible, character; and if they were not so satisfied, then the verdict was a wrong and a crime. Looseness and latitudinarianism in the construction of criminal law, and in judicial trials of grave offense, and compromise of legal principles and of honest judgment, in order to effect some agreement or to render some verdict in the trial of high crimes or of offenses of any grade, induced by whatever influence, must not be tolerated by the courts; and the responsibility in such cases must rest upon the tribunal in which it is practiced or attempted.

So far as possible, there should be absolute certainty in the administration of criminal law; and its essential principles will not be preverted or compromised by this court in any case, in consideration of future proceedings or ultimate results.

*Judgment reversed.*

---

## MURDER — MANSLAUGHTER — MUTUAL COMBAT — HEAT OF PASSION — DEGREES OF MURDER.

## PEOPLE *v.* SANCHEZ.

[24 Cal. 17.]

*In the Supreme Court of California, 1864.*

1. **In Case of Mutual** combat where a homicide is committed, in order to reduce the offense from murder to manslaughter, it must appear that the contest was waged on eqnal terms, and no undue advantage was songht or taken by the defendant, for if such was the case, malice may be inferred, and the killing amount to murder.
2. **Same.**— When two persons have a sudden quarrel, and after a sufficient time has elapsed for the blood to cool and passion to subside, go out to fight, and one of them kills the other, the killing will be murder and not manslaughter.
3. **Instructions to a Jury.**— No instruction should be given to a jury which is not predicated upon some theory, logically deducible from at least some portion of the testimony.
4. **What Constitutes Murder in First and Second Degrees.**— In order to constitute murder in the first degree there must be something more than malicious or intentional killing. There must be killing by means of poison, lying in wait, or torture, or some other kind of killing different from that of poison, lying in wait, or torture, which is

[1] See State *v.* Hammond, *supra*, and State *v.* Erickson, 45 Wis. 86.

**willful, deliberate, and premeditated, or a killing which is committed in the perpetration or the attempt to perpetrate any arson, rape, robbery or burglary. Every other kind of murder, which is murder at common law, is murder in the second degree.**

Appeal from the District Court, Third Judicial District, Santa Cruz County.

SANDERSON, C. J. (omitting rulings on questions of practice). The next error assigned is the refusal of the court to give certain instructions asked on behalf of the prisoner. The first instruction is in the following words: "When, upon sudden quarrel, two persons fight, and one of them kills the other, this is voluntary manslaughter; and so if they, upon such occasion, go out and fight in a field, for this is one continued act of passion."

This instruction seems to be founded upon the theory that the killing was the result of mutual combat. It is doubtful whether such a theory is logically deducible from the evidence; but however that may be, it is clear that the instruction was properly refused, for the obvious reason, even in view of that theory, that it is not law. It ignores entirely the doctrine that in case of mutual combat, in order to reduce the offense from murder to manslaughter, it must appear that the contest was waged upon equal terms and no undue advantage was sought or taken by either side; for if such was the case, malice may be inferred, and the killing amount to murder. The latter clause, which, it is presumed, was more especially intended to apply to the present case, is also erroneous, because it ignores the doctrine that such "going out to fight" must occur immediately after the quarrel; for if sufficient time elapse between the quarrel and the "going out to fight," to enable the blood to cool and passion to subside, the killing will be murder, and not manslaughter.

The next instruction refused by the court is in the following language: "Under the indictment against the defendant, he may be found guilty of an offense the commission of which is necessarily included in that with which he is charged in the indictment; that is, he may be found guilty of murder in the first degree, of murder in the second degree, of manslaughter, of fighting a duel and killing his antagonist, and of excusable or justifiable homicide."

In determining this question of error it is unnecessary to decide whether, under an indictment for murder, a defendant may be found guilty "of fighting a duel and killing his antagonist," inasmuch as the action of the court below must be sustained on other and sufficient grounds. The instruction was properly overruled for several obvious reasons.

1. All of it, except that portion which relates to dueling and excus-

able or justifiable homicide had already been given by the court, and the refusal was accompanied by a statement to that effect.

2. The theory that the homicide in this case was the result of a duel has no foundation in the evidence. No instruction should be given to a jury which is not predicated upon some theory logically deducible from at least some portion of the testimony. Such instructions are only calculated to confuse and mislead the jury, and ought not to be given.

3. It announces for the first time in the history of criminal procedure, the startling doctrine that a defendant on trial for murder may be found guilty of excusable or justifiable homicide. Upon this branch of the instruction comment is unnecessary.

4. Numerous objections to the instructions given by the court are next urged, most of which have more or less merit; and one of them is clearly fatal to the judgment in this case.

The following definition of murder of the first degree is found in the charge: "Murder is divided by our law into two degrees — the first includes every unlawful killing of a human being done maliciously or intentionally."

At best this is but a lame definition of murder, and contains none of the characteristics which mark the distinction between murder of the first and murder of the second degree. In effect, the jury are told that every unlawful killing of a human being done maliciously is murder of the first degree, and every unlawful killing of a human being done intentionally is murder of the first degree. Neither of these propositions is true; for malice must and intent to kill may exist, where the killing only amounts to murder of the second degree.

In order to constitute murder of the first degree there must be something more than a malicious or intentional killing. There must be a killing within one of the three classes of cases described in the statute as constituting murder of the first degree. There must be a killing by means of poison, lying in wait, torture, or some other kind of killing different from that of poison, lying in wait, or torture, which is willful, deliberate, and premeditated; or a killing which is committed in the perpetration or the attempt to perpetrate any arson, rape, robbery, or burglary.

In dividing murder into two degrees, the Legislature intended to assign to the first, as deserving of greater punishment, all murders of a cruel and aggravated character; and to the second all other kinds of murder which are murder at common law; and to establish a test by which the degree of every case of murder may be readily ascertained. That test may be thus stated: Is the killing willful (that is to say, inten-

tional), deliberate and premeditated? If it is, the case falls within the first, and if not, within the second degree.

There are certain kinds of murder which carry with them conclusive evidence of premeditation. These the Legislature has enumerated in the statute, and has taken upon it the responsibility of saying that they shall be deemed and held to be murder of the first degree. These cases are of two classes. First, where the killing is perpetrated by means of poison, etc. Here the means used is held to be conclusive evidence of premeditation. The second is where the killing is done in the perpetration or attempt to perpetrate some one of the felonies enumerated in the statute. Here the occasion is made conclusive evidence of premeditation. Where the case comes within either of these classes, the test question "Is the killing willful, deliberate, and premeditated?" is answered by the statute itself, and the jury have no option, but to find the prisoner guilty in the first degree. Hence, so far as these two classes are concerned, all difficulty as to the question of degree is removed by the statute. But there is another and much larger class of cases included in the definition of murder in the first degree, which are of equal cruelty and aggravation with those enumerated, and which, owing to the different and countless forms which murder assumes, it is impossible to describe in the statute. In this class the Legislature leaves the jury to determine, from all the evidence before them, the degree of the crime, but prescribes, for the government of their deliberations, the same test which has been used by itself in determining the degree of the other two classes — to wit, the deliberate and preconceived intent to kill. Thus the three classes of cases which constitute murder of the first degree are made to stand upon the same principle.

It is only in the latter class of cases that any difficulty is experienced in drawing the distinction between murder of the first and murder of the second degree, and this difficulty is more apparent than real. The unlawful killing must be accompanied with a deliberate and clear intent to take life, in order to constitute murder in the first degree. The intent to kill must be the result of deliberate premeditation; it must be formed upon a pre-existing reflection, and not upon a sudden heat of passion sufficient to preclude the idea of deliberation. There need be no appreciable space of time between the intention to kill and the act of killing; they may be as instantaneous as successive thoughts of the mind. It is only necessary that the act of killing be preceded by a concurrence of will, deliberation, and premeditation on the part of the slayer; and if such is the case, the killing is murder of the first degree, no matter how rapidly these acts of the mind may succeed each other, or how rapidly they may be followed by the act of killing.

We have carefully read the entire charge of the court, for the pur-

pose of ascertaining whether this objection is cured in any other part; and although we find other attempts at definition and illustration, we are satisfied that the distinction between the two degrees of murder is nowhere drawn with that perspicuity which is necessary in order to render it distinct and clear to the comprehension of a jury. This leaves to us no option but to reverse the judgment and order a new trial.

*Ordered accordingly.*

---

## DEGREES OF MURDER—MURDER IN FIRST DEGREE—MURDER IN SECOND DEGREE.

## PEOPLE *v.* LONG.

[39 Cal. 694.]

*In the Supreme Court of California, 1870.*

1. **Murder in the First Degree.**—Murder in the first degree, unless committed in perpetrating or attempting to perpetrate arson, rape, robbery or burglary, is the unlawful killing, with malice, and with a deliberate, premeditated, preconceived design to take life, though such design may have been formed in the mind immediately before the mortal wound was given.
2. **Murder in the Second Degree.**—Murder in the second degree is the unlawful killing with malice, but without a deliberate, premeditated or preconceived design to kill.
3. **Instructions to Jury—Practice on Appeal.**—When the evidence is not brought up in the transcript the judgment will not usually be reversed for an alleged error in the instructions; but where the court gives an instruction which is clearly contrary to law, on a particular point, it will be presumed that there was some evidence requiring an instruction on that point.

Appeal from the District Court of the Second District, Tehama County.

The facts are stated in the opinion.

*Haymond & Stratton*, for appellant.

The charge is in the very teeth of the doctrine held by this court in *People* v. *Sanchez*,[1] *People* v. *Foren*,[2] and *People* v. *Nichol*.[3]

In effect, the jury were told that if the defendant, with malice, intentionally killed the person slain, they must find him guilty of murder in the first degree. The vice in this is, that the mere intent to kill is made the distinguishing test between the two degrees of murder, yet the intent to kill may, and often does exist, and the killing only amounts to murder in the second degree.

*J. Hamilton*, Attorney-General for respondent.

In its charge, it was the intention of the court to convey to the minds of the jury the idea that premeditated intention could form no

[1] 24 Cal. 28. [2] 25 Cal. 361. [3] 34 Cal. 214.

part of the crime of murder in the second degree, but that it was an ingredient of murder in the first degree, which was correct.[1]

CROCKETT, J., delivered the opinion of the court.

The defendant was convicted of murder in the first degree and has appealed from the judgment. On the trial, the court, after reading to the jury from the statute the definition of murder of the first and second degrees, charged as follows: "Murder, therefore, of the first degree has in it the ingredient of malice towards the person killed; and also a deliberate and premeditated intention to take life. In murder of the second degree there is the same degree of malice as in murder of the first degree, and the killing is done unlawfully, but without the intention to take life." After defining the crime of manslaughter, the court then proceeds as follows: "Thus, you have the grades of crime included in this indictment; first, murder in the first degree, which is an unlawful killing, accompanied by malice and by a premeditated intention to take life, murder of the second degree, which is the unlawful killing accompanied with malice, but in it was no intention of taking life, for the reason that as soon as that ingredient enters into the killing it becomes murder in the first degree."

This charge was excepted to by the defendant, and is relied upon as error on the appeal.

The different degrees of murder are thus defined in the statute: "All murder which shall be perpetrated by means of poison, or lying in wait, torture, or by any other kind of willful, deliberate or premeditated killing, or which shall be committed in the perpetration or attempt to perpetrate any arson, rape, robbery, or burglary, shall be deemed murder of the first degree; and all other kinds of murder shall be deemed murder in the second degree."[2] Section nineteen of the act defines murder to be "the unlawful killing of a human being, with malice aforethought, either express or implied." The court, therefore, correctly charged the jury, that to constitute murder of either the first or second degree the killing must have been unlawful and accompanied with malice; and the charge that to constitute murder of the first degree, there must have been a deliberate and premeditated intention to take life, is perhaps not objectionable, as applied to the facts of the case, though not as broad as the statutory definition, which includes also killing committed in the perpetration or attempt to perpetrate arson, rape, robbery, or burglary. But the court, in its definition of murder in the second degree, not only fails to define it correctly, but may have confused the jury in respect to the definition of murder in

1 People *v.* Bealoba, 17 Cal. 395; People *v.* Foren, 25 Cal. 365; Com. *v.* Green, 1 Ash. 296; Pennsylvania *v.* Lewis, Add. 279.

2 Statute concerning Crimes and Punishments, sec. 21.

the first degree. The jury was told in substance, that the only difference between murder of the first degree and of the second degree is, that in the former there must be an intention to take life, whilst in the latter there is not. But to constitute murder of the first degree there must be not only an intention to take life, but it must also be "a deliberate and premeditated killing;" nor is it true that in murder of the second degree there must, of necessity, be an absence of all intention to take life. On the contrary, the true distinction between the two grades of the offense is, that in murder of the first degree, unless it was committed in perpetrating or attempting to perpetrate arson, rape, robbery, or burglary, the killing must be deliberate and premeditated, whilst in murder of the second degree, the killing is not deliberate or premeditated. In the one case there is a deliberate, premeditated, preconceived design, though it may have been formed in the mind immediately before the mortal wound was given, to take life. In the other case there is no deliberation, premeditation, or preconceived design to kill. In both, however, the killing must have been unlawful and accompanied with malice. We think the charge of the court may have misled the jury in respect to the proper distinction between the two grades of the offense.[1]

The evidence is not brought up in the transcript, and usually in such cases the judgment will not be reversed for an alleged error in the instructions. We must assume, from the fact that the court instructed the jury in relation to murder in the second degree, that there was some evidence in the case requiring an instruction on that point; but as the instruction is not and can not in any conceivable state of the evidence be a correct definition of murder in the second degree, we can not say that the error was not productive of any injury to the defendant.

*Judgment reversed and a new trial ordered.*

---

## MURDER IN THE FIRST DEGREE—PREMEDITATION NOT PROVED.

### PEOPLE *v.* MONGANO.

[1 N. Y. Crim. Rep. 411.]

*In the Supreme Court of New York, 1883.*

1. **A Charge which in Effect** states that to constitute murder in the first degree, no particular time is necessary previous to the killing in which to deliberate and premeditate, provided there be premeditation and deliberation, is correct and presents no ground of exception by the prisoner.

1 People *v.* Sanchez, 24 Cal. 28; People *v.* Foren, 25 Cal. 361; People *v.* Nichol, 34 Cal. 241.

2. **Where, in Response to a Request** by the prisoner to charge that the word "deliberate" has a different meaning and signification from the word "premeditated," the court says: "I suppose there is a slight shade of difference, I will so charge," no question is raised by a general exception. If the prisoner wishes the terms defined with greater minuteness, he must make a direct request to that effect.

**The Jury are not** authorized to arbitrarily draw an inference of premeditation as they see fit; the facts must point to and warrant it, otherwise a verdict can not stand.

4. **The Execution of the Guilty** purpose is required to be settled and determined upon reflection, before the crime of murder in the first degree can be committed, and a free and determined purpose is rendered necessary, as distinguished from a mere impulsive fatal act.

5. **The Facts in this Case** reviewed by the court, and held insufficient to establish premeditation.

Appeal by defendant from judgment entered upon verdict of jury, and from an order denying a motion for a new trial, made under section 465, of the Code of Criminal Procedure.

The facts and exceptions appear in the opinion.

*Francis Larkin*, *Michael J. Keogh* and *Isaac N. Mills*, for the appellant.

*C. Frost*, for the People, respondent.

CULLEN, J. The prisoner, a life convict, was convicted of murder in the first degree for killing a fellow-convict, Williams, at the Sing Sing State prison.

Two exceptions were taken to the charge of the court. It is urged that it was error to charge "that no length of time is required" previous to striking the blow in which to premeditate and deliberate. If it were conceded that such a statement standing by itself were erroneous, I do not think the exception here well taken. The expression was not a single isolated proposition submitted to the jury, but must be construed in connection with the whole contents of the charge on that point. The district attorney asked the court to charge in the language above given. "BY THE COURT. I will charge that no particular length of time is required, but that no time is required I will not charge. (Defendant excepts.) *Mr. Baker.* I mean no appreciable length of time. THE COURT. I will charge that no length of time is required, but there must be deliberation and premeditation. (Defendant excepts)."

Taking all of this together, the charge was unobjectionable in my opinion. In effect, it was that no particular time was necessary, provided there was deliberation and premeditation. Upon being requested to charge that the word "deliberate" has a different meaning and signification from the word "premeditated," the court said: "I suppose there is a slight shade of difference; I will so charge." To the first statement the prisoner excepted. We think there is substantial difference between those two terms as used in the statute. But we think no question was raised by the exception. The court charged as required.

It had already defined the meaning of these terms accurately. If the prisoner wished such definition made with greater minuteness, there should have been a direct request to that effect. We think, therefore, neither exception tenable. But the question is presented to us, a motion for a new trial having been made, that the verdict is against the evidence; that is, that there was no sufficient evidence of deliberation to justify the conviction in the first degree. Formerly, in criminal cases courts could not grant new trials on such ground. Now, by the express terms of the law a motion for that purpose may be made, and an appeal from the judgment brings before us for review the decision of such motion as well as the proceedings upon trial. The power of interfering with the verdict in a criminal case is doubtless to be exercised with caution, especially where the question of fact to be determined is one incapable of direct proof and only to be established by inference from other facts. The old decisions denied not only the power but the propriety of vesting such power in the courts; but the Legislature having cast upon the courts such duty, we are bound to exercise it. The history of this case is brief. There is little or no conflict between the witnesses or dispute as to the fact. Its salient features are beyond dispute. The deceased, one Cornetti (an Italian), and the prisoner were all at work in the prison peeling potatoes. Cornetti applied some opprobrious epithet to the deceased, upon which the deceased struck Cornetti with a stick. Cornetti then seized a stick or stool and attacked the deceased.

While this altercation was transpiring, the prisoner picked up a broom and also attacked the deceased. One Coburn, a convict, but a sort of overseer over the others, slipped between the parties to stop the conflict, and seized the defendant. A convict named Cash took the broom from the prisoner and thrust him aside the distance of two or three barrels, when the prisoner immediately took the knife which he had used in his work, rushed towards the deceased and struck him, inflicting the fatal blow. It was proved there was no dispute or ill feeling between the parties prior to this occurrence. The whole affray lasted, according to one witness, five minutes, the others place it at from two to three minutes. The time that elapsed between the disarming of the prisoner by Cash and the striking of the blow with the knife was, according to one witness, "half a second," according to another it was "instantly." This is substantially the whole occurrence. Now, is there sufficient evidence in it to warrant the finding of the jury of deliberation on the part of the prisoner? It is true that such deliberation is incapable of proof, save as an inference from other facts. But that does not authorize the jury to arbitrarily draw such inference, as they see fit. The facts must point to and warrant the

inference, otherwise a verdict can not stand. This undoubtedly is the rule in civil cases. It should hardly be less potent where life is involved. The inference is generally proved by the nature of the occurrence, the manner in which the crime is committed, the weapon, threats, or expression of hostile feeling toward the deceased, or preparation on the part of the prisoner. But this case seems barren of all such features. There is not ground even for suspicion that prior to the altercation the prisoner meditated an injury to the deceased. When the fight between deceased and Cornetti occurred the prisoner attacked the deceased, but with a weapon not calculated to inflict fatal or even serious injuries. For while many blows were struck by Cornetti and the deceased, who were similarly armed, no serious results followed to either party. When disarmed by Cash, the prisoner took from his person the knife, not possessed by him for any unlawful purpose, but used in the work in which he had been engaged, and immediately stabs the deceased. The use of the deadly weapon and the thrust at the vital part would warrant the conclusion that the prisoner intended to take life, and therefore that the act was premeditated. But there is nothing to show deliberation, but on the contrary, the facts of the transaction negative that conclusion.

As we have said, there is a substantial difference between premeditation and deliberation — a difference more readily appreciated than to be accurately defined. An apt statement is to be found in the opinion of Judge Daniels in *People* v. *Leighton*, speaking of the elements necessary to constitute murder in the first degree, he says: "The execution of the guilty purpose is required to be settled and determined upon reflection, before the crime of murder in the first degree can be committed. A full and determined purpose is rendered necessary as distinguished from a mere impulsive fatal act." No particular period of time is requisite for the deliberation, but still deliberation must take place. We do not say that in no supposable case could deliberation be consummated in so brief a period as that occupied by the broil in which this crime was committed; but we do say that in this case there is nothing to show deliberation, but rather a passionate vicious impulse. The result of these views is that the prisoner obtains practical immunity for his crime; for being a prisoner for life nothing save a capital execution can increase his punishment. We can not but think that this consideration affected the verdict. But the law recognizes no distinction between one in the condition of this prisoner and a free person. If it be necessary for the purposes of prison discipline, or to protect the lives, whether of keepers or convicts, that offenses committed by prisoners shall be punished more severly than those committed by others, the remedy is with the Legislature. The courts must carry out the law

as they find it, and not strain it to punish even the greatest of offenders.

The conviction and judgment should be reversed and a new trial ordered.

---

## MURDER IN THE FIRST DEGREE — PREMEDITATION.

## PEOPLE v. CONROY.

[2 N. Y. Crim. Rep. 247.]

*In the Supreme Court of New York, June, 1884.*

1. **Upon the Trial of an Indictment Framed** under the first subdivision of section 183 of the Penal Code, where the evidence shows a killing with a design to effect death, but not deliberation and premeditation, the verdict can not be anything more than murder in the second degree.
2. **The Crime of Murder in the First Degree** under such an indictment can only be shown by proof of some amount or kind of deliberation and premeditation antecedent to the act which intentionally effects the death, and of which the intent alone is not sufficient evidence.
3. **Voluntary Intoxication may be Considered** upon the question of premeditation.

APPEAL from a judgment of the Court of General Sessions of the City and County of New York, of December 6, 1883, convicting defendant, William Conroy, of murder in the first degree.

The facts appear in the opinions.

*Wm. F. Howe*, for defendant, appellant.

*Peter B. Olney* (*John Vincent*, assistant), for the People, respondent.

BARRETT, J. Conroy was convicted of murder in the first degree, upon an indictment charging him with the killing of one Keenan. The indictment is under the first subdivision of section 183 of the Penal Code; and it avers that the killing was from a deliberate and premeditated design to effect the death of Keenan.

We have gone over the evidence with care, and we are of opinion that the element of deliberation is entirely wanting. The learned judge should, as requested, have withdrawn the question of murder in the first degree from the consideration of the jury. His instructions upon the law of the two degrees of murder were entirely accurate. But he failed to apply the facts to his definitions, and consequently the jury fell into the quite natural error of treating the many brutal and atrocious features of this homicide as the equivalent of legal evidence of deliberation. We find enough to warrant the submission to the jury of the question of murder in the second degree; that is, of killing with the design to effect the death of Keenan or of some other person, but

without deliberation and premeditation. Enough, too, if the indictment had been framed under the second subdivision of section 183, and had charged the killing by an act imminently dangerous to others, and evincing a depraved mind regardless of human life, although without premeditation, to have justified the submission of murder in the first degree. But for the evidence of deliberation, we have sought in vain. Upon the contrary, the strongest testimony against Conroy points no farther than to sudden impulse. Between the impulse and the act there was no reflection, however slight or brief. There were, in fact, none of the *indicia* of deliberate purpose; no hesitation, no doubt overcome, no choice made as the result of thought. Indeed, the gravest question was, whether the shot was fired with any distinct and specific intent, or merely with a reckless and wanton disregard of human life.

Conroy's acts throughout were those of a ferocious ruffian inflamed by drink; but the law expressly declares that voluntary intoxication, though furnishing no excuse for a criminal act, may be considered by the jury upon the questions of intent and of the degree of crime.[1] If voluntary intoxication may be considered upon the question of intent, *a fortiori* upon that of deliberation. The defence of insanity in our judgment entirely failed and was properly overruled by the jury. Undoubtedly Conroy was responsible for his acts in every legal sense. But the evidence upon that head, while failing to establish irresponsibility, indicated an abnormal sensitiveness to liquor, resulting from sunstroke, a fall from a loft and other incidents, fully accounting for the extraordinary mental disturbance caused by two glasses of barroom sherry. An exhibition of violence followed each dram, and followed it almost instantly. Nothing of the kind preceded the drinking. Certainly Conroy had no homicidal intent when he entered Cody's saloon. That event was purely casual. He happened to be passing, and he was invited in to drink. He then seemed to be sober. The people within were either his friends, ordinary acquaintances, or persons with whom he was entirely unacquainted. At all events, he found no enemy there. After taking a glass of what was called sherry wine, he became quarrelsome, accused a man named Cantwell of having previously betrayed his improper presence in a drinking saloon while on duty, and upon Cantwell's retorting, offered to fight. In a few moments, he seemed to get entirely over his combative spirit, became, as one of the witnesses described it, "happy," and invited all present to drink at his expense. Again he took a glass of the so-called sherry wine, again he became quarrelsome. At first he questioned the price of

1 Penal Code, sec. 22.

the drinks. Then Cody, to pacify him, reduced the charge from one dollar to seventy cents. Still he seemed dissatisfied, inquiring of several about him, if they had drunk. He then asked a man named McGuinness what he had taken, and upon McGuinness replying "mixed ale," Conroy called him a liar. McGuinness retorted, "You are another," and thereupon Conroy struck him with his fist, knocking him down; and while McGuinness was down kicked him about the hips. This raised a tumult. The crowd "hallooed" at Conroy to let McGuinness up, and began to close in around him. Conroy then drew his club, and the crowd retreated to a card-room in the rear. As they retreated Conroy also drew his revolver, holding the club in one hand, the revolver in the other. Some one then put his head out of the card-room door and Conroy threw his club at him, missing the man's head, but smashing a pane of glass in the door. Almost immediately another pane of glass was broken from the inside of the card-room. This evidently startled Conroy and precipitated the firing, for instantly he "wheeled to his left" with his face still towards the card-room door, and as a friend (Keating), who undoubtedly perceived the danger was imminent, grasped him by the shoulder, the revolver, to use the language of the witness Buckley, "at that instant went off."

This description is slightly varied by one of the witnesses, who says that Conroy, after breaking the pane of glass, stepped back two or three paces, placed his club in his belt, threw open his coat, and with some difficulty got at and drew his revolver; that, as he did so, Keating exclaimed, "For God's sake, Billy, don't fire; those are friends of mine;" and that, notwithstanding this warning, Conroy, according to the witness Cantwell, "turned round and let go that way as quick as lightning."

In all this there was surely not the slightest indication of a deliberate purpose. Conroy had no quarrel of any kind with the unfortunate man who received the bullet. In fact, he scarcely knew this man. Even the dispute with Cantwell had been composed.

McGuinness had fled and was not in the saloon. Conroy was then his own worst and only enemy.

It is palpable either that he fired without mental concentration upon any individual object, but recklessly and in utter disregard of human life (for which offense as we have seen he has not been indicted), or that fearing an attack he acted upon a sudden impulse to strike terror into the crowd by firing at the first person who stood before or about him. The extreme rapidity of Conroy's movements, the absence of threats, pre-existing ill-will or motive; the presence of self-aroused passion and sudden violence; the inappreciable space of time between the act and the earliest previous moment when it is possible to assume the

flash of design; the unreasoning, senseless, and frenzied condition of his mind; all tend absolutely to exclude the idea of deliberation, even within the most extreme construction which, in the interests of society, has been or can be given to this word in its present statutory relation.

The law must not be nullified, strained or perverted to meet an exceptional case nor to make an example of a particular offender.

In all the cases to which we have been referred, there was undoubted evidence of a deliberate purpose. They differ in every essential particular from the present.

In *Hovey's Case*,[1] the evidence of deliberation consisted of the purchase and loading of the pistol, followed directly by its use in the commission of the deed.

In *Sindram's Case*,[2] it consisted of previous bad blood and threats, followed by preparation, the prisoner's seeking the deceased, and the deliberate firing of a second shot after the failure of the first.

In *Majone's Case*,[3] it consisted in the exhaustion of any possible impulse upon the previous killing of his wife, and his proceeding with the same weapon from the room where his first victim lay, directly to the deceased.

In *Cornetti's Case*,[4] it consisted in the prisoner's taking advantage of an opportunity to secure the knife with which the crime was perpetrated, and, in shortly afterwards, without a word, approaching the deceased and stabbing him to death.

In *Leighton's Case*,[5] it consisted of previous threats to injure the deceased, Mary Dean; of the prisoner seeking her out with the razor in his pocket; and of an all-potent motive — jealousy, and her abandonment of him for another man.

The distinction between these cases and the present is marked and obvious. It is the distinction between premeditation and impulse — between the cold-blooded or deliberate assassin and the brutal or reckless bar-room brawler.

The Legislature has chosen to make this distinction. It has enacted that the one offender shall suffer death, the other imprisonment for life. Courts and juries must not be wiser than the law. It is sufficient that it is the law, and it should be enforced loyally and with submission to the legislative will.

We have not been unmindful of what transpired after the homicide — the prisoner's wanton shooting in the street, his stupid lying to his brother officers, his outrageous behavior to the deceased, and his

1 29 Hun, 382; 1 N. Y. Cr. Rep. 180
2 88 N. Y. 196.
3 91 N. Y. 211; 1 N. Y. Cr. Rep. 94.
4 92 N. Y. 85; 1 N. Y. Cr. Rep. 303.
5 10 Abb. (N. C.) 261.

declaration to Sergeant Cassidy that he "tried hard enough to shoot Keenan."

All this, however, has a more important bearing upon Conroy's mental condition as affected by the two glasses of sherry than upon the question of deliberation. In truth it is almost inconceivable that a man capable of a deliberate murder and conscious of having committed it, should have closed the door to all hope by clubbing his dying victim, shooting at other innocent people and avoiding anything like plausibility in the preposterous falsehoods which were put forward to account for what had happened — falsehoods which any one capable of even the lowest order of reflection would have seen must be instantly and completely exploded by every witness of the occurrence.

As to Conroy's statement, so earnestly dwelt upon by the learned District Attorney, that he "tried hard enough to shoot Keenan," it is impossible to give to it the force of a confession of a deliberate purpose.

At the utmost and treated literally the words convey nothing beyond an intent to kill, formed at the moment.

They do not necessarily import deliberation; and thus they really add nothing to the actual occurrence as narrated by the witnesses. If in fact the whole scene, as thus laid down before us, excludes the responsibility of deliberation, the value of such a retrospect is limited to its bearing upon the question of murder in the second degree. But in truth Conroy thereby intended not to confess his guilt, but blatantly to protest his innocence and to boast of his prowess. This is apparent from Sergeant Cassidy's testimony. We quote: —

Q. What did he tell you?

A. He told me that he had arrested this man for being drunk and disorderly.

Q. Arrested Keenan?

A. Keenan for being drunk and disorderly; he was attacked by a crowd there and his prisoner rescued; I says, "Conroy, is this man shot?" "Well," he says, "I don't know, if he is or not," he says, "it is not my fault; I tried hard enough to shoot him."

Under the circumstances, to treat this expression as evidence of deliberation would require not only the straining of language, but its entire misapplication — that is, its transposition from the imaginary scene it was intended to color to the real occurrence which it sought to conceal; and then ascribing to it as thus grafted, the sincerity and truth which it originally lacked. Hard cases sometimes produce bad logic as well as bad law. If the *res gestæ* had supported the claim of deliberation with something less insignificant than a want of ease in drawing the revolver and the failure almost at the moment of the shooting to heed a

bystander's exclamation, we would probably never have heard of this subsequent straw.

The truth is, that it was simply an idle phrase, meant to be cunning but really transparent, put forward to color the equally idle falsehood that he had arrested Keenan for being drunk and disorderly; and that he had then been attacked by a mob in the street and his prisoner rescued. What he meant in his besotted way, to convey to Sergeant Cassidy was that he had shot Keenan in the faithful performance of the duty which devolved upon him to prevent, by every means in his power, the escape of a rescued prisoner. Plainly this and nothing more.

Whether, then, this shocking affair be regarded in the light of what transpired after, before or at the time of the shooting, the absence of deliberation is equally apparent.

The result is inevitable. Under the law as it existed prior to 1873, Conroy would have forfeited his life.

There was then but one degree of murder, and to constitute it, premeditation alone was required. The courts had construed the law so that premeditation and intent were substantially equivalent. The Legislature then divided the crime into two degrees, requiring intent with deliberation and premeditation to constitute the first; intent without deliberation and premeditation to constitute the second. Conroy's case, therefore, comes clearly with the second and not within the first of these degrees. But the error below was not unnatural. For if ever there was a case where the judgment of a right minded court, prosecuting officer or jury might readily be obscured by a feeling of just indignation, it is assuredly the present. The tendency of its horrible detail is to make the citizen deplore the alteration in the law. It cries aloud for a judicial view of deliberation from which, under other and less aggravated circumstances, the mind would instantly revolt. The fact that the prisoner was a police officer, employed to protect the people from violence and to guard them from outrage, can not but intensify this sentiment. Beyond question, Conroy richly deserves all the punishment which can lawfully be inflicted upon him. Less than this would be a miscarriage of justice. More, however, would be lynch law, under the forms of law. What, after all, is more important than Conroy's death or imprisonment for life, is accuracy in the administration of justice — precise conformity to the law. The latter it is our duty to exact, and in doing so to stand, if necessary, between the vilest wretch and even the righteous indignation of those who would add one jot to his punishment beyond what the law prescribes. Such a duty is now plainly before us, and it can only be faithfully performed by the reversal of this judgment and the direction of a new trial.

DAVIS, P. J. I have given careful attention to the conflicting opin-

ions of my brothers Brady and Barrett, and a most painstaking examination of the evidence in the case, bearing upon the question in conflict, between them, and my mind is brought to the conclusion reached by my brother Barrett, that there was no sufficient evidence in the case of such premeditation and deliberation on the part of the prisoner, as is required by the present law of this State to justify a conviction of murder in the first degree.

At common law all felonious killing of a human being with intent to take life was murder, and of that crime there were no degrees.

By the former statute of this State this rule of the common law was sought to be modified by requiring, in murder, proof of a deliberate design to kill. But the courts promptly held that the statute was satisfied whenever the evidence showed to a jury that the act of homicide was the result of a fully formed intent to kill, although the intent was concurrent with the act and had no appreciable antecedent period of deliberation or consideration. This was practically reinstating the law sought to be modified; or in other words holding that the common-law rule had not been changed in substance. It may well be doubted whether the courts would have deemed themselves forced to, or justified in such a construction, if the statutes referred to had created degrees of murder and defined the second degree to be a homicide with design to kill but without deliberation.

Subsequently the Legislature created two degrees of the crime of murder. The first they declared to be the killing of a human being (unless it be excusable or justifiable) when perpetrated with a deliberate and premeditated design to effect the death of the person killed, or of another person; the second they defined to be the killing of a human being with intent to cause the death of the person killed, or another, but without deliberation or premeditation. To the first of these degrees they attached the penalty of death; to the second the absolute penalty of imprisonment for life.

It is impossible now for the courts to hold that the killing of a human being with design to effect death, not accompanied with deliberation and premeditation, is anything more than murder in the second degree, however clear and manifest the design which accompanies and induces the act may be.

It would now be manifest error to charge a jury upon a trial for murder that a clear and manifest design to effect death is itself sufficient evidence of deliberation and premeditation to constitute murder in the first degree; for that is the exact thing which the statute declares shall be murder in the second degree. Hence, there must be, in addition to proof of design, some satisfactory evidence that it was a "deliberate

and premeditated design" before the crime of murder in the first degree is proven. If past constructions disarm the word "deliberate" of any portion of the normal significance, they do not, of course, impair the just sense of the word "premeditated," which is new to the statute; and the conjunction of the two words, in a form which requires the satisfaction of both, especially when accompanied with the creation of a new degree of the crime of murder, which itself requires the presence of an actual and established intent to kill, leaves no door open to doubt that murder in the first degree can now only be shown by proof of some amount or kind of deliberation and premeditation antecedent to the act or blow which intentionally effects the death, and of which the intent alone is not adequate evidence. The intent or design is, of course, necessary in both degrees. It alone is sufficient in the second; but in the first it must have the characterization of deliberate and premeditated design. There are many modes in which this characterization may be shown; as, for instance, by procuring and administering poison, by lying in wait, by arming or preparing for the deed in advance, by seeking an opportunity or advantage, by threats of revenge or hate, or, in short, any form of words or action which indicates thought and conclusion of a considered purpose to effect a design. My brother Barrett has shown how clearly the cases cited by the counsel for the People fall within this rule. It is not necessary to repeat what is so well said.

In the case at bar I am unable to find any evidence to justify a finding of deliberate and premeditated design to effect the death of the person killed, or of any other person. The prisoner was a policeman, but the law of murder for him is no different for that reason. He was charged with duties and trusts which made misconduct a crime on his part peculiarly odious; but that fact, while it may expose him to the dangers of popular prejudice, and in a sense excuse clamorous condemnation, can not in law change or affect his guilt or innocence of murder in the first degree. He is not on trial for violation of official duty, but for a felony affecting his life, and in its definition of that crime and its requirements of proof to establish it, the law knows no scale of adjustment that fits a brutal policeman but does not fit other brutal criminals. The Legislature has not so provided; and that is an answer to every suggestion of undue severity because of official position.

To my mind the evidence against the prisoner fails to show that he entered the drinking saloon of the witness Cody for any purpose of crime or violence. He went for the purpose of drinking on "the treat" of a candidate for office. He drank what is called sherry, and it is not difficult to imagine what sort of vile concoction bore that name

in that place. The evidence shows that he was peculiarly susceptible to the effects of drink, and he speedily showed its effects upon him. A colloquy and controversy sprung up between him and another, which led, on his part, to an offer to fight any person present for money — but this passed over, and the prisoner invited every person present to drink. They all drank, a dozen or fifteen in number. The prisoner again drank sherry; when he asked what he had to pay he was told a dollar. The price angered him, and he asked who had drank. Cody told him all, but the prisoner disputed, and turned to one person, asked what he had drank; he answered, "mixed ale." The prisoner called him a liar, and the lie was given back to him. That party approached the prisoner, who immediately struck him and knocked him down, and commenced kicking him while down. At this several persons demanded that he let the person up, and all gathered around the prisoner. The party knocked down got up and immediately fled from the saloon. The prisoner, as soon as freed from those holding him, drew his policeman's club, and went toward the "crowd," some of whom retreated into the "card-room," and shut the door; the prisoner went toward the card-room, and struck with his club, breaking a light of glass in the door; immediately a light was broken from the other side; the prisoner stepped back and drew his revolver and cocked it, and although seized by one person present, who said, "Don't shoot, Billy; those are my friends," he turned partly around and fired in the direction of three persons standing near each other, and hit the deceased, with whom he had had no controversy, in the abdomen and inflicted a wound from which he afterwards died. The deceased exclaimed that he was "done for" and fell over — but no one seemed to think at that time that the bullet had taken effect. This is the substance of all that took place up to the time of the shooting. It is impossible, I think, to see in it any "deliberate and premeditated design" to effect the death of any person. There was nothing of deliberation or premeditation in the affair. The madness of drink operating upon a brain and system physically and morally weak and wicked, perhaps was there and very likely a drunken and reckless intent to kill, quite sufficient to justify a conviction of murder in the second degree; but it seems to be in vain to look for evidence of deliberate and premeditated murder.

What afterwards occurred gives no different oolor to the actual transaction.

It was in substance this: When officers came in, the prisoner pretended to be performing his official duty. The officers examined the deceased and did not discover that he was shot. One proposed to send for an ambulance. The prisoner exclaimed "ambulance be d—d, the man is not shot," and he gave into their custody two young men whom

he charged with disorderly conduct, and he himself dragged out the deceased to take him to the police station. On the way he beat him brutally with his club, but those injuries are shown to have had no effect in causing his death. At the station he stated that he had arrested the deceased for drunkenness and disorderly conduct; that he was assaulted by a mob and his prisoner was recovered and that he shot the prisoner to prevent his escape, and afterwards when he was told the prisoner was really shot, he said in substance he ought to be for he "tried hard enought to shoot him."

His statements were wholly false. He had not arrested the deceased. There had been no mob — no rescue, or attempt at rescue, and no shooting on such an occasion. This was all a falsehood invented as an excuse for his misconduct as an officer, and the statement that he tried hard to shoot the deceased was not intended to be anything more than an assertion that he tried hard to do his duty as against a mob of rescuers and an escaping prisoner. It is not to be detached from its context and distorted into an admission that he tried hard to shoot the deceased, while he sat quietly on a whisky cask in Cody's saloon at the time he was wounded. To do so is to make the prisoner's false declaration that something took place that would justify a shooting, a confession of something in conflict with the testimony of every witness on the part of the People.

The actual shooting was clearly the act of an infuriated man, firing with a reckless intent to kill any one who might chance to be in the way of his bullet — but there is not, I think, a symptom of proof that he "tried hard to shoot" his victim, who by chance happened to be in the range of his reckless aim.

There are several questions in the case arising upon exceptions which seems to me of serious importance; but I prefer the decision of the case should be put upon the ground that as a matter of law there was not sufficient evidence of deliberate and premeditated design to effect death to justify the conclusion, so that the Court of Appeals may review our decision and correct it if wrong.

I concur, therefore, in a reversal of the judgment and a new trial.

Brady, J. The controlling facts upon which the appellant was convicted are these: He had by his aggressive conduct driven nearly all the persons from the saloon (fourteen or fifteen in number) in which the deceased was shot, some of them taking refuge in the card-room, which was separated from the saloon by a partition, having a door partially of glass opening into it, and others in a rear room or hall. Those who remained in the saloon were the proprietor, Cody, his wife, Cantwell, Keating and the deceased. The appellant approached the door mentioned, and observing that one of the persons who had retreated was

exposing his head, doubtless to ascertain where the appellant was, struck at the head, but missed it, and broke some of the glass. He then backed from the door, and as he did so, put his club in his belt and deliberately drew his revolver, which he had some trouble in taking from his pocket. Keating seeing this said to him: "For God's sake, Billy, don't fire; those are friends of mine." The appellant paid no attention to this request, but turned towards where the deceased was standing with others, raised his revolver and fired the fatal shot. He attempted another shot, but was stopped by Keating and Buckley. When asked by the sergeant at the station-house after his arrest, "Conroy, is this man shot?" he said, "I don't know. If he is not, it is not my fault. I tried hard enough to shoot him."

This conduct was by the jury declared to be that of a person entirely responsible for his acts, and not that of one affected mentally either by the element of insanity or temporary derangement arising from the effect of liquor taken. He had displayed a belligerent spirit soon after entering the saloon, and having provoked a quarrel with one McGuinness, knocked him down and continued to maltreat him until he was dragged away. The brutal recklessness of the murderous desperado had seized him, and when he drew his pistol he determined to shoot some one of the persons who remained in the saloon, a resolution strengthened doubtless by the request of Keating, a result natural in the conduct of a person controlled by the bravado spirit which then influenced him. He had resolved to shoot, notwithstanding he had no enemy to confront him; was not in danger by act or threat of any one present, and knew his victim must be one of the persons present. The deceased was to him the most insignificant, apparently, and suited his design. His purpose was to shoot, and he carried it out by discharging his weapon at the deceased, towards whom it must have been pointed or it would not have taken effect upon him. There is no pretense that the ball from the pistol was deflected by contact with any substance. It was sent directly into the body of the deceased.

We have then apparently the pre-existing murderous intent carried out by the shot, the premeditation and deliberation culminating in the shot at the deceased, a fact demonstrated by the declaration of the appellant that if the deceased was not shot it was not his fault—he tried hard enough to do it. This is undoubtedly the theory upon which the jury rendered the verdict given, and whether it was right or not is the only question of the least importance here.

The legal proposition necessary to sustain the verdict upon these facts and this theory is, that if a person in the company of several deliberately resolves to shoot one of them, and does the act contemplated, he may be charged with having killed the person shot with a premeditated

and deliberate design to effect his death. It is not necessary, under such circumstances, in order to properly convict a person of murder in the first degree, to show that when the intention to shoot was formed the person shot was also then selected and determined upon. It is enough if there be a general design to shoot one of the persons present and such intention is carried out.

The Penal Code by section 183 provides by the first subdivision that the killing of a human being is murder in the first degree, when committed from a deliberate and premeditated design to effect the death of a person killed or of another. This contemplates, as well as others, the crime of killing a person not within the intent of the killer, and slain in error or by mistake. If the design is to kill B., and the shot misdirected kills C., it is murder if the elements exist which would make it murder had B. been killed in accordance with the original intent. If the design be to kill one or several present, and one be selected in accordance with such design, it is not at all illogical or unreasonable to declare that the persou killed was slain by premeditation. The case as presented to the jury having the characteristics mentioned, it could not be taken from them. Indeed, they were warranted in declaring the presence of the design stated, not only from the acts of the appellant, but his subsequent declaration that if he did not shoot the deceased it was not his fault — he tried hard enough to do it.

In estimating the force and effect of the circumstances to which reference has been made, we must bear in mind that we are dealing with a sane person having no enemy to overcome, but brutally excited, and drawing his pistol without reason — without cause, and seemingly for no other than a murderous purpose and after he had without its use created a reign of terror. He had time enongh to deliberate upon the act of shooting. The law upon that subject was clearly and accurately charged and no exception was taken to what was said.

The court said in reference to 'deliberation and premeditation — quoting from the opinion of Justice Earle in *People* v. *Majone*,[1] that the design must precede the killing by some appreciable time, but the time need not be long. It was sufficient if time existed for choice to kill or not to kill and when the time was sufficient for that it matters not how brief.

The appellant, it must be observed, was advised of the impropriety of his contemplated act — he was warned against it by a request made of him not to shoot, to which he paid no attention. He did not mean to be interfered with; he was the master of the situation and meant to maintain that attitude. He was cool and collected when he reached the

[1] 91 N. Y. 211; 1 N. Y. Crim. Rep. 95.

station-house, and his declaration there made was undoubtedly understood by him.

It matters not what we may conjecture as to the spirit in which it was said or the emotion which prompted it. It must be united to other events and he must take the consequences resulting from it. If the jury had not found that he was then wholly responsible for his conduct, we should be obliged to assert this to have been his condition when the declaration mentioned was made. There is and can be no pretense that he was as much excited at that time as he was in the saloon. He was then where he could not hold supreme sway either as a bully, bravado or desparado.

The history of this country unfortunately is not without precedent for terrorisms created by one individual even without the semblance of authority, a feature not marking the appellant's career on the occasion referred to, inasmuch as he was dressed in his uniform and had all the insignia necessary to enable him to act as the official bully — the man in power, in brief authority.

It is true that all the witnesses for the People did not tally in their details of the occurrence, but the jury had the right to accept such version as the evidence best commended to their judgment, and the assumed controlling facts herein recited are established by it. The witnesses were not sufficiently in conflict to make it difficult to reconcile their testimony and establish a satisfactory basis for the judgment arrived at, and particularly inasmuch as the witnesses who said the pistol was pointed at the floor or barrel, must have been mistaken, as the ball discharged from it entered the body of the deceased and without deflection, as already suggested.

Whether the premeditation and deliberation required by the statute as an ingredient of murder in the first degree existed or not is, as already suggested, the only question at issue on this appeal, none of the exceptions taken having any real value. The charge was elaborate and clear. Indeed, it was pronouuced by the learned and experienced counsel for the appellant to be most fair, and numerous requests to charge which he had handed to the court, were withdrawn by him. After a careful, deliberate and conscientious examination of this case, therefore, with, I hope a just sense of my responsibility, I am unable to agree with the conclusion that the learned justice who presided at the General Sessions, could in the face of the appellant's satement at the station-house, in connection with the other facts, withdraw the element of premeditation from the consideration of the jury. The question of the appellant's innocence or guilt was for them to determine on the evidence. They are the judges of the facts, and if a reasonable

view of the evidence sustains their finding it should not be disturbed.

*Judgment reversed.*

---

MURDER IN FIRST DEGREE — BURDEN OF PROOF

## McDANIEL *v.* COMMONWEALTH.

[77 Va. 281.]

*In the Supreme Court of Appeals of Virginia, 1883.*

1. **Onus on Prosecution to Show Murder is in the First Degree.** — To constitute the offense of murder in the first degree, the killing must be predetermined, and not under momentary impulse of passion; though the determination need not have existed any particular length of time. *Prima facie*, all homicide is murder in the second degree. *Onus* is on prosecution to raise the offense to the first degree.
2. **What the Record must Show.** — To sustain a verdict of murder in the first degree, the record must show proof, direct or inferential, sufficient to justify the jury in coming to the conclusion that the death of the deceased was the ultimate result which the concurring will, deliberation and premeditation of the prisoner sought.
3. **Case in Judgment.** — A quarrel had taken place between the prisoner and the deceased, in which both had used violent language, and the former had given the latter the lie; they then separated, and fifteen or twenty minutes later the deceased, carrying a light cane, approached the prisoner, declaring that he would not stand what the prisoner had said; the prisoner picked up a large stick, and upon being asked by the deceased why he stood holding that stick, said, "If you come here, I will show you;" the deceased then raised his cane to parry a blow from the prisoner, and struck at or struck the prisoner, who then struck the deceased two blows with his stick, from which he died about two hours afterwards. *Held*, not guilty of murder in the first degree.

ERROR to the Circuit Court of Amherst County.

For plaintiff in error. *L. S. Marye* and *W. B. Tinsley.*

For the Commonwealth, the *Attorney-General.*

HINTON, J. This is a writ of error to a judgment of the Circuit Court of the county of Amherst, convicting Frederick McDaniel, the plaintiff in error, of murder in the first degree, and sentencing him to be hanged therefor. The accused moved the court to set aside the verdict and grant him a new trial; but the court overruled the motion, and to this ruling the prisoner excepted. The bill of exceptions contains a certificate of what is stated to be the "facts and all the facts proved upon the trial."

The only assignment of error is, the refusal of the court to set aside the verdict and to award a new trial.

Upon an application of this kind, this court is always loth to disturb the judgment of the trial court. On this point Christian, J., delivering the opinion of the court in *Pryor's Case*,[1] said: "This court has always acted with great caution in granting new trials in cases where the new trial is asked solely upon the ground that the verdict is contrary to the evidence, and great weight is always given, and justly so, to the verdict of the jury and judgment of the court in which the case is tried. The cases are very rare in which this court interferes; and it is only in a case where the evidence is plainly insufficient to warrant the finding of the jury." I fully recognize the salutary influences of this rule, and have no purpose to relax its operation. But I think we may remand this case for a new trial without being amenable to the charge of violating its spirit or provisions in the special circumstances of this case.

I proceed to state as briefly as I can some general doctrines of the law of homicide, which will, I think, materially assist us in arriving at a correct conclusion upon this point. Every homicide under our statute is, *prima facie*, a case of murder in the second degree. And it is incumbent upon the Commonwealth, in a case like the present, where the offense was not committed by any of the specific means enumerated in the statute, that is, "by poison, lying in wait, imprisonment or starving," nor in the commission of, or attempt to commit "arson, rape, robbery or burglary," in order to elevate it to murder in the first degree, to prove by evidence, either direct or circumstantial, beyond rational doubt, that the killing was "willful, deliberate and premeditated." And on the other hand, the burden is upon the accused, if he would reduce the offense below murder in the second degree, to show the absence of malice and the other mitigating circumstances necessary for that purpose.

Now, to constitute a "willful, deliberate and premeditated killing," it is necessary that the killing should have been done on purpose, and not by accident or without design; that the accused must have reflected with a view to determine whether he would kill or not; and that he must have determined to kill, as the result of that reflection, before he does the act. That is to say, the killing must be a predetermined killing upon consideration, and not a sudden killing under the momentary excitement and impulse of passion, upon provocation given at the time or so recently before as not to allow time for reflection. And this design to kill need not have existed for any particular length of time. It may be formed at the moment of the commission of the act.[2] With

[1] 21 Gratt. 1010.

[2] King's Case and note, 2 Va. Cas. 84; Whiteford's Case, 6 Rand. 721; Jones' Case, 1 Leigh, 598; Hill's Case, 2 Gratt. 595; Howell's Case, 26 Gratt. 995; Wright's Case, 33 Gratt. 881; Wright's Case, 75 Va. 914.

these familiar principles of the law of homicide in mind, we now come to examine the facts of this case.

From the certificate thereof it appears that the prisoner, who lived in a cabin in the yard, and upon the land of the deceased, near Pedlar Mills, in the county of Amherst, went, on the 24th day of January, 1882, to a mill a few miles distant, and that one of the horses which he drove to the wagon on that occasion was loaned to him by the deceased; that he returned with the wagon about two hours after sundown, and at that time the deceased was absent from home; that the wagon was then sent for a load of wood, a small son of the prisoner driving it. It returned with the wood a little while after dark, and the prisoner commenced unhitching the team, when the deceased went out to the wagon and may have assisted in unhitching. A quarrel ensued between the prisoner and the deceased, both of whom were in liquor although not drunk. The deceased had taken a drink at a negro man's cabin just before night. The deceased charged that the prisoner had neglected his horse in not feeding him during the day. Loud and violent language was used, in the course of which the prisoner gave the lie to the deceased as to the charge of not feeding his horse. The deceased applied harsh and profane language to the prisoner. The prisoner, having unhitched the horses, carried them to the creek to water them. After the prisoner got back with the horses from the creek, which was some distance off, he led the horses around the road, just outside of the fence, on the way to the stable, and when he came to the wood-pile by the side of the yard fence, the deceased, whose wife had vainly tried to detain him in the house, came towards the fence and towards the prisoner, with a walking-stick of dogwood, light and not long, in his hand; that whilst his wife was trying to detain him in the house, the deceased said he would not stand what the prisoner had said. She followed him to the fence. There was a stick used in plowing, commonly called a bearing stick, about four feet and a half long, and about three and a half inches in circumference, of seasoned white oak, lying on the wood-pile. And this stick the prisoner picked up. That the deceased demanded to know why the prisoner stood holding the stick in his hand; to which the prisoner said: "If you come here I will show you." The fence around the yard, at this point, was a low one, not more than about two and a half feet high, so that a man could step over it, and this point was about twelve or fifteen yards from the house of the deceased. This was about fifteen or twenty minutes after the first quarrel at the wagon. The deceased raised his stick to ward off a blow from the prisoner, and maybe he struck at or struck the prisoner. The prisoner then stepped over the fence, struck at the

deceased and knocked the walking-stick out of his hand, and with the bearing-stick struck the deceased two blows over the head. From the first blow, which was above the left eye, the deceased was apparently made insensible but did not fall. The second blow fractured and indented the skull behind and above the left ear. He never spoke afterwards, and died within about two hours, from the effects of the blows.

These being all the facts proved on the trial, as the judge certifies, do they make out a case of "willful, deliberate and premeditated killing?"

The prisoner certainly killed the deceased, and it is equally certain that this was not accidentally done by him. But this is not enough to constitute a case of murder in the first degree. Before we can pronounce him guilty of murder in the first degree, we must be able to find, in the certificate of facts, proof, direct or inferential, sufficient to justify the jury in coming to the conclusion that the death of the deceased was the ultimate result which the concurring will, deliberation and premeditation of the prisoner sought.[1] If we fail to find this measure of proof, the case falls short of murder in the first degree. For it is laid down and believed to be undoubted law that in all cases of slight and insufficient provocation, if it may be reasonably inferred from the weapon made use of, or the manner of using it, or from any other circumstance, that the party intended merely to do some great bodily harm, such homicide will be murder in the second degree, in like manner as if no provocation had been given, but not a case of murder in the first degree.[2]

In this case there had been a quarrel between the prisoner and the deceased whilst he, and perhaps the deceased, were unhitching the horses, but there was no disposition shown by the prisoner to strike the deceased either with his fists or with a weapon at that time. On the contrary, he unhitches the horses, leads them to water, and is in the act of quietly leading them to the stable, when just as he arrives at the wood-pile, where doubtless the wagon-load of wood had just been deposited, he perceives the deceased, in spite of the entreaties of his wife, armed with a walking-stick, coming towards him and bent upon having a difficulty with him. In this condition of affairs, instead of selecting from the load of wood a stick of wood, one blow with which would be certain death, he stops and picks up a stick of comparatively insignificant proportions, which he finds lying on the wood-pile. It is true that when the deceased asked him why he stood there holding that stick in his hand, he replied, "If you come here I will show you." But

[1] Jones' Case, 1 Leigh, 611.

[2] Davis Cr. L. 99.

this language, in the light of what subsequently happened, can only be interpreted to mean something like this, namely: Whilst I shall not seek you, yet if you shall attack me with that cane, I shall repel your attack with this stick. This language, instead of revealing a deliberate and preconceived purpose to kill, would imply, it seems to me it might well be argued, that in the event the deceased kept away from him it was not his purpose to bring about a difficulty. At any rate I do not think that from this language, even if coupled with the blows inflicted on the deceased, without any other acts or declarations shedding light upon the intention of the prisoner, that the jury were warranted in finding, or that this court could be justified in holding, that the prisoner killed the deceased in pursuance of a deliberate and preconceived purpose to kill him, and that therefore this was a case of murder in the first degree.

It is not intended to intimate in anything that has been said in this opinion that the stick used by the prisoner in his encounter with the deceased was not a deadly weapon, for the fatal effect of its use in this case but too surely establishes its deadly character when used by a person of the prisoner's strength; nor is it intended in any wise to contravene that wise and wholesome rule: "That a man must be taken to intend that which he does, or which is the natural and necessary consequence of his act."[1] All that I do mean to say is, that giving to this rule its proper scope, in the meager and peculiar circumstances of this particular case, this court is not warranted in presuming (from the mere use of this weapon, without any words, other than those heretofore mentioned, or circumstances, either before or after or at the time of the killing, going to show the intention of the prisoner) that the purpose of the prisoner was neither to forcibly repel the attack of the deceased, nor to inflict grievous bodily harm upon him, but to kill him.

For these reasons, I am of opinion that the judgment of the Circuit Court of Amherst County be reversed and annulled, the verdict of the jury set aside, and that a new trial be awarded the plaintiff in error.

RICHARDSON and FAUNTLEROY, JJ., concurred.

LEWIS and LACY, JJ., dissented.

1 Murphy's Case, 23 Gratt. 972; Hill's Case, 2 Gratt. 595.

## MURDER IN FIRST DEGREE — PREMEDITATION — DELIBERATION.

### STATE v. ROBINSON.

[73 Mo. 306.]

*In the Supreme Court of Missouri, October Term, 1880.*

1. **There can be no Murder** in the second degree without premeditation.
2. **Where there is Testimony from which** the jury might infer that the killing took place under such circumstances as to make it either murder in the first or second degree or manslaughter in the fourth degree, it is error in the trial court to refuse or fail to give appropriate instructions on these offenses.

APPEAL from Clinton Circuit Court.

HOUGH, J., delivered the opinion of the court.

The defendant was indicted for murder in the first degree, and was convicted of murder in the second degree. It is unnecessary to state the facts. The court gave, among others, the following instructions: "3. If the jury find from the evidence that the defendant feloniously, willfully, and maliciously, and not deliberately and premeditatedly, shot and killed Thomas J. Robinson they will find him guilty of murder in the second degree." Instruction No. 8, given for the State, is to the same effect. These instructions do not conform to the definition of murder in the second degree laid down in *State* v. *Curtis.*[1] It was distinctly stated in the opinion in that case that there can be no murder in the second degree without premeditation — a word which has uniformly been defined by this court, since the statute classifying murders has been in force in this State, to mean, "thought of beforehand for any period of time, however short." Premeditation is a necessary constituent of murder in the second degree, as there can be no murder in the second degree which was not murder at common law, and there could be no murder at common law unless the act causing death was committed with malice aforethought; that is, with malice and premeditation. This statement, which is substantially the same as that embodied in the opinion in *State* v. *Curtis*,[2] does not mean that the death itself must have been premeditated in order to constitute murder in the second degree. Both the act causing death and its natural consequence, ths death, may in some cases be premeditated; but in all cases it is essential that the act causing death should be premeditated in order to constitue murder in the second degree. The Legislature certainly did not intend the words "premeditated" and "deliberate" to be construed as meaning precisely the same thing. The simple fact of the employment of both words, apart from other considerations,

[1] 70 Mo. 594.

[2] *supra.*

shows that one of them was intended to have a larger signification than the other, and this larger signification has, in recent cases by this court, been assigned to the word "deliberate."[1] The distinction thus drawn between murder in the first and murder in the second degree is a rational and just one; one which can be observed in practice, because in harmony with that discriminating sense of right which, in calm times, will always control the juries of any enlightened and law-abiding community in the enforcement of the criminal law. This distinction is well illustrated in the case put in *State* v. *Wieners*.[2] We will instance substantially the same case: If A. and B., being friends, should casually meet upon the street, and, in the course of a conversation, which gradually assumes the character of a heated controversy, A. should, in apparent anger, apply to B. some degrading epithet or impute to him some act of criminal baseness, and B., stung to madness by the insult, should, upon the instant, strike and kill A. with some deadly weapon, this would undoubtedly be murder; but under the classification made in the *Curtis Case*, it would be murder in the second degree. The act causing death would have been intentional; and as no act can be intentional unless it be previously thought of, it would, therefore, have been premeditated; B. would be held to have intended the natural consequences of his act; from the fatal use of the deadly weapon the law would imply malice; there was no lawful provocation, and, consequently, no technical heat of passion; in short, the killing would have been a willful killing with malice aforethought, — that is, with malice and premeditation, — but it would not fill the measure of the definition of murder in the first degree, because it would not also be deliberate. And it would be against our common sense of right and the presumable intent of the Legislature that a murder so committed should be visited with the same punishment which the law inflicts for a murder committed by lying in wait or by poison. The provocation being insufficient in the eye of the law to reduce the killing to manslaughter, yet being such as would naturally rouse the passions and excite the mind, would prevent the homicide from reaching the highest grade of murder.

The only direct testimony in the case at bar as to the manner in which the deceased was killed was the testimony of the defendant himself, and that tended to show that it was accidental. The killing took place in the upper hall-way of a dwelling house, in which the defendant and deceased, who were brothers, resided together, and there was no witness to the difficulty. But there was other testimony from which the jury might have inferred that the killing took place under such circumstances as would have made it either murder in the first degree or

[1] State *v.* Wieners, 66 Mo. 11; State *v.* Curtis, 70 Mo. 594.

[2] *supra*, p. 25.

second degree, or manslaughter in the fourth degree.[1] For the error committed by the court in defining murder in the second degree, and in failing to give an instruction as to manslaughter in the fourth degree, the judgment will be reversed and the cause remanded.

The other judges concur.

---

## DEGREES OF MURDER — MURDER IN SECOND DEGREE — DELIBERATION NECESSARY — MANSLAUGHTER.

## STATE *v.* CURTIS.

[70 Mo. 594.]

*In the Supreme Court of Missouri, 1879.*

1. **Willful Murder with Malice** and premeditation, in a cool state of the blood, is murder in the first degree. Murder in the second degree is a willful killing committed with premeditation and malice, but without deliberation.
2. **The Words "Malice Aforethought"** are equivalent to "malice" and "premeditation." "Deliberation" means "a cool state of the blood;" premeditation, in a cool state of the blood, is murder in th first degree. Willful killing, without deliberation and without malice aforethought, constitutes manslaughter.
3. **Evidence — Res Gestæ.** — Deceased, who was in company with the prisoner C. and S. was stabbed at night in the dark and after walking one hundred yards fell, and soon after became insensible and remained so until the next morning. C. offered to prove that four hours after the return of consciousness, S. was taken by the sheriff to the deceased, who recognized S. as the man who stabbed him. *Held*, inadmissible.

APPEAL from Livingston County.

Attorney-General *Smith* for State.

*Shanklin*, *Waters & Dixon*, for appellant.

HOUGH, J., delivered the opinion of the court.

The defendant was indicted for murder in the first degree for the killing of one Charles Powell, and was tried and convicted of murder in the second degree. In a difficnlty at a disreputable house in Chillicothe, on the night of the 27th of July, 1878, the deceased was stabbed and mortally wounded, and on the 14th of December following died of the wounds thus received. The deceased, the defendant and one Stoner and others were together in a room, the only light in which was a lamp which the deceased took in his hands to go in an adjoining room, when it either fell into the lap of the defendant, or was knocked from Powell's hand by the defendant and was extinguished, and a struggle ensued in the dark, in which the deceased was stabbed. The testimony

[1] State *v.* Edwards, 70 Mo. 480.

tended to fasten the crime upon the defendant. The deceased immediately after being stabbed left the house and walked about one hundred yards, when he fell and soon after became insensible, and so remained until after six o'clock the next morning.

The defendant offered to prove by the sheriff that he arrested Stoner, and took him to Powell's room between nine and ten o'clock on the morning of the 28th, and that Powell recognized Stoner as the man who cut him. This testimony was rejected by the court and its exclusion is assigned for error. The defendant also complains of the action of the court in giving the following instructions on the part of the State.

"4th. The jury are instructed if they believe from all the facts and circumstances beyond a reasonable doubt, that the defendant willfully and with his malice aforethought, but without deliberation and premeditation, stabbed and killed the deceased, Charles Powell, as charged in the indictment at the County of Livingston and State of Missouri, then they will find him guilty of murder in the second degree, and assess his punishment at imprisonment in the State penitentiary for a term of not less than ten years. The jury are instructed that murder in the second degree is the wrongful killing with malice aforethought, but, as stated above, without premeditation and deliberation; it is where the intent to kill is in a heat of passion, executed the instant it is conceived and before there has been time for the passion to subside."

"8th. In considering what the defendant said after the fatal stabbing the jury must consider it altogether. The defendant is entitled to the benefit of what he said for himself if true, as the State is of anything he said against himself in any conversation proved by the State; what he said against himself the law presumes to be true because against himself; but what he said for himself the jury are not bound to believe because said in conversation proved by the State; they may believe or disbelieve it, as it is shown to be true or false by all the evidence in the case."

* * * * * * * * * * * * *

"10th. The court instrncts the jury that if the killing was committed willfully, premeditatedly and deliberately with means and instruments likely to produce death, then the malice requisite to murder will be presumed; and if the jury are satisfied from the evidence beyond a reasonable doubt, that the defendant stabbed and killed Charles Powell willfully, maliciously, premeditatedly and deliberately, with an instrument likely to produce death, then it devolves upon the defendant to adduce evidence to meet and repel such a presumption."

The statements of the deceased on the morning after the difficulty identifying Stoner as his assailant were properly rejected. They were

not made *in extremis*, and indeed, were not offered as dying declarations and hence were not admissible on that ground — nor could they in any point of view be regarded as the declarations of a party to the record or as binding upon the State. In criminal prosecutions the State sustains no such relation to the party injured as will render his declarations admissible in evidence against the State.[1] Immediately after the stabbing and before Powell left the house, he declared Curtis cut him, and while being carried to the hotel from the place where he fell he was sufficiently conscious to state where he wished to be taken. The statement sought to be introduced was not made until nearly four hours had elapsed after his return to consciousness on the morning of the 28th. So there was no such continuous unconsciousness from the time when the wound was inflicted to the time when the declaration was made as would render such declaration as part of the *res gestæ* even on the theory contended for by the defendant.

The fourth instruction given on behalf of the State is erroneous. It is contradictory and calculated to mislead. There is no murder in the second degree under our statute without premeditation. No homicide can be murder in the second degree which was not murder at common law. The statute so declares.[2] To constitute murder at common law the homicide must have been committed "willfully and with malice aforethought," or as the statute of 23 Henry VIII.,[3] expressed it, "of malice prepense." Now the words "aforethought" and "prepensed" or "prepense" each mean "premeditated" or thought of beforehand. These words thus explained do not mean that the malice should be premeditated, for, as was said in the *State* v. *Wieners*,[4] that would be absurd, as malice is only a condition of the mind; but they mean that the act which the party is prompted by his malice to commit should be premeditated or thought of beforehand, and if such act so prompted be homicide, then of course it must be premeditated.[5] The words "with malice aforethought" are equivalent to the words "with malice and premeditation."[6] Now to tell the jury that if they find that the defendant willfully and with premeditation and malice but without premeditation stabbed and killed the deceased, they will find him guilty of murder in the second degree is contradictory and absurd. Malice aforethought is usually defined by defining premeditation and malice.

In the case at bar premeditation is not defined, nor is the term "malice aforethought" defined. Simple malice is defined but there is

[1] Com. *v.* Dinsmore, 12 Allen, 235; People *v.* McLaughlin, 44 Cal. 435; nor were the declarations of the deceased admissible as a part of the *res gestæ*.

[2] Wag. Stats., p. 446, sec. 2.

[3] ch. 1, sec. 3.

[4] 6 Cent. L. J. 70.

[5] Keenan *v.* Com., 44 Pa. St. 55.

[6] People *v.* Vance, 21 Cal. 400.

a substantial difference between malice and malice aforethought.[1] In *Regina* v. *Griffiths*,[2] Alderson, B., said: "By the term maliciously, is not meant 'with malice aforethought,' because if it were with malice aforethought, that would constitute a still more grave offense as that would show an intent to murder." In *Bradley* v. *Banks*,[3] it is said: * * * "Although the indictment or the appeal says that the defendant *murdravit* such a man, if it does not say *malitia præcogitata*, it is but manslaughter."

That we have assigned to premeditation, its proper place may be shown by examining the question from another point of view. Murder at common law was a homicide committed "willfully and of malice aforethought." Our statute in substance declares that any willful, deliberate, and premeditated killing being also murder at common law, shall be murder in the first degree. Every other homicide, being murder at common law and not declared to be manslaughter in some of its degrees, is murder in the second degree. In *State* v. *Wieners*,[4] it was said, "premeditation and deliberation are not synonymous, and a homicide may be premeditated without being deliberately committed." It is further held in that case that "murder in the second degree is such a homicide as would have been murder in the first degree, if committed deliberately." If these views be correct, it must necessarily follow that all intentional homicides committed with premeditation and malice, but without deliberation, must be murder in the second degree. The word "deliberation," as used in the statute, implies a cool state of the blood, and is intended to characterize what are ordinarily termed a cool-blooded murders; such as proceed from deep malignity of heart, or are prompted by motives of revenge or gain. These are classed as murders in the first degree. On the other hand, premeditation may exist in an excited state of the mind, and if the passion or excitement of the mind be not provoked by what the law excepts as an adequate cause, so as to rebut the imputation of malice, an intentional killing under the influence of such passion will be murder in the second degree. If the party act upon sudden passion, engendered by reasonable provocation, the existence of malice will be negatived, and the killing, though intentional, will be manslaughter in the fourth degree.[5]

To make our meaning plain, we will recapitulate our classification of intentional homicides: Where there is a willful killing with malice aforethought and deliberation, that is, with malice and premeditation in a cool state of the blood, the offense is murder in the first degree. This

1 1 Bish. Cr. L., sec. 429.
2 8 C. & P. 248.
3 Yelv. 205*a*.
4 *supra*.
5 State *v.* Edwards, decided at present term.

definition is not intended to include cases in which acts are specific by statute made murder in the first degree. Where there is a willful killing with malice aforethought, that is with malice and premeditation, but not with deliberation, or in a cool state of the blood, the offense is murder in the second degree; nor can any homicide be murder in the second degree, unless the act causing death was committed with malice aforethought, that is with malice and premeditation. Where there is a willful killing without deliberation, and without malice aforethought, the offense is manslaughter; but whether manslaughter in the second or the fourth degree, will depend upon whether the facts bring the killing within the twelfth or eighteenth section of the chapter on homicide.[1]

We deem it necessary to examine the views presented in the elaborate argument of the counsel for the defendant in regard to the eighth instruction. It is almost a literal copy of an instruction which received the approval of this court in the case of *State* v. *West*.[2] This instruction though in the form in which it is usually given, it must be confessed, is not happily worded, and while its phraseology might be improved without impairing its force, we do not think it calculated to mislead. Men of ordinary capacity will readily understand it, and can intelligently and properly apply it to the facts of every case in which there is any necessity for giving it.

We perceive no error in the tenth instruction. It more than complies with the requirements of the rule laid down in the case of *State* v. *Alexander*.[3] After stating in the first paragraph that malice will be presumed from a willful, premeditated and deliberate killing with a deadly weapon, the succeeding paragraph expressly requires the jury to find from the evidence beyond a reasonable doubt, that the killing was maliciously as well as willfully, premeditatedly and deliberately done with a deadly weapon. This paragraph renders all reference to legal presumption wholly superfluous.

For error committed in giving the fourth instruction, judgment will be reversed and the cause remanded. The other judges concur.

[1] State *v.* Edwards, *supra*. [2] 69 Mo. 401. [3] 66 Mo. 148.

## DEGREES OF MURDER — DELIBERATION—INCORRECT DEFINITION OF TERMS.

## STATE *v.* SHARP.

[71 Mo. 218.]

*In the Supreme Court of Missouri, 1879.*

1. **To Constitute Murder in the First** degree, the killing must have been done willfully, deliberately, premeditatedly and with malice aforethought, and these different words must be defined by the instructions of the court.
2. **An Instruction which Defines the word "Deliberately"** to mean intentionally, purposely, considerately, is insufficient. "Deliberately" means in a cool state of the blood, and a willful, premeditated killing is murder in the second degree.

The defendant was convicted of murder in the first degree for having shot and killed one Martin Edward Hogin. It appears from the testimony in the case that the defendant was charged with the crime of forgery, a felony, by complaint before a justice of the peace, and a warrant was issued and placed in the hands of an acting deputy constable to be executed; that said constable requested one or two persons to aid in making the arrest, among others the deceased, who had also been acting as constable on special occasions. Two or three other persons afterwards joined the *posse*, and assisted in looking for defendant. The defendant, having learned that these parties were seeking his arrest, made some effort to escape, and declared that if they attempted to arrest him they would get hurt, or he would hurt them. Some of the party discovering the defendant passing through the town (a newly laid out town on the C. B. & St. L. R. R.) in the direction of the livery stable, called to him to halt; he immediately answered this call by firing two shots at the person halting him, and this person then snapped his revolver at defendant. Defendant then fired two more shots at another member of the *posse* who was near by, and then went to the livery stable, and in the office of the stable (this being after night), reloaded his revolver by putting four loads into it, saying at the same time that if they bothered him they would get hurt, that he had not killed any body and had not committed forgery, and would not be taken by that crowd from Possum Walk, and kissing his revolver he passed out of the office into the stables. He sent word to the constable by one Brown, a friend of his, that if they would let him alone until morning he would go down o the justice's office, but if they attempted to arrest him that night, he would kill the first man who attempted to arrest him. The constable and his *posse* resolved to arrest him forthwith, and Hogin, the deceased, remarked to some one in the *posse* to give him a revolver and he would arrest him without any trouble, and upon receiving the revolver he

started toward the livery stable, inquired at the office for the defendant, and was told that he was back in the barn, and not to go in there, he would get hurt, but he walked in and called to the defendant: "Sharp, where are you? I want you?" Sharp answered: "Damn you, take it then," and thereupon three shots were fired in quick succession, one of which inflicted upon the deceased the wound of which he died in about ten hours. Upon hearing the shooting the other persons rushed in and found defendant down on his back, deceased upon him holding him down, while defendant had his revolver in his hand pointing it at the head of the deceased, making an effort to shoot him in the head. When the crowd rushed in defendant called out, 'Adams, is that you; don't let them hurt me; they are trying to kill me." The defendant was secured and disarmed, and the deceased was assisted into the office and placed upon a bed and a physician sent for. Deceased was shot through the upper part or the thigh, the bullet cutting or injuring the sciatic nerve, which caused him great pain and suffering until he passed into a comatose state, and died in that condition about ten hours after he was shot. Shortly after the shooting defendant asked to see Hogin, and was taken to his presence in the office, and there is a running conversation between them, Sharp said, "Hogin, you shot first." Hogin denied this. Some one said a load had been shot out of Hogin's pistol and two from defendant's. Hogin said if his pistol was discharged it went off accidently in the scuffle, that he did not shoot. Defendant said, "If I had had you where you had me I would have blown your d—d brains out, and if I had had my finger on the trigger instead of on the guard I would have blown your d—d brains out." He said it might go hard with him, but he did not give a damn. He also said he was sorry it had happened; that Hogin was to blame and that he ought not to have rushed on me as he did; he might have known that I would shoot." Hogin said: "I arrested you all the same." When taken before the justice, defendant pleaded guilty to the charge of forgery and was committed for that offense. There was evidence of some other statement by defendant, boasting on his manhood and the kind of man he was, etc.

The court gave the following instructions: —

"1. If the jury believe from the evidence that on or about the 9th day of October, 1879, in this county, the defendant, Otto Sharp, did willfully, deliberately, premeditatedly, and with malice aforethought shoot and kill one Martin Edward Hogin with a pistol, the jury should find the defendant guilty of murder in the first degree, and so state in in the verdict.

"2. Willfully means intentionally, and not accidentally; therefore, if the defendant intended to kill, such intention was willful. Deliber-

ately means intentionally, purposely, considerately; therefore if the defendant formed a design to kill, and was conscious of such a purpose, it was deliberate. Premeditatedly means thought of beforehand for any length of time, however short; and malice signifies a condition of the mind, an unlawful intention to kill or do some great bodily harm to another without just cause or excuse; aforethought means thought of beforehand for any length of time, however short.

"3. To constitute murder in the first degree there must have been an intention to kill; the killing must have been willful at the time of the alleged shooting, and there must have been deliberation and premeditation, a formed design and determination to take life, but the intention to kill and the deliberation and premeditation with which the alleged act was done, and the necessary malice may all be proved by circumstances, and need not be proved by direct and positive evidence as to such facts; the intention and deliberation and premeditation need not be expressly proved, but the facts must appear from which their existence may be rationally and satisfactorily inferred.

"4. If the jury believe from the evidence that the defendant intended to kill and shot with that intention, and such intention was accompanied by such circumstances of its own purpose and design, it was deliberate, and if sufficient time was afforded to enable the defendant to select or prepare the weapon, a place to carry out his intention and design, it was premeditated.

"5. It may be presumed that a man intends the natural and probable result of his own willful acts. The intention with which an act is done may be inferred from the facts and circumstances attending it; therefore, if a man uses a deadly weapon by which death is produced, with a manifest design so to use it, with sufficient time to deliberate and fully to form a conscious purpose to kill, without just cause or excuse, it may be inferred that he intended to kill, and the willfulness, deliberation and premeditation and malice essential to murder may be also inferred when the jury, from all the facts and circumstances in proof, feel warranted in making such inference. The law fixes on no length of time to form this intention to kill, or to deliberate or premeditate upon it, but leaves the existence of a fully formed intent, and the willfulness and deliberation and premeditation, as facts to be determined by the jury from all the facts and circumstances in proof, the conduct of the defendant, what he said and did at any shortly before the alleged shooting."

Then follow a few instructions in relation to the rights of the parties to make arrests, and as to the duty of the defendant to submit to arrest, and his right to defend himself and under what circumstances. As to murder in the second degree, the court instructed as follows: —

"10. If the jury believe from the evidence that about the 9th day of

October, 1879, in this county, the defendant with intent to kill willfully and maliciously shot and killed one Martin Edward Hogin with a pistol, and that said intention to kill was not deliberate and premeditated by the defendant, the jury should find the defendant guilty of murder in the second degree, and so state in the verdict, and assess his punishment at imprisonment in the penitentiary for any determinate period not less than ten years.

"11. The jury must inquire, and by their verdict ascertain from the evidence under the instructions of the court whether the defendant is guilty of murder at all or not, and whether he is guilty in the first or second degree of murder, if guilty at all, under the evidence and instructions of the court, and return their verdict according to the fact as found by them; that is to say, if the jury believe from the evidence that the defendant did willfully, deliberately and premeditatedly, and of his malice aforethought, as these words and terms have been defined and explained by the court, kill the said Hogin by shooting him with a pistol, the jury should find him guilty of murder in the first degree. But if they find and believe from the evidence that he killed said Hogan intentionally and with malice aforethought, but without deliberation and premeditation, the jury should find him guilty of murder in the second degree, and unless the jury find him guilty of either the first or second degree of murder, they should find him not guilty."

SHERWOOD, C. J., delivered the opinion of the court.

The defendant was indicted for the crime of murder in the first degree; the name of the person on whom the murder was alleged in the indictment to have been perpetrated was Martin Edward Hogin. On trial the jury by their verdict found the defendant guilty of murder in the first degree; and he was therefore sentenced in conformity to the verdict.

We shall enter on no discussion of the testimony as to the degree of homicide which is established, as we regard a fatal error as having been committed in the giving by the court, of its own motion, the second instruction on behalf of the State. The instruction read as follows: —

"Willfully means intentionally and not accidentally; therefore, if the defendant intended to kill, such intention was willful. Deliberately means intentionally, purposely, considerately; therefore if the defendant formed a design to kill and was conscious of such a purpose, it was deliberate. Premeditatedly means thought of beforehand for any length of time however short. Malice signifies a condition of the mind, an unlawful intention to kill or do some great bodily harm to another without just cause or excuse. Aforethought means thought of beforehand for any length of time, however short." That instruction is clearly faulty in that it does not correctly define the word "de-

liberately." To constitute murder in the first degree, there must concur wilfullness, deliberation, premeditation and malice aforethought.

The first instruction clearly stated in general terms what was necessary to constitute murder in the first degree, but the terms used in that instruction needed to be explained so that the jury might fully understand their import. This explanation of the words used in the first instruction was attempted in the second instruction, but with a signal lack of satisfactory results. "Deliberately" is said to mean that which is done in the cool state of blood. A homicide may be thought of beforehand, that is premeditated and intentionally done, and still if the elements of deliberation be lacking the homicidal act will be only murder in the second degree. So that it will be readily seen that "deliberately" does not, as defined in the objectionable instruction, mean intentionally or purposely done, otherwise every act of intentional killing done with premeditation and malice would carry with it the element of deliberation and amount to murder in the first degree. For it is held that "all intentional homicides committed with premeditation, but without deliberation, must be murder in the second degree," and that murder in the second degree is such a homicide as would have been murder in the first degree if committed deliberately, and we do not consider the definition of the word "deliberately" as made any clearer by the words which follow the word "purposely" in the same clause. Even if we grant that the word "considerately" is a synonym of "deliberately," "considerately" is not defined, and the jury were as much in the dark as if the word being defined had been merely repeated in the explanatory sentence. Nor do we think the matter is helped by the addition of the words, "that if the defendant formed a design to kill, and was conscious of such a purpose, it was deliberate." Because every intentional killing — a killing with premeditation, as seen, only makes murder in the second degree, and it is impossible to conceive of such a killing, unaccompanied by a previously formed design to kill, or the forming of such design without a consciousness of its purpose. Then the jury were in effect told that deliberation was an ingredient of murder in the second degree, that therefore there was no distinction between the two degrees of murder. Had the jury been told that deliberately meant in a cool state of blood, and that in such a state of the blood the defendant formed a design to kill, the act would have been deliberate. The instruction, taken as a whole, and in connection with its other definitions would perhaps have been unobjectionable. As it is we can not give our sanction. The foregoing views are fully supported by the cases of *State* v. *Weiners* [1] and *State* v. *Curtis.* [4]

[1] 66 Mo. 12.

[4] 70 Mo. 594.

In relation to the point that there was variance between the name of the deceased and that mentioned in the indictment, it is sufficient to say that such variance is immaterial unless the trial court found it "material to the merits of the case, and prejudicial to the defence of the defendants." There has been no such injury in the case.[1]

Judgment reversed and cause remanded. All concur, except Judge NORTON, who dissents.

---

MURDER AND MANSLAUGHTER—INTENT TO KILL.

## PEOPLE v. FREEL.

[48 Cal. 436.]

*In the Supreme Court of California, 1874.*

1. **Whether a Homicide Amounts** to murder or to manslaughter merely, does not depend upon the presence or absence of the intent to kill.
2. **In either murder or manslaughter,** there may be a present intention to kill at the moment of the commission of the act.

Appeal from the District Court of the Third Judicial District, city and county of San Francisco.

The defendant was indicted for the crime of murder, alleged to have been committed at San Francisco, on the first day of November, 1873, by killing one Edward W. Allen. Allen kept a saloon, and a crowd of persons having collected there so as to obstruct his doorway, he went from his place behind the bar with a cane or stick to clear the passageway. A difficulty took place during which he was killed. The defendant claimed to have been justified, but the testimony was of such a character, that it became a question, if he was not justified, whether the offense was murder or manslaughter. The defendant was convicted of murder in the second degree, and appealed.

*C. B. Darwin*, for the appellant, agreed that if there was no intention to kill, there was no crime unless there was criminal negligence.

*Attorney-General Love*, for the People.

*By the Court*, NILES, J. The court instructed the jury as follows: "You will also observe that the difference between murder and manslaughter is, that in manslaughter there is no intention whatever, either to kill or to do bodily harm. The killing is the unintentional result of

1 Rev. Stats. 1879, p. 307, sec. 1820. State v. Wammack, decided at present term.

a sudden heat of passion, or of an unlawful act committed without due caution or circumspection."

This is clearly erroneous. Whether the homicide amounts to murder or to manslaughter merely, does not depend upon the presence or absence of the intent to kill. In either case there may be a present intention to kill at the moment of the commission of the act. But, when the mortal blow is struck in the heat of passion, excited by a quarrel, sudden, and of sufficient violence to amount to adequate provocation, the law, out of forbearance for the weakness of human nature, will disregard the actual intent and will reduce the offense to manslaughter. In such case, although the intent to kill exists, it is not that deliberate and malicious intent which is an essential element in the crime of murder.

Under the circumstances of this case, as shown by the testimony, it was important that the distinctions between the several grades of homicides should be correctly stated to the jury. They could harly fail to be misled by the erroneous instruction we have noticed.

Several other points were made by the counsel for defendant, which we do not deem it necessary to discuss.

Judgment and order reversed, and cause remanded for a new trial.

---

## MURDER IN THE SECOND DEGREE—INTENT TO KILL MUST BE SHOWN.

## DALY v. PEOPLE.

[32 Hun, 182.]

*In the Supreme Court of New York, 1880.*

**Upon a Sunday** evening the defendant and four person, all more or less under the influence of liqnor, assaulted one Daly, threw him down, struck him with a stone and cut him with knives. Daly had been drinking with them, and the cause of the disagreement was not shown, nor was there any evidence to show that they intended to kill him. The wonnds and cuts inflicted were not considered, by the physician who attended him, to be of a dangerous character. He died the next night, and a *post mortem* examination showed that his death resulted from meningitis, and that his disease had probably been produced by an injury to his head resulting from the blows or a fall. *Held*, that there was no evidence to sustain a conviction of murder in the second degree.

Writ of error to review the judgment of the Court of General Sessions of the county of New York, by which the plaintiff in error was convicted of the crime of murder in the second degree, and sentenced to imprisonment in the State prison for life.

*Wm. F. Kintzing*, for plaintiff in error.

*John Vincent*, Assistant District Attorney, for the defendant in error.

DANIELS, J. At the close of the trial, and before the cause was submitted to the jury, the court was requested to hold and direct them that the defendant could not be convicted of the offense charged against him, in different counts of the indictment, as murder in the second degree. This was refused, and exceptions were taken to the decision on behalf of the defendant. By the evidence it was made to appear that the defendant and four other persons together assaulted and beat the deceased. They had him down upon the street; one of them struck him with a stone, and others cut him with knives.

What caused their disagreement out of which the assault upon him originated, did not clearly appear. They all drank together, and Daly and the deceased scuffled together. He was also knocked down, and at least three of these persons were engaged in beating and cutting him while he was down. In doing this a stone was used by one of them, and knives by the others.

But out of their preceding relations no evidence was given indicating that the assailants had any motive, or that it was any part of their design to kill the deceased. The weapons and stone made use of were not applied in such a manner as to be evidence that they entertained that design, for none of the wounds made upon the deceased as they were described, were so aimed or serious as, in the judgment of the first physician who was called and dressed them, could possibly be attended with the death of the deceased. While he had been struck upon his head, and wounds inflicted by cuts upon his body, they were neither of them, nor altogether, considered of a dangerous character, and were inflicted evidently more for the purpose of punishing the deceased on account of some unexplained disagreement, than with any intention to produce his death. This assault took place upon a Sunday night, and he died the next night. A *post mortem* examination was made of his body, and it was found that he had died from what was stated by the surgeon to be meningitis. His statement of the wounds confirmed the description given by the physician who first examined and treated the deceased. But he added further that it was probable that this disease had been produced by an injury to the head from the blows it had received, or from a fall; that under the circumstances they were likely to have been the cause developing this disease. But after allowing all the weight that can be given to the evidence of the surgeon making this final examination, nothing can be held to have been added to the case which would sustain the conclusion that in the blows which were inflicted, the defendant, or either of his associates, was actu-

ated with the design to take the life of the deceased. It is highly probable that as they were all more or less affected by drinking, that some common cause of disagreement arose between them, as is frequently the case with persons stimulated in this manner, leading them into the fight with the defendant, and that this was produced by such a provocation as induced them severely to chastise him without intending to kill him. It was what may be called a drunken brawl, not infrequently resulting in more serious consequences than either of the persons engaged in it intended or expects. Neither the acts themselves, nor the instruments made use of, nor the wounds inflicted upon the body, with any reasonable degree of certainty will sustain the conclusion that there was any intention on the part of either the assailants to kill the person so assailed. The court, therefore, should have directed the jury that the defendant could not be convicted of the crime of murder in the second degree, for the existence of an intent to kill is indispensable under the statute to the commission of that offense. The offense committed by these persons was clearly one of manslaughter, not that of murder.

The judgment should therefore be reversed and a new trial ordered.

BRADY, P. J., concurred.

*Judgment reversed and a new trial ordered.*

---

## HOMICIDE — PROVOCATION — ADEQUATE CAUSE — ERRONEOUS TREATMENT.

## BROWN v. STATE.

[38 Tex. 482.]

*In the Supreme Court of Texas, 1873.*

1. **Where the Court is Satisfied** that a defendant who is taken sick during his trial on a charge of felony is too unwell to be present in court at every stage of the trial, the cause should either be temporarily continued, to await his convalescence, or a juror withdrawn and the cause continued.
2. **On a Trial for** felony, no separation of the jury can be allowed, under article 3070, Paschal's Digest, except with the consent of the party on trial; it is not within the power of his attorney to give such consent.
3. **When such Separation** takes place, every juror should be under the control of an officer, that no communication may be had with other persons, in regard to the cause on trial.
4. **In a Capital** case, this court will ascertain whether there has been any violation of article 3059, Paschal's Digest, though no exception may have been taken on the trial.

5. **There may be Other** adequate causes, which will reduce a homicide from murder to manslaughter, besides the four provoking causes enumerated in article 2254, Paschal's Digest.

6. **On a Trial for** murder, where there is evidence of malpractice on the part of the surgeon who attended the deceased, the jury should be instructed that they can not convict of murder, unless satisfied that the death resulted from the wound, and not from the malpractice of the surgeon.

Appeal from Fort Bend. Tried below before the Hon. L. LINDSAY. The appellant was indicted for the murder of one Ted Benjamin. The evidence shows that when appellant shot Benjamin, the latter was advancing upon him in an excited and angry manner, swearing he would have his revenge, and denouncing Brown as "a d—d rebel son of a b—h." No weapon was in the hands of deceased, but an ax and handspike were within his reach when he was wounded by a pistol shot from appellant. The shot entered the lower part of the abdomen and passed through his body. The attending surgeon sewed up the wound on one side of the body, and closed it with adhesive plaster on the other. Benjamin died in seven hours.

On the trial the attorneys for the State and accused consented to the separation of the jury from the adjournment at night until next morning, the accused not consenting, he being in an adjoining room sick, having been removed by the instruction of the attending doctor during the argument.

The court consented that the jury might separate under the charge of officers of the court, and they were taken to different rooms under different officers, six jurors being under a deputy sheriff, five colored jurors in an adjoining room under two bailiffs, and one white juror at his own house, under an officer. When the court asked the accused why the sentence of the law should not be passed upon him, or if he had anything to say, he answered, "that he did not consent to the jury separating; that he was sick in an adjoining room; and that he desired an appeal to the Supreme Court."

The court refused to charge the jury, on the application of appellant's counsel, that they could not find the prisoner guilty of murder unless they were satisfied that Benjamin died from the wound, and not from the malpractice of the surgeon.

It appears that from the beginning of the argument up to and including the return of the verdict and the charge of the court and the action of the court and counsel in regard to the separation of the jury, the trial was conducted in the absence of the accused.

Among other charges the court gave the following: "The only adequate causes fixed by our law to reduce the act of killing from murder to manslaughter are an assault and battery;" reciting and quoting the

four adequate causes named in the code,[1] and proceeding: "These are all the causes which our law allows as adequate causes to reduce the killing of a human being from murder to manslaughter. If any one of these causes is found to exist, from the testimony, then the crime would be simple manslaughter. In the absence of all of them the crime is murder, of the first or second degree, as the jury may determine from the evidence." There was a verdict and judgment of guilty of murder in the second degree, and assessing the punishment of appellant at five years imprisonment in the penitentiary.

*P. E. Pearson*, for appellant.

*The Attorney-General*, for the State.

WALKER, J. There is some novelty in this case.

Where a defendant in a prosecution for felony is taken ill on the trial, and the court is satisfied, by the opinions of physicians or otherwise, that he is too ill to be present in open court at every stage of the trial, the cause should either be temporarily continued to await his convalescence, or a juror should be withdrawn and the cause continued for the term. The accused should not only be within the walls of the court-house, but he should be present where the trial is conducted, that he may see and be seen, heard and be heard, under such regulations as the law has established.

Under our Code of Criminal Procedure it is competent, on the trial of a felony, for counsel to do certain things in the presence of the defendant, but these things strictly pertain to professional acts; but that article of our code [2] which provides that a jury may be allowed to separate, by consent, in charge of an officer, limits the consent to the defendant alone, so far as he is concerned. It is not an act, either by practice or by our code, brought within the province of counsel.

Had the prisoner consented to the separation of the jury contemplated by the statute he would not be bound in this case, for the separation which took place was not such as is contemplated by the law. When a separation takes place by the consent of the accused, every juror should be under the protection and control of an officer, that no communication may be had with other persons in any wise touching the cause on trial. It is the practice of the courts to permit a juror to retire from the panel for a temporary or necessary cause, and this practice grows out of necessity; but this court should be watchful and vigilant to see that the law is executed which forbids all improper conduct on the part of jurors, and all intermeddling or tampering with them by parties interested in the suit, their friends, or other persons.

[1] art. 2254, Pasc. Dig. [2] 3070, Pasc. Dig.

Exception is taken to the charge of the court in the assignment of errors, but no special exception was taken on the trial; yet in a felony case it has been the practice of the court to examine the general charge in order to determine whether the accused has been fairly tried.[1] The court will not, however, in cases of misdemeanor, reverse a judgment on account of the insufficiency or error of the general charge, unless an exception be taken on the trial.[2] In such cases a written charge is not required by the District Court, but in capital cases the court will look at any violation of article 3059, Paschal's Digest. The charge of the court in this case may have misled the jury. There was no evidence of threats made on condition that the deceased should first be assailed, and the presentation of this question to the minds of the jurors may have led them into an erroneous conception of what the evidence in the case really was.

It was error to instruct the jury on the law of adequate cause, which would reduce murder to manslaughter; the four provoking causes enumerated in article 2254 were the only causes which could reduce murder to manslaughter. The maxim, *expressio unius est exclusio alterius* can not apply to article 2254. By article 2252 the Legislature has defined the words "adequate cause."

By the expression "adequate cause" is meant such as would commonly produce a degree of anger, rage, resentment or terror, in a person of ordinary temper, sufficient to render the mind incapable of cool reflection. It is unfortunate that bad and vicious men can and do find many more means of outraging and insulting others of ordinary temper than those four enumerated in article 2254. The language employed by the deceased was grossly profane, vulgar and abusive. It was applied to the appellant in the presence of his friends and neighbors; it was such language as in most instances, if applied to men of ordinary temper, was calculated to produce anger, rage and resentment.

It was error in the court, under our law,[3] to refuse giving the charge as asked, concerning the treatment of the wound by the physician, from which the deceased is supposed to have come to his death. Our law undoubtedly changes the rule of the common law, the theory of which was that he who caused the first injury should be held guilty, upon the theory that without the first injury no other would have followed, as resulting from the first.

The judgment of the District Court is reversed and the cause remanded.

*Reversed and remanded.*

1 Villareal *v.* State, 26 Tex. 107; 23 Tex. 557; 27 Tex. 146, 438, 765; 28 Tex. 711; 29 Tex. 500; 31 Tex. 608, 575; 30 Tex. 472; 33 Tex. 660.

2 24 Tex. 154.

3 Pasc. Dig., arts. 2203, 2204.

## HOMICIDE — KILLING AFTER PROVOCATION AND IN HEAT OF PASSION.

## McCANN *v.* PEOPLE.

[6 Park. 629.]

*In the Supreme Court of New York, 1867.*

**The Prisoner was Convicted** of murder. The evidence showed the homicide was committed by stabbing the deceased with a knife, in immediate retaliation for insulting words and a violent blow struck the prisoner by the deceased. *Held*, that, in the absence of premeditated design, which was clearly wanting, the conviction was unauthorized.

Error to the Columbia Oyer and Terminer, in which court the prisoner was tried and convicted of murder. The questions involved sufficiently appear in the opinion of the court.

*C. L. Beale*, for the plaintiff in error.

*J. M. Welch*, District-Attorney, for the defendant in error.

INGALLS, J. At the Oyer and Terminer, held in and for the County of Columbia, in April, 1866, Barney McCann was tried and convicted of the murder of Edward Pye. The prisoner, with several others, met at the house of one Mrs. Riley, and indulged in drinking liquor. Pye was present, and a dispute arose between him and the prisoner in relation to some tobacco. The witnesses agree that McCann asked Pye for a chew of tobacco, which was refused. One witness states that Pye, in answer to the request said, "I would sooner hit you in the face than give you a chew." Another witness gives the following version: "Pye said, No, you dirty Irish son of a bitch, get on the floor and I can lick you." Immediately after these words, Pye struck McCann, and knocked him nearly or quite down, and McCann got up and rushed towards Pye, making a thrust with a knife, which inflicted the fatal wound. The evidence showed clearly that the whole transaction occurred within a few moments, and that McCann could not have advanced more than six or eight feet when he administered the blow with the knife. Shaffer, a witness for the prosecution testifies: "The whole transaction occurred in about a minute; it was all right along."

Stafford, another witness for the People, testified: "Did not see McCann fall; he went back three or four paces, and the next I saw, I saw him (McCann) coming with a knife. This was but a few moments after Pye struck McCann." It is apparent that McCann was in a violent passion, amounting to a paroxysm of anger induced by the insulting language of Pye, accompanied with a severe blow, which nearly or quite prostrated the prisoner. The evidence shows that the attack by Pye was wholly unprovoked by the prisoner, and that the injury was

inflicted by McCann while he was in the heat of passion, induced by sudden, violent, and unjustifiable provocation. Under such circumstances it is unreasonable to conclude that time had elapsed sufficient for passion to cool and reason to regain control, so that a premeditated design to take the life of Pye could have been proved, which is indispensable to constitute the crime of murder in the first degree. We are inclined to the conclusion, that the prisoner might with propriety have been convicted of manslaughter in the third degree. Certainly not murder in the first degree. It may be well to examine some of the authorities bearing upon the questions presented, with a view to arrive at a correct conclusion in regard to the grade of crime which the evidence shows was committed.[1] "Manslaughter at common law is of two kinds. 1st. Voluntary manslaughter, which is the unlawful killing of another without malice on sudden quarrel or in heat of passion. When upon sudden quarrel two persons fight and one of them kills the other that is voluntary manslaughter. And so if they upon such occasion go out and fight in a field, for this is one continued act of passion. So, if a man is greatly provoked by any gross indignity, and immediately kills his aggressor, it is voluntary manslaughter, and not excusable homicide, not being *se defedendi;* neither is it murder, for there is no previous malice. In these and such like cases, the law kindly appreciating the infirmities of human nature, extenuates the offense committed, and mercifully hesitates to put on the same footing of guilt, the cool deliberate act, and the result of hasty passion."[2]

"When the defendant, having been violently beaten and abused, ran to his house eighty rods, got a knife, ran back, and on meeting the deceased stabbed him, it was held but manslaughter."[3]

"If on receiving such a deadly assault, he suddenly leave the scene of outrage, procure arms, and in the heat of blood consequent upon the wrong, return and renew the combat, and slay his adversary, both being armed, such a homicide would be but manslaughter. For the law from its sense of, and tenderness towards human infirmity, would consider that sufficient time had not elapsed for the blood to cool and reason to resume its empire over the mind smarting under the original wrong."

Sec. 987: "When death ensues in heat of blood on immediate provocation there having been no previous malice, the offense is manslaughter."

Same section: "The indulgence which the law extends to cases of this description is founded on the supposition that a sudden and violent exasperation is generated in the affray, so as to produce a temporary

1 Whart. on Hom. 35. 3 Whart.'s Cr. L. sec. 922 (4th ed.) 2 sec. 190.

suspension of reason. And that the transport of passion excludes the presumption of malice."

Wharton on Homicide:[1] "Any assault in general, made with violence or circumstances of indignity upon a man's person, if it be resented immediately by the death of the aggressor, and it appears that the party acted in the heat of blood upon that provocation, will render the crime manslaughter."

Taunton, J., in *Taylor's Case*, defines manslaughter as follows: "Manslaughter — homicide, not under malice, but when the blood is heated by provocation, and before it has time to cool."

In *Rex.* v. *Taylor*,[2] after a quarrel an attempt was made to expel Taylor from the house, and he drew a sword and stabbed Smith, the deceased, and inflicted a mortal wound. The court, after deliberation, pronounced it manslaughter. That case is often referred to with approbation. In the case of *Rogers* v. *People*,[3] much of the reasoning of the court applies to the case under consideration, and some of the circumstances are similar to those in the case at bar. The homicide was committed under circumstances of much less provocation, and there is evidence in the case cited to the effect that only words preceded the fatal blow. In this case there is no conflict in the evidence. All the witnesses agree in saying that words and blows constituted the provocation. Judge Sutherland, in the case cited, remarks: "If the prisoner struck the fatal blow in the heat of passion, without the intention or design to kill, he was guilty of one of the degrees of manslaughter." Again: "But the violent homicide for which the prisoner was tried had different degrees, depending on the intent to kill, or the absence of such intent. The statutory definition of two of the degrees of manslaughter implies, not only that a homicide committed in the heat of passion may have been committed without the intention to kill; but that also such heat of passion is likely to prevent the reasoning, calculation, reflection or design implied by a particular intent."[4]

In this case the prisoner and the deceased engaged in a fight in the public highway, and the prisoner knocked the deceased down, and then took a large stone from a wall, and with both hands threw it upon the head of the deceased, breaking the skull and causing death. The prisoner was convicted of murder, and such conviction was reversed, and the reasoning of the court shows conclusively that the crime was regarded manslaughter and not murder. Barculo, J., says: "We suppose that an erroneous impression may thus have been produced upon the minds of the jury. We consider the second subdivision wholly inapplicable to a case where there is reason to believe that the killing was in the heat of

[1] p. 186.
[2] 5 Burr. 2793.
[3] 15 How. Pr. 558.
[4] People *v.* Johnson, 1 Park. Cr. Rep. 219.

passion, for such killing never was murder at common, and the revisers did not intend to increase the cases of murder." This remark of the learned judge bears with force upon the case at bar. In *People* v. *Clark*,[1] the court recognizes the distinction between cases where there is a provocation and heat of passion, and where those features do not exist, in determining the grade of crime. The court says: "In the case before us, there was no provocation, no mutual combat, no heat of passion which the law can recognize." Turning to the case at bar, we find all these features, mutual combat, gross provocation, and consequent heat of passion without time for such passion to cool, before the fatal thrust. The parties did not separate from the commencement until the termination of the affray. How can it be reasonably contended under such circumstances, that there could be premeditation? If not, the case is wanting in an indispensable element to constitute the crime of which the prisoner was convicted. The jury must have misconceived the directions which they received from the court, for upon no other reasonable hypothesis can we account for their verdict, which is in direct conflict with the facts proved, and the law, which was correctly pronounced by the learned justice. There accompanied the verdict positive evidence of the reluctance with which it was rendered, in the written communication containing an unusually urgent appeal on behalf of the prisoner for the exercise of executive clemency. The judicial mind can not apply the law to the undisputed facts of this case, and fail to be convinced that the prisoner has been convicted of a crime of which he was not guilty, and which stands wholly unproved against him. It might be insisted, certainly at least with plausibility, that the facts proved reduce the offense to manslaughter in the third degree, as defined by section 12,[2] which is as follows: "The killing of another in the heat of passion, without a design to effect death, by a dangerous weapon, in any case except such wherein the killing of another is herein declared to be justifiable or excusable, shall be deemed manslaughter in the third degree."

It is not pretended that there is evidence of express malice, and in my judgment it can not be implied from the facts proved, and the law applicable thereto,. And hence the design to effect the death of the deceased, as contemplated by the statute referred to, did not exist.

Foster, in defining what constitutes implied malice, says: "And I believe that most, if not all, the cases which in the books are ranged under the head of implied malice, will, if carefully adverted to, be found to turn upon this single point: that the fact hath been attended with such circumstances as carry in them a plain indication of a heart regardless of social duty and fatally bent on mischief." There is not a fact in the

[1] 7 N Y. 385.

[2] p. 940, vol. 3, Rev. Stats.

whole case which proves the existence of those qualities in the prisoner. All who testify as to his general character and demeanor speak favorably, and the history of the fatal affray shows that he was not the aggressor.

In *People* v. *Johnson*,[1] Barculo, J., says: "Thus it appears by the terms of the statute the killing of a human being, in three specified cases, is murder, unless it falls within some of the inferior classes of homicide, from which we deduce the inference, that if a case comes within any degree of manslaughter, it can not be deemed murder, although it is accompanied by some of the circumstances which make up the latter crime."

The fact that the prisoner used a knife and death ensued, does not necessarily raise the presumption of malice or that within the meaning of the statute there existed the design to effect the death of the deceased. This has been shown by the authorities which have been cited. When we reflect that there was a violent provocation, and almost instantaneously thereupon the fatal injury was inflicted by the prisoner, we may properly hesitate before declaring that the prisoner's crime was not manslaughter in the third degree. It is, however, only necessary to satisfy ourselves whether or not the prisoner was guilty of murder in the first degree, and the other considerations are only important so far as they aid in determining that question, except possibly they may furnish some guide in a future trial. The reflection that the life of a human being is even jeoparded by the verdict of a jury, erroneously, although conscientiously, rendered, is revolting to every sense of justice and dictate of humanity, and calls upon the court to interpose on behalf of the prisoner, to the extent of its power, in the exercise of judicial discretion. It is said by counsel, in substance, that it was the province of the jury to determine whether there existed a premeditated design to effect the death of the deceased, and having rendered a verdict which implies such finding, this court is powerless to grant relief, although satisfied that such verdict stands unsustained by any evidence which even tends to prove the crime. We can not give our assent to such a proposition. Suppose the jury had rendered a verdict in this case, pronouncing the prisoner guilty of treason, this court would not, I apprehend, hesitate a moment to set aside such a verdict, and order a new trial. It may be said the case put is a strong one, and improbable — nevertheless it tests the power of the court to interpose, in the exercise of that general control which it possesses over its own records and proceedings. Conceding that the case is not improved in every particular which enters into a conviction for the crime of murder, and

[1] 1 Park. 291.

yet the case is wanting in one indispensable element to constitute the crime, and that too which distinguishes murder from manslaughter, and upon which depended the life of the prisoner, viz.: the premeditated design to take life. The record which we are to examine purports to contain all the evidence and proceedings had and taken upon the trial, and from it we perceive that the learned justice charged the jury, among other things, that to constitute the crime of murder there must be some deliberation and premeditation preceding the act. That if in the heat of passion a man strikes a blow without intending to kill, and death follows, then it is manslaughter in the third degree. These instructions, as has been before remarked, were probably misconceived by the jury, and as a consequence they rendered a verdict unauthorized by the law and facts of the case. If there were some evidence which tended to show premeditation, so that a conflict in the evidence was produced, a very different question would be presented for our determination. In this case the proposition is presented — whether, where a prisoner is convicted by the verdict of a jury upon undisputed evidence of a crime involving his life, and an indispensable element to constitute such crime is unsupported by any evidence tending to prove the same, this court has the power to grant a new trial. We are of opinion that such power exists, and that a case is presented where it should be exercised.[1]

It is really the determination of a question of law upon undisputed facts, where there is a clear failure of proof upon a material point, and not the ordinary application to set aside a conviction on the ground that it is against the weight of evidence. In *Davis* v. *Spencer*,[2] Allen, J., remarks: "If there was no evidence the decision would be clearly erroneous in law." This case has been considered upon the assumption that no error was committed by the learned justice, either in his charge to the jury, or in any ruling upon the trial. We are clearly of opinion that the conviction should be awarded and a new tria ordered.

MILLER and HOGEBOOM, JJ., concurred in the result.

[1] Hillard on New Tr., p. 353, sec. 36.

[2] 24 N. Y. 390.

HOMICIDE — PROVOCATION — HUSBAND AND WIFE — ADULTERY.

## PRICE *v.* STATE.

[18 Tex. (App.) 474; 51 Am. Rep. 322.]

*In the Court of Appeals of Texas, 1885.*

**Under the Law Making** homicide by a husband justifiable when committed on one taken in the act of adultery with his wife, before the parties have separated, it is sufficient if the parties are taken in such circumstances as reasonably indicate that they have just committed or are about to commit the adulterous act. Adultery here means violation of the marriage bed, and not habitual carnal intercourse.

Conviction of manslaughter. The opinion states the case.

*Dowell & Wooten*, for appellant.

*J. H. Burts*, Assistant Attorney-General, for State.

WHITE, P. J. Appellant was convicted of manslaughter committed upon one William Chandler; his punishment being assessed at two years' confinement in the penitentiary.

Before the homicide, appellant had evidently become dissatisfied with the familiarity which had existed for some time, as shown in the conduct of his wife toward deceased and the deceased toward his wife. He may even have entertained suspicions that all was not as it should be between them, or to say the least of it, he felt that their conduct was highly improper.

On the night of the homicide he had evinced this state of feeling of dissatisfaction and suspicion in more than one particular when deceased and his wife had been seen whispering and "carrying on together" before he retired to his bed, leaving his wife, the deceased and his mother still sitting by the fire. But he retired and went to sleep. Not long after, Chandler, the deceased, left; and not long after he had, ostensibly, gone to his home, defendant's wife, complaining of feeling sick, went out. She was gone so long that defendant's mother became uneasy, woke defendant up, and told him he had better go and see what was the matter. Defendant finally got up, and hearing persons talking in his corn pen, went back into the house, got his gun, went into the corn pen found the door open, went in and asked "who was there?" After this question had been repeated three times by him, his wife, who was lying down with some one in the crib, got up and answered "It's me, Price," and said she had gone there to get some corn. Defendant told her to come out and asked "who was with her." She replied "no one." Defendant insisted there was some one. She said "no," and went out at the door. Defendant again asked who was there and deceased got up and caught the gun. Defendant backed out of the door, the parties struggling over the gun. After getting out

of the door defendant said, "let go of the gun and let me go about my business," the wife begging her husband not to shoot him. Chandler then turned loose his hold of the gun and defendant shot him. After the shooting, when a light was struck, the coat of the deceased was found spread out in the crib, at the place where he and defendant's wife had been lying down.

In his voluntary statement, which was read by the prosecution as evidence at the trial, defendant says: "I do not know what they (Chandler and my wife) were doing. I did not take time to investigate that. I knew they were there for no good. That was the only time I ever saw them lying down together any where. I can't say that I thought they were having connection with each other at the time I called to them at the door of the crib, but by finding them together I supposed that their object was to have connection with each other, and I shot him, Chandler, because I felt that that was the object of their being together at that time."

This concise statement of the substance of the facts will sufficiently illustrate the main question presented in the record, and so ably argued by appellant's counsel.

The defence claimed was that under the facts stated and our law, the homicide was justifiable. Our statute so reads: "Homicide is justifiable, when committed by the husband upon the person of any one taken in the act of adultery with his wife, provided the killing take place before the parties to the act of adultery have separated." [1] We are not aware that a similar statute, making such a homicide justifiable, can be found in the codes of any other State; though the principle and precedent from which ours is derived is of the most ancient origin. But in most, if not all the States, as at common law a killing under such circumstances would reduce the homicide from murder to manslaughter.

Blackstone says: "So, if a man takes another in the act of adultery with his wife, and kills him directly upon the spot, though this was allowed by the laws of Solon as likewise by the Roman civil law (if the adulterer was found in the husband's own house), and also among the ancient Goths, yet in England, it is not absolutely ranked in the class of justifiable homicide as in the case of a forcible rape, but it is manslaughter. It is, however, the lowest degree of it; and, therefore, in such a case the court directed the burning in the hand to be gently inflicted, because there could not be a greater provocation." [2]

Mr. Bishop states the rule as it now obtains thus: "If a husband finds his wife committing adultery, and, provoked by the wrong, instantly takes her life or the adulterer's * * * the homicide is only man-

[1] Penal Code, art. 567.

[2] 4 Bla. Com. (Chitty), side p. 191.

slaughter. But if on merely hearing of the outrage, he pursues and kills the offender, he commits murder. The distinction rests on the greater tendency of seeing the passing fact, than of hearing of it when accomplished, to stir the passions; and if a husband is not actually witnessing the wife's adultery, but knows it is transpiring and in an overpowering passion, no time for cooling having elapsed, he kills the wrong-doer, the offense is reduced to manslaughter."[1]

Our statute uses the expression, "taken in the act of adultery with the wife." The question is as to the proper meaning or construction of these terms. Do the words, when properly construed, mean that the husband must discover, find, or see the wife and adulterer in the very act of illicit intercourse or copulation in order to constitute the offense denominated "taken in the act of adultery."

Such positive proofs of the commission of the crime of adultery are not required and are rarely attainable. As a crime adultery itself may be established and proven by circumstantial testimony.[2] Should the law hold the husband to a greater or higher degree of proof than itself requires to establish a given fact? It is a late hour of the night — the parties are found in a corn crib some distance from the house, lying down in the dark. They refuse at first to answer when called; then when the wife answers, she denies that any one is with her — when deceased gets up he clutches the gun — defendant finds that the one whose previous conduct and "carrying on" with his wife has excited his suspicions is the one he has thus found in company with his wife. What would any reasonable, sensible man have concluded from these circumstances? In other words, how did the matter reasonably appear to defendant? To him are not these facts "confirmations strong as proofs of holy writ?" Could it have been otherwise than that he had caught the parties in the act of adultery, either just as they were about to commit, or just after they had in fact committed it? His voice when he called perhaps had arrested them in the very act of carnal coition, and if that were so, then were not the parties caught or taken by him in adultery? Does not the law always estimate a man's right to act upon reasonable appearances? Taking into consideration the *res gestæ* — taking the acts of the parties and their words coupled with their acts — and were not the appearances of a character such as would have created the reasonable apprehension and conviction, in a person of ordinary mind, that the parties thus taken were taken in the act oı adultery?

We are of opinion that the correct doctrine is that enunciated in *State* v. *Pratt*.[3] In passing upon the construction and application of

1 2 Bish. Cr. L. (7th ed.), sec. 708.

2 Richardson *v.* State, 34 Tex. 142.

3 7 Houst. 249.

a statute substantially similar to ours, except that in Delaware the homicide under such circumstances would only have been reduced from murder to manslaughter instead of being justifiable, as with us, it was held: "If a husband find another in the act of adultery with his wife, and in the first transport of passion, excited by it then and there kills him, it will not be murder but manslaughter only. It is not necessary, however, that he should witness an act of adultery committed by them. If he saw the deceased in bed with his wife or leaving it, or found them together in such a position as to indicate with reasonable certainty to a rational mind that they had just then committed the adulterous act, or were then about to commit it, the effect will be the same; and if under such circumstances the mortal blow was then and there given, the killing will be manslaughter merely. But no other knowledge on the part of the husband, however positive, otherwise acquired of their adulterous intercourse can suffice to mitigate and reduce the crime from murder to manslaughter." [1]

As to a proper construction of the expression "taken in the act," we can not believe that the law requires or restricts the right of the husband to the fact that he must be an eye witness to physical coition of his wife with the other party. As we have seen, adultery can be proven by circumstances and the circumstances in this case were not hearsay so far as this defendant was concerned; they transpired in his own presence, sight and hearing. A mistake may possibly exist as to the fact; "but if a person laboring under a mistake as to a particular fact shall do an act which would otherwise be criminal, he is guilty of no offense;" [2] provided it be such mistake as does not arise from want of proper care on his part.[3] A party may always act upon reasonable appearances, and his guilt depends upon the reasonableness of the appearances, judged of from his own standpoint.

Mr. Bishop's rule as above quoted also commends itself to us as both just and proper: "If a husband is not actually witnessing his wife's adultery, but knows it is transpiring and in an overpowering passion, no time for cooling having elapsed, he kills the wrong-doer, the offense is reduced to manslaughter." [4] If the offense would be manslaughter at common law and in most of the other States it would be justifiable homicide under the special provisions of our statute.[5]

In his charge to the jury the learned trial judge instructed them fully and ably upon the law of murder of the second degree (murder in the first degree being abandoned) and manslaughter. His charge

1 See same case in 1 Cr. L. Mag. 809, 810.

2 Penal Code, art. 45.

3 Penal Code, art. 46.

4 State v. Holmes, 54 Miss. 153; Biggs v. State, 29 Ga. 723; Cheek v. State, 35 Ind. 492. And to the same effect is Maher v. State, 10 Mich. 212.

5 Penal Code, art. 576.

upon justifiable homicide, predicated upon the statute, was in these words, viz.: "If the jury find that the defendant shot and killed the said Chandler at the time and place as alleged, and it also appears from the testimony that defendant shot and killed said Chandler when taken in the act of adultery or carnal intercourse with the wife of the defendant and before they (Chandler and his wife) had separated, then they will find him not guilty."

The very gist of the issue made by the facts in the case was as to whether the facts tended to show that the parties were "taken in the act of adultery," and in all such cases we imagine the principal contest will be as to that fact. Such being true, it is a part of the law of such cases that the jury should be properly instructed as to what is meant by the expression "taken in the act." Without some explanation of the phrase, a jury would scarcely be able to comprehend and understand its import, so as correctly to apply it to the facts. They would perhaps be most likely to interpret it as meaning that the parties must be taken in the very act and process of carnal intercourse and copulation.

Again it was important that the jury should have been instructed as to the meaning of the other expression used in the statute, "before the parties to the act of adultery have separated." Giving the language a too literal coustruction, they might infer that it meant that the parties must be physically united with the *rem in re*, in the act of copulation, and that it would be a separation though they might still be in the same bed or same room. Evidently the statute means no such thing, and contemplates only that parties are seen together in company with each other, after the act, when the homicide is committed.

Again it is most clear that the word "adultery" as used in the statute can not be or mean, the adultery which is defined as a specific offense by the code, and which is the "living together and carnal intercourse with each other, or habitual carnal intercourse with each other," etc., of a man and woman, etc.[1]

It can not be that a statutory adultery must be shown by a husband justifying under the law we are discussing. Evidently ecclesiastical adultery is meant, adultery as it is known in common parlance "violation of the marriage bed," whether the adultery consisted of one or more acts, or whether the parties lived in habitual carnal intercourse or not. It was part of the law of the case that "adultery" as used in this statute, should have been explained to the jury.

There were no special exceptions to the charge of the court, but the defects of omission pointed out are, in our opinion, fatal to the sufficiency of the charge, which under the statute must set forth distinctly

1 Penal Code, art. 333.

the law applicable to the facts. Defendant's counsel submitted several requested instructions which should have called the attention of the court to the omissions in its own charge, though it might not feel inclined to give said instructions as presented and requested.

For the errors in the charge of the court as above pointed out, the judgment is reversed and the cause remanded.

*Reversed and remanded.*

---

MURDER — MANSLAUGHTER — PROVOCATION — ADEQUATE CAUSE.

## HUDSON *v.* STATE.

[6 Tex. (App.) 565.]

*In the Court of Appeals of Texas, 1879.*

1. **The Charge of the Court** upon the law of manslaughter, in defining "adequate cause" as arising from the use of insulting language towards a female relative by the deceased told the jury that such language, unless it was used in the presence of the female, did not constitute "adequate cause" within the meaning of the statute. *Held,* error.
2. **The Defendant in a Murder Trial** can not put in evidence the dangerous or desperate character of the deceased in justification, but he may prove it in excuse for the killing, provided he first shows that the deceased manifested a purpose of attacking him, and he was aware of the dangerous character of the deceased.

Appeal from the District Court of Bell. Tried below before the Hon. L. C. ALEXANDER.

The indictment charged the murder of J. J. Crow. The conviction was for murder in the second degree, and the penalty imposed was ninety-nine years in the State penitentiary.

The dying declarations of the deceased, made without solicitation, and in anticipation of death, were testified to by several witnesses. The substance of them was, that on the evening of the 1st of April, 1879, the deceased started to Dr. Russell's for medicine for his sick family. His route lay by the school-house where the defendant was teaching. School was in session, and the deceased saw the defendant in the school as he was passing. From Dr. Russell's he went to Little River City, and when he stepped into Fletcher's store he saw the defendant. He was somewhat surprised, as it was early, and the defendant usually dismissed school quite late. From Fletcher's store the deceased went on to Hale & Wilson's saloon, to get a bottle of whisky. While in the saloon, behind a partition, talking to Hale and Dave Robertson, the defendant came in and looked behind the partition. Pres-

ently the deceased came from behind the partition, bought his whisky, and himself and Robertson, who lived in the same direction from the town, got on their horses and started home. They had traveled some little distance, when, looking back, they saw defendant coming towards them. Defendant rode up on the side of Robertson, and the three rode on abreast until they reached a point in the road where Robertson's route diverged. At this point Robertson took a drink from deceased's bottle, and left the parties. The defendant declined to drink. Deceased then remarked: "If we can't drink together, we can ride together;" to which the defendant assented, saying that he never refused to ride with any one. The two rode on together, in friendly discussion of the school matter about which they had previously disagreed. When near Thornton's residence, defendant checked up his horse, and, as the deceased turned his face to observe the cause, he received a shot in the right side of his face. Deceased fell, and for some time remained unconscious, but finally recovered sufficiently to reach a neighbor's house, from where he was taken home.

The evidence of the deceased taken at the preliminary trial of the defendant, upon a charge of assault with intent to murder, comports with the above; but adds that, when discussing the school matter, the defendant asked him why he thought that he (the defendant) "had not treated him (the deceased) right;" and he answered, "I know you are no school-teacher, in the first place, and you have married a prostitute." He did not at that time say to defendant, "God d—n your soul, I will bring you to time yet."

The witness Wilson corroborates the statements as to what occurred at the saloon, and the witness Robertson made the same statement of the occurrences from the time the deceased entered the saloon until they separated at the forks of the road.

Thomas Clegg testified, for the defence, that in the preceding February the defendant and the deceased met at a party in the neighborhood, and engaged in a quarrel. The deceased asked the defendant if he had said that he had arrested his (the deceased's) father for horse-stealing, — following up this question with the statement that, if so, he had told a d—n lie, and he would kill him for it. Defendant answered that he had arrested one Zeke Crow for horse theft, and that if deceased had a brother of that name, then he had said it. Deceased responded that he had told a d—n lie, — that he had never arrested a man named Zeke Crow.

The testimony of this witness is corroborated by Jasper Wiley, who testified, in addition, that on the second Saturday of the previous March the deceased read a letter to him, and asked him if he had ever heard defendant say anything about him. Being answered in the neg-

ative, the deceased then said, "Hudson and I can not live in the same country."

Another witness detailed the quarrel between the deceased and the defendant at the party, in substance as above set out. These statements are disputed by A. J. Smith. Smith testified that he went with deceased to the house of Shaver, where the party was given (not knowing there was to be an entertainment), to see Shaver about a report that the defendant had told him that he had arrested deceased's father for horse stealing. Witness went with deceased, at his request, to hear what might be said. On their return homeward they met the defendant near the fence. Deceased asked the defendant there if he had circulated such a report. Defendant answered that he had arrested the father of one Zeke Crow for that offense, and that if deceased had a brother of that name, then he had arrested his father for such offense. Deceased merely answered that defendant had "better go slow" when he slandered his old father, who had been dead forty-two years, and before defendant was born. He did not threaten to kill defendant. If such threat had been made, witness would have heard it. It was in evidence that deceased was one of the school trustees.

*Thomas Ball*, Assistant Attorney-General, for the State.

ECTOR, P. J. The defendant was indicted by the grand jury of Bell County, for the murder of J. J. Crow. He was tried, found guilty of murder in the second degree, and his punishment assessed at confinement in the penitentiary for ninety-nine years.

Defendant filed a motion for new trial, and in arrest of judgment which were overruled, and he has prosecuted an appeal to this court. We will briefly refer to such portions of the evidence as we deem necessary to a proper discussion of the questions presented in the record, and on which the defendant relies for a reversal of the judgment.

The evidence shows, beyond all question, that the prisoner killed the deceased. Defendant was a school teacher in Bell County, and the deceased was one of the trustees of the school. These parties had been unfriendly for several months. Some time in January last, there was held what is termed in the statement of facts a school meeting, in the school-house where defendant kept school. The defendant and Crow were there. Defendant asked Crow to explain something he had said about his family. Crow refused to explain anything about it, and said that "this was not the place; some other time would do." Shortly after this, Crow, in company with a friend, called on the defendant in regard to certain remarks which he had been informed Hudson had made about his (Crow's) father. Crow asked defendant what he had said about arresting his (Crow's) father for horse stealing. Defendant told him that he had said he arrested Zeke Crow for horse stealing, and

that he had not arrested his father for horse stealing, unless his father had a son named Zeke Crow. Crow said it was a d—d lie; and some of the persons present say that he threatened to take the life of defendant. On the 1st of April, 1879, Crow left home, going to see Dr. Russell, who lived in Little River City, to get some medicine for a sick family. His route was by the house where defendant was engaged, as he passed, in teaching school. Crow stopped at the house of Dr. Russell a short time, and then went to a store to buy a bottle of whisky, and saw Hudson in Little River City. Crow left there in company with the witness Robertson, and both of them traveled the same road a part of the way home. After Crow and Robertson had ridden a short distance, Hudson caught up with them, and the three rode along together until the road forked, one part leading to Robertson's home and the other to Crow's, *via* Thornton's house, where Hudson was boarding. Crow, before separating from Robertson, pulled out his bottle of whisky and asked him to take a drink, which he did, as the three were halted in the road. Crow also invited Hudson to take a drink, and he declined, saying he never drank. Robertson here parted with Crow and Hudson. Crow then said to Hudson, if they could not drink together, they could ride together. Hudson said, all right, — that he never refused to ride with anybody, and the two rode off together. After they had ridden some distance Crow testified that defendant pulled out his pistol, and fired suddenly and unexpectedly upon him, shooting him in the right side of his face, in his temple; that when he was shot he fell off of his horse, and lay insensible for some time; and finally, when he came to his senses, succeeded, after much delay, in making his way to a house about a fourth of a mile distant.

Counsel for the prosecution read, on the trial, the testimony of Crow, given in evidence before a justice of the peace sitting as an examining court, where the matter under investigation was the shooting of Crow by defendant, from which we make the following extract, to wit: "After riding about a quarter of a mile, the subject regarding the free-school, about which we had had some trouble, was raised. I was a trustee of the school community. No angry words passed between us. I told him I did not want any trouble about it. We had no quarrel before he shot me. Defendant asked me, on the road, if I thought I could 'get away with him.' I said, 'No; I did not want to harm any one.' We had been riding side by side until we neared the place where I was shot. * * * The defendant checked his horse, which threw him about half the length of his horse in my rear. I turned my face towards him, and saw him throw up his right arm. I immediately heard the report of a pistol. I fell from my horse after I was shot. * * * I was powder-burnt on the right side of my face — the

side on which I was shot — by the firing of the pistol. The ill-feeling of the defendant towards me has existed for about three or four months."

Crow, on cross-examination, also testified that, "I did not say, in the conversation referred to in direct examination, 'Hudson, you have not treated me right.' I told him I knew he was no school-teacher, in the first place; and he had married a prostitute. I did not say to defendant, 'God d—n your soul, I will bring you to trouble yet,' Crow was shot about dusk in the evening of the 1st of April, 1879, and the shot produced his death on the 13th of the same month.

On the trial of the cause in the District Court, after the defendant had introduced all his evidence, which is set out in the statement of facts, his counsel stated to the court he had no testimony to offer to show that Crow had done any act manifesting an intention to injure the defendant at the time of the alleged homicide; and then asked R. P. Talley, one of the defendant's witnesses, the following question: "Was J. J. Crow a man of dangerous and violent character?" To which the counsel for the State objected; which objection was sustained by the court, because, in view of the evidence adduced, and the above statement of the counsel of defendant, said evidence was irrelevant and immaterial. We do not think the court erred in this ruling.

It is a good general proposition that the character of a person does not justify a taking away of his life, when the act would be otherwise unjustifiable. Yet there are exceptions to this general rule. The general character of deceased for violence may be proved when it would serve to explain his actions at the time of the killing. The actions which it would serve to explain must first be proved, before it would be admissible as evidence. The Supreme Court of Louisiana, in the case of the *State* v. *Robertson*,[1] say: "The defendant, who is on trial for murder can not introduce evidence of the quarrelsome or dangerous character of the deceased, in justification; but he may introduce evidence of such character in excuse for the killing, provided he first shows he was actually attacked by the deceased, and that he was aware of the latter's character." However bad and desperate the character of the deceased may have been, and however many threats he may have made, he forfeits no right to his life, until by an actual attempt to execute his threats, or by some act or demonstration at the time of the killing, taken in connection with such character and threats, he induces a reasonable belief on the part of the slayer that it is necessary to deprive him of life in order to save his own, or to prevent some serious bodily injury from being inflicted upon his person.[2]

[1] 30 La. An. 340.

[2] Stevens *v.* State, 1 Tex. (App.) 591; Horbach *v.* State, 43 Tex. 254; 1 Whart. Cr. L., sec. 641; 2 Bish. Cr. L.625-630.

We believe the court did not err in refusing to permit the counsel for defendant to read in his argument, on the trial of the cause, the cases referred to in defendant's second and third assignments of error. It appears that counsel for defendant offered to read to the court below the case of *Marshall* v. *State*,[1] which the court declined to hear, because it was sufficiently advised of the law of the case. Counsel for defendant also offered to read to the jury the case of *Horbach* v. *State*,[2] when the court stated that the counsel might read so much of the same as illustrated this case or discussed the weight of evidence. Whereupon the counsel proposed to read the whole of the case to the jury, which the court refused to hear, because the court was fully advised, and understood and remembered said case.

The extent to which counsel may read from legal authority, or from works of general science, rests within the sound discretion of the court, and the manner of exercising the judicial discretion will not be revised on appeal, except in a clear case of its abuse. It has been held, both by the Supreme Court and this court, that it is better for the protection of the rights of the parties that the exercise of this privilege should be regulated by judicial discretion than that it be left to the unlimited discretion of counsel, governed by the powerful motives of interest and ambition.[3]

The fourth assignment of error is, that "the court erred in the eighth paragraph of his charge to the jury." This assignment presents a question which, we believe, has never before been passed upon by a court of last resort in this State, and upon which there is quite a difference of opinion among many of our best lawyers. In order fairly to present the question here made, we will copy the seventh and eighth paragraphs of the charge, which the court gave as instructions to the jury on the law of manslaughter: —

"7. By adequate cause is meant such as would commonly produce a degree of anger, rage, resentment, or terror in a person of ordinary temper, sufficient to render the mind incapable of cool reflection. Insulting words or gestures are not adequate cause, in the legal meaning of said phrase. Insulting words or conduct of the person killed, towards a female relative of the party guilty of the homicide, is adequate cause, provided the killing took place immediately upon the happening of the insulting conduct or words, or as soon thereafter as the party killing may meet with the person killed, after having been informed of such insults, and providing such insulting words or conduct

1 33 Tex. 664.

2 43 Tex. 242.

3 See Dempsey *v.* State, 3 Tex. (App.) 429; Hines *v.* State, 3 Tex. (App.) 483, and authorities there cited.

were the real cause of the killing, and produced the state of mind above described in subdivisions 6 and 7 of this charge.

"8. But insulting words of, about, and concerning a female relative who is not present, are not insulting words 'towards' a female relation as used herein before, and would not necessarily be 'adequate cause' as fixed by the law; but, if a person used insulting words to another about a female relation of the latter, and in the opinion of the jury the words such are as would commonly produce a degree of anger, rage or resentment in a person of ordinary temper, sufficient to render the mind incapable of cool reflection, and such condition of mind is thereby produced, and such second person, at the time of such provocation, killed such first person, the act would be manslaughter."

We believe that the first part of the eighth subdivision of the charge of the court was not a correct enunciation of the law, and was well calculated to mislead the jury. In telling the jury "that insulting words of, about, and concerning a female relation who is not present are not insulting words 'towards' a female relative as used herein, and would not necessarily be adequate cause as fixed by the law," we think the court committed an error. In our judgment, the Legislature never intended, in subdivision 4 of article 2254, Paschal's Digest, to restrict the insulting words of the person killed, "towards" a relative of the party guilty of the homicide, to remarks made to her or in her presence, but intended to include insulting words about a female relative, whether she was present or absent.

Mr. Webster, in his Unabridged Dictionary, gives "toward," when used as a preposition, the following meaning, to wit: "Toward — 1. In the direction to. 2. With direction to; in a moral sense, with regard to, regarding. 3. With ideal tendency to. 4. Nearly." If the Legislature had intended that such insulting words must be used by the deceased to or in the presence of the female, in order to reduce the killing to manslaughter, some other word than "towards," and one that would have better expressed the idea, would have been used in the statute. It appears clear to us that, on the plainest principles of justice and reason, it could make no difference, so far as the provocation is concerned in this instance, whether the deceased told the wife of the defendant that she was a prostitute, or her husband that he had married a prostitute. The extent of the transport of passion, to extenuate the guilt of the homicide, would be as great in the one case as in the other. And in every case when such a defence is relied on to reduce the killing to manslaughter, the jury must be at liberty to determine whether, under all the circumstances, the insulting words were the real cause which provoked the killing. The court did not err in overruling defendant's motion in arrest of judgment.

As this case must be reversed on account of the error in the charge of the court, it is unnecessary to notice the other assignments of error; they will not likely occur on another trial.

The judgment of the District Court is reversed and the cause remanded.

*Reversed and remanded.*

---

HOMICIDE — MURDER — COOLING TIME.

## STATE *v*. MOORE.

[69 N. C. 267.]

*In the Supreme Court of North Carolina, 1873.*

1. **Cooling Time** is a question of law for the court and not a question for the jury.
2. **Cooling Time — Case in Judgment.** — The separation of two persons engaged in a fist fight, which eventually terminates in a homicide, to justify a verdict of murder must be for a time sufficient for the passions excited by the fight to have subsided, and reason to have resumed its sway. Hence, where one witness testified that the prisoner was "absent no time," and another, that after the first fight he started to go home, and looking back the parties were again fighting, *held*, there was not such sufficient cooling time to justify a verdict of murder.

Indictment for murder, tried before LOGAN, J., at Spring Term, 1873, of the Superior Court of Mecklenburg County.

Prisoners were indicted for the murder of one Robert Smith, and having severed in their trial, Charles Moore was tried and convicted.

It was contended for the prisoner that the crime committed was manslaughter. The evidence for the State was substantially as follows: —

Sarah Ann Davidson testified that she lived a short distance from the deceased on the same side of the alley; the prisoner lived on the opposite side of the alley, and opposite the house of the witness. When the fight took place witness was opposite prisoner's house, and the deceased was going along the street towards the house, and when opposite the gate the prisoner said, "Who is that?" Deceased answered, "It is me." Prisoner said, "What do you want?" Deceased replied, "I don't want you, but want to see Mary" (living with prisoner as his wife). Prisoner then said, "You were listening to my conversation." Deceased replied, "That he was doing no such thing." Prisoner replied, "You are a damned liar;" to which deceased said, "You are an infernal liar." Curses followed. Deceased was in the street, and said to prisoner, "If you come out and curse me I will hit you." Prisoner went out, he and deceased continued to quarrel, prisoner alleging that the deceased was eavesdropping, and deceased deny-

ing it all the while; then they both went together fighting; were not long engaged in a fight when they stopped; prisoner's so-called wife called him into the house; he went in, but remained (in the language of the witness) "absent but no time." Deceased was still in the street; witness walked off; heard deceased say that prisoner had killed him; the parties were still close together; deceased then went home; he was stabbed in the left side; it was about eight o'clock p. m. and cloudy; witness saw no knife; deceased and prisoner were not friendly; they did not visit.

On her cross-examination the witness testified: At first the parties did not appear mad; witness heard all the talk; they made considerable fuss; heard prisoner say to deceased: "I will report you to the Mayor."

Jane Smith, a daughter of the deceased, testified that when she went out they were fighting; she tried to get deceased home; went between them and tried to separate them; deceased walked off; prisoner said: "If you hit me again I will sicken you;" Mary Moore, prisoner's wife, said, "Let them fight," and pushed the prisoner to the deceased and they went together fighting; deceased jumped away and said, "Charley has killed me;" deceased went home and fell in the door; he was stabbed in the left side and lived an hour and a half.

Other witnesses were examined for the prosecution, but no new facts were elicited. The prisoner offered no evidence, but through his counsel asked his honor to charge the jury: —

That if the jury are satisfied that the parties upon a sudden quarrel got into a fist fight, and the prisoner, before separation, gave the fatal stab, it would be manslaughter.

That a mutual combat with fists is a legal provocation, and reduces a slaying by a deadly weapon (not shown to be unusual) to manslaughter.

That the evidence discloses that there was not sufficient "cooling time" between the fights.

Other instructions were asked, but as the case in this court turned upon the last, they are not necessary to an understanding of the decision.

In answer to the last instructions, his honor charged the jury that if parties engage in any affray, or there is other legal provocation, and they become separated, then if there is sufficient "cooling time," it will be murder; that if one of two parties, after separation, goes off and then returns and again engages in an affray, then if there was sufficient time for the passions to cool, it would be murder.

That it was the duty of the jury to apply these principles to the evidence, and if they were satisfied that the prisoner was guilty of murder, they should so find; otherwise to find him guilty of manslaughter.

Verdict, guilty of murder. Rule for a new trial; rule discharged. Judgment and appeal.

*Purnell*, for prisoner.

Attorney-General *Hargrove*, for the State.

BOYDEN, J. We think his honor erred in refusing the sixth prayer for specific instructions, to wit: That the evidence discloses that there was not sufficient cooling time between the fights.

The whole testimony shows that there was a sudden quarrel resulting in blows with the fists; that at length the combatants separated, and the evidence as to the length of time they were separated is first by the witness, Sarah Ann Davidson, witness for State, who says that "the prisoner was absent but no time." William Smith, another witness for the State, testified that he saw the parties fighting; deceased told witness to go home, and witness started back; prisoner and deceased had separated; witness looked back and saw they were fighting again, then heard the deceased say that the prisoner had killed him.

It is well settled in our State that the question of cooling time is a question of law to be decided by the court, and not a question for the jury. It is also settled that if such a question is left to the jury, and they decided the question as the court should have decided it, this error forms no cause for a new trial. So the question is distinctly raised: Does the evidence show that in law there was sufficient cooling time? The court here are of opinion that there was not sufficient cooling time. The two witnesses for the State, and the only ones that testified upon this question, state the fact that the prisoner was absent no time, in other words, the separation was so short that she could not compute the time; and the other witness says the prisoner and the deceased were separated and deceased desired witness to go home; that he started, that he looked back and they were again engaged in the fight. It seems to the court that this testimony does not show that there was a sufficient time during the separation for the passions excited by the fight to have subsided, and reason to have resumed its sway, and on this ground there must be a *venire de novo*.

This renders it unnecessary to notice the other questions made in the case.

PER CURIAM.

*Venire de novo.*

## MANSLAUGHTER — USE OF DEADLY WEAPON.

### PEOPLE *v.* CROWEY.

[56 Cal. 36.]

*In the Supreme Court of California, 1880.*

**An Instruction that if one Slay Another** in the heat of passion and without malice, the crime can not be manslaughter, if a dangerous weapon is used, is error.

Appeal from a conviction and denial of a new trial in the Supreme Court of Napa County, WALLACE, J.

*Alexander Campbell* and *Robinson & Johnston*, for the appellant.

The *Attorney-General* for the State.

MORRISON, C. J. [After passing on a question of practice.] We will now pass to the instructions in the case. It is claimed on behalf of the appellant, that the court erred in modifying instructions nineteen and twenty. These instructions are definitions of the crime of manslaughter, and are as follows: —

19. "Manslaughter is the unlawful killing of a human being, without malice, upon a sudden quarrel or heat of passion. If two parties upon a sudden quarrel, fight one another, upon equal terms, and one slays the other, not in self-defence, but under the exclusive influence of the passion engendered by the quarrel, and no undue advantage is taken *or dangerous weapon used*, even though the party killing may be the aggressor, he is not guilty of murder.

20. "If the jury find that John Crowey and the deceased, upon a sudden quarrel, engaged in a combat upon equal terms, and after the deceased had declined any further combat, but before the passion engendered in the mind of John Crowey, by the conflict, had had time to cool, John Crowey struck the deceased an additional blow or blows, *not with a dangerous weapon*, by reason of said passion, he is not guilty of murder."

These instructions, as worded by defendant's counsel, did not contain the words italicised, but they were changed by the court before given to the jury, and the words "or dangerous weapon used," were inserted in the nineteenth instruction, and the words, "not with a dangerous weapon" were introduced into the twentieth instruction.

The effect of these instructions, as we understand them, is, that if one party slay another in the heat of passion, and without malice, the crime can not be manslaughter if a dangerous weapon is used. Such, in our opinion, is not the law. Whether the killing is murder or manslaughter, does not depend upon the fact whether or not a dangerous weapon was used; and to make the character of the crime depend not

upon the intention with which the act was done, but upon the character of the instrument by means of which the death-blow was inflicted, is not, in our opinion, justified by any legal principle.

In the case of *Erwin* v. *State*,[1] the following instructions were held erroneous: "If you find from the evidence that the defendant used a deadly weapon in this case, and that death ensued from the use of such deadly weapon, then the law raises the presumption of malice in the defendant, and also an intent on his part to kill the decedent." The court says: "This was not an abstract proposition. It covered the case before the jury, and in our opinion, a jury of ordinary intelligence might well understand that the law fixed the guilt of the defendant as a murderer, if the evidence showed that he took the life of the deceased by the use of a deadly weapon without regard to other circumstances. * * *

"As an abstract proposition, where the circumstances of a homicide are not known further than the mere fact, that the death was caused by the use of a deadly weapon, we do not deny that the jury may from such fact alone, infer both malice and a purpose to kill. But where the attending circumstances are shown in detail, some of which tend to disprove the presence of malice or purpose to kill, it is misleading and erroneous to charge a jury that in such a case the law raises a presumption of malice and intent to kill from the isolated fact that death was caused by the use of a deadly weapon. In such case, the presence of malice or intent to kill must be determined from all the circumstances proven, including, of course, the character of the weapon."

The case of *Cotton* v. *State*,[2] is also in point. In that case it was held, that the qualification by the court made to the third instruction was clearly erroneous. The court says: "The instruction is in substance, that if Cotton killed Smith, not in pursuance of a premeditated design, but in a sudden quarrel, the crime of murder is not made out. The modification made, is, 'unless Cotton sought the quarrel and used a deadly weapon.' The question was whether malice prompted the accused to kill. He interposed as his defence by the instruction, 'no design to kill, and that the killing was on a sudden quarrel.' The court say to him that this is no defence, not even to mitigate the crime, if he sought the quarrel and used a deadly weapon. Now, he may have done both without being guilty of murder, for he may not, by seeking the quarrel, have intended the slightest personal injury to the deceased, and he may from sudden provocation have used his weapon, or he may have been forced to do so in self-defence, although he was the aggressor in the quarrel. The modification amounts to this: That although there

[1] 29 Ohio St. 186.

[2] 31 Miss. 505.

must be a formed design to take life to constitute murder, yet such design is not necessary when the party killing seeks the quarrel and uses a deadly weapon. There must be proof of malice in some form; the seeking of the quarrel and using the deadly weapon, may be evidence for the purpose. But this is what the defendant below was endeavoring to meet, by showing no design to take life, because the killing occurred on a sudden quarrel. The modification virtually declares this to be no defence, if the party sought a quarrel."

In the case of *People* v. *Freel*,[1] the court instructed the jury as follows: "You will also observe that the difference between murder and manslaughter is, that in manslaughter there is no intention whatever, either to kill or do bodily harm. The killing is the unintentional result of a sudden heat of passion, or of an unlawful act committed without due caution or circumspection." This court held: "This is clearly erroneous. Whether the homicide amounts to murder or manslaughter merely does not depend upon the presence or absence of the intent to kill. In either case there may be a present intention to kill at the moment of the commission of the act. But when the mortal blow is struck in the heat of passion, excited by a quarrel, sudden and of sufficient violence to amount to adequate provocation, the law, out of forbearance for the weakness of human nature, will disregard the actual intent, and will reduce the offense to manslaughter. In such case, although the intent to kill exists, it is not that deliberate and malicious intent which is an essential element in the crime of murder." These cases sufficiently show that it is not the character of the weapon used that determines the degree of the offense, but it is the presence or absence of deliberation and malice that makes the crime manslaughter or murder.

It is claimed, on behalf of the State, that there was nothing in the case to justify the jury in finding the defendant guilty of a less degree than murder in the first or second degree. It is not our purpose to express any opinion upon the evidence, and it will be sufficient for us to say, that there was some evidence tending to show that the defendant was not the aggressor; that there was a mutual combat; that both sides used deadly weapons; and enough to make it the duty of the court to give the jury a correct definition of the crime of manslaughter.

It is unnecessary for us to examine other errors assigned, as the judgment will have to be reversed for the errors contained in the above instructions.

*Judgment and order reversed.*

SHARPSTEIN, J., and MYRICK, J., concurred.

[1] 48 Cal. 436.

## MANSLAUGHTER IN FIRST DEGREE — ATTEMPT TO COMMIT ABORTION.

## STATE v. EMMERICH.

[1 West Rep. 760.]

*In the Supreme Court of Missouri, 1885.*

1. **An Indictment for Manslaughter** in the first degree, brought nnder the Revised Statutes of Missouri[1] which does not charge that the killing was done without a design to effect death, nor while the doer of the act was engaged in the perpetration or attempt to perpetrate any crime or misdemeanor not amounting to a felony, is insufficient.
2. **An Indictment** brought under sec. 1241, for the crime of manslaughter in the first degree, perpetrated in the attempt to commit an abortion, is bad, where the descriptive words "pregnant with a quick child" are not employed; nor is it good under section 1268, which defines the crime of ahortion; since that section, at the time of the criminal act, did not apply to a case where death ensued in conseqnence of the criminal act.

Appeal from St. Louis Court of Appeals.

Indictment for manslaughter in the first degree, in perpetrating the crime of abortion.

The case is stated in the opinion of the court.

*B. G. Boone*, Attorney-General, for appellant.

The defendant attempted without a design to effect death, to produce abortion, and the death of the woman ensued from such attempt. This was murder at common law.[2] The defendant was attempting to perpetrate an offense which in itself was a misdemeanor under our statute; from his act a killing resulted which was murder at common law, and he was properly indicted under section 7,[3] for manslaughter in the first degree.

*Chas. P. & John D. Johnson*, for respondent.

Under the indictment there could be no conviction of manslaughter, either in the first or second degree.[4] The verdict should have been for a misdemeanor under section 34,[5] and not for manslaughter in the first or any other degree. To destroy or to attempt to destroy a "quick" unborn child is made a felony by our statute; while to destroy or to attempt to destroy an unborn child not "quick," by way of abortion, is only a misdemeanor.[6] In 1879, and in the Revised Statutes,[7] they have amended section 34,[8] by adding the following clause: "But if

[1] sec. 1238.

[2] 1 Hale's P. C. (1st Am. ed.), secs. 429, 430; Reg. v. Gaylor, 7 Cox. C. C., 253; 1 Whart. C. L. (8th ed.), secs. 316, 390; Whart. Hom. (2d ed.), secs. 41, 192; Com. v. Keeper of Prison, 2 Ashm. (Penn.) 227; Com. v. Jackson, 15 Gray, 187; State v. Moore, 25 Iowa, 128.

[3] p. 778, Gen. Stats.; sec. 1238, Rev. Stats.

[4] Wag. Stats., ch. 42, art. 2, secs. 9, 10, 34.

[5] sec. 34, ch. 42, art. 2, Wag. Stats.

[6] Wag. State., secs. 9, 10, 34, ch. 42, art. 2.

[7] sec. 1268.

[8] ch. 42, art. 2, of Wag. Stats.

the death of such woman ensue from the means so employed, the person so offending shall be deemed guilty of manslaughter in the second degree." This shows conclusively that when this alleged crime was committed there was no punishment for it but under said section 34 of Wagner's Statutes, which made it a misdemeanor. If the child had been "quick," and respondent had tried to destroy it by abortion and had killed it and the mother too in the attempt, he could only have been prosecuted for manslaughter in the second degree.[1] As to the meaning of "quick child" in law, see Wharton on Homicide,[2] *Regina* v. *Wycherley*,[3] 1 Beck's Medical Jurisprudence,[4] Taylor's Medical Jurisprudence,[5] *Rex* v. *Phillips*,[6] Burden of proving quickening is on State.[7] The court is also referred to the able opinion given in this case by BAKEWELL, J., of the Court of Appeals.[8]

SHERWOOD, J., delivered the opinion of the court.

The indictment in this cause is as follows: —

STATE OF MISSOURI,<br>CITY OF ST. LOUIS,<br>ST. LOUIS CRIMINAL COURT,<br>*March Term, 1879.* } *ss.*

The grand jurors of the State of Missouri, within and for the body of the City of St. Louis, aforesaid, now here in court duly impaneled, sworn and charged upon their oath, present that Charles P. Emmerich, late of St. Louis City, aforesaid, on the 30th day of December, 1877, with force and arms, in and upon the body of one Maggie Gibbons, a woman there and then pregnant and big with child, in the peace of the State then and there being, did willfully, feloniously and unlawfully make an assault and then and there unlawfully and feloniously use and employ in and upon the body and womb of the said Maggie Gibbons, a certain instrument of hard substance, the nature and description whereof is to these grand jurors unknown, by then and there inserting, thrusting and forcing the said instrument into the private parts and womb of the said Maggie Gibbons with the intent then and there and thereby to procure an abortion or miscarriage of said Maggie Gibbons, the same not being necessary to preserve the life of said Maggie Gibbons, and not being advised by a physician to be necessary for the purpose, and by means and in consequence of the employment and use of said instrument in and upon said Maggie Gibbons by the said Charles P. Emmerich

1 See sec. 10. ch. 42, art. 2, Wag. Stats., and so the law stands to-day; see sec. 1241, Rev. Stats.

2 p. 339.

3 8 C. & P. 263.

4 pp. 252, 177, 278.

5 p. 498.

6 3 Camp. 74.

7 Evans *v.* People, 49 N. Y 86; Com. *v.* Thompson, 108 Mass. 461.

8 State *v.* Emmerich, 13 Mo. App. 492.

aforesaid, she, the said Maggie Gibbons then and there became gravely wounded and mortally diseased of her body, and from the said 30th day of December, A. D. 1877, to the third day of January, A. D. 1878, in the City of St. Louis did languish, and languishing did live, on which said third day of January, in the year and in the city aforesaid, the said Maggie Gibbons of the mortal wound and disease aforesaid did die; and so the grand jurors aforesaid upon their oath aforesaid, do say that the said Charles P. Emmerich, the said Maggie Gibbons, in the manner and by the means aforesaid, willfully, feloniously and unlawfully did kill, slay and murder contrary to the form of the statute in such cases made and provided and against the peace and dignity of the State.

Upon this indictment the defendant was tried, found guilty of manslaughter in the first degree, and his punishment was assessed at imprisonment in the penitentiary for the period of five years.

The various statutory provisions relating to the crime of abortion or attempted abortion are as follows: —

Sec. 1241. *Manslaughter in second degree.* Every person who shall administer to any woman, pregnant with a quick child, any medicine, drug or substance whatsoever, or shall use or employ any instrument or other means, with intent thereby to destroy such child, unless the same shall have been necessary to preserve the life of such mother, or shall have been advised by a physician to be necessary for that purpose, shall if the death of such child or mother thereof ensue from the means so employed, be deemed guilty of manslaughter in the second degree.[1]

Sec. 1268. *Abortion* Every physician or other person, who shall willfully administer to any pregnant woman, any medicine, drug or substance whatsoever, or shall use and employ any means whatsoever, with intent thereby to procure abortion or the miscarriage of any such woman, unless the same shall have been necessary to preserve the life of such woman, or shall have been advised by a physician to be necessary for that purpose, shall, upon conviction, be adjudged guilty of a misdemeanor, and punished by imprisonment in a county jail not exceeding one year, or by fine not exceeding five hundred dollars, or by both such fine and imprisonment; [but if the death of such woman ensue from the means so employed, the person so offending shall be deemed guilty of manslaughter in the second degree].[2]

The act with which the defendant is charged occurred December 30, 1877, and at that time section 34,[3] was in force. Since then the section has been amended, and I have given the amendatory words in brackets.

1 Gen. Stats. 778, sec. 10.

2 6 Gen. Stats., p. 781, sec 34., amended.

3 Gen. Stats. 781.

It is insisted by counsel for the State that the indictment is sufficient under section 1238,[1] which reads: —

Sec. 1238. *Manslaughter in the first degree.* The killing of a human being, without a design to effect death, by the act, procurement or culpable negligence of another, while such other is engaged in the perpetration or attempt to perpetrate any crime or misdemeanor not amounting to a felony, in cases where such killing would be murder at the common law, shall be deemed manslaughter in the first degree.[2]

An examination of this section will, however, readily show that the indictment was not framed or intended to be framed upon it; and if it were so intended, it does not contain the constituent elements in that section set forth. It does not charge that the killing was done without a design to effect death nor that it was done while the doer of the act was engaged in the perpetration or attempt to perpetrate any crime or misdemeanor not amounting to a felony. These things may be inferred from the allegations made, but this will not answer; this is no case for inferences. And although the grade of the offense specified in that section is manslaughter in the first degree, and punishable by imprisonment in the penitentiary,[3] and therefore a felony,[4] it is nowhere charged in the indictment that the act itself which caused the death was feloniously done. It is true that it is alleged that the assault was made feloniously and that a certain instrument was used feloniously; but it is nowhere charged that the thrusting, etc., of such instrument was feloniously done. This itself would be a fatal defect.[5]

There is no rule of criminal law more firmly established than that which requires an indictment bottomed on a statute to contain all these forms of expression; those descriptive words, which will bring the defendant precisely within the definition of the statute.[6]

There are cases where a less degree of certainty will answer than in others; where descriptive words are not used in defining the crime; where words of equivalent import making the charge certain to a certain extent will be sufficient; but this case falls short of either standard. And there are cases where the pleader attempts to draft an indictment under one section and blunders into another; in such case the indictment may still charge an offense after rejecting surplusage.[7] But this is not the case presented. All redundant words may be stricken out from the indictment and still there will not be enough left to make a valid indictment under section 1238. Nor will the indictment fare any better when

1 Rev. Stats.

2 Gen. Stats. p. 778, sec. 7.

3 Rev. Stats., sec. 1251.

4 *Ib.*, sec. 1676.

5 State *v.* Feastor, 25 Mo. 324.

6 State *v.* Helm, 6 Mo. 243; State *v.* Ross, 25 Mo. 426.

7 State *v.* Seward, 42 Mo. 206.

examined by the light of the other sections already quoted. It is bad under section 1241,[1] because the descriptive words: "pregnant with a quick child" are not employed. Nor is the indictment good under section 1268, since that section at the time of the commission of the criminal act did not apply to cases where death ensued in consequence of such act.

It follows that the defendant was improperly convicted of manslaughter in the first degree, and would have been improperly convicted of any degree of that offense, as the indictment is insufficient viewed in any light or from any standpoint. I regret to be compelled to arrive at this conclusion, as this record is stained with a crime most atrociously cruel and brutal.

It only remains to say that the judgment of the Court of Appeals and its order discharging the defendant are affirmed.

All concur except HENRY, C. J., who dissents.

---

## MANSLAUGHTER — RAILROAD COMPANY — NEGLIGENCE.

## COMMONWEALTH v. FITCHBURG R. CO.

[120 Mass. 373.]

*In the Supreme Judicial Court of Massachusetts, 1879.*

1. **Where an Indictment** charges a single offense in several counts as committed in different ways, inconsistent with each other, a general verdict should be returned upon the whole indictment, as for a single offense, or a verdict of guilty upon the count proved, if either is proved, and not guilty upon all the others; and it is a mistrial to allow the jury to return a verdict of guilty upon each count; and, if such a verdict is rendered the government is not entitled to enter a *nolle prosequi* as to all the counts but one, and retain the verdict as to that count.
2. **The Degree of Negligence on the Part** of the servants of a railroad corporation required to be proved on an indictment under the General Statutes,[2] is not changed by the statute of 1871,[3] and, on an indictment under the latter statute, if negligence of the servants of the corporation is relied on, gross negligence must be averred and proved.
3. **If an Indictment Against a Railroad** corporation under the General Statutes,[4] and the statute of 1871,[5] does not allege that the neglect on the part of the corporation to give the signals required by law contributed to the death of the person killed, evidence of such neglect is inadmissible.

1 *supra*.
2 ch. 63, sec. 98.
3 ch. 352.
4 ch. 63, sec.
5 ch. 352.

Indictment, in five counts, under the General Statutes, and the statute of 1871,[2] to recover for the use of the widow and children of Charles Keniston, a fine, by reason of the loss of his life, from being run over on May 7th, 1874, by an engine and train of cars, of the defendant, at a place in Somerville where the defendant's railroad crosses Park Street, so-called, at grade.

The first count was as follows: "The jurors for the Commonwealth of Massachusetts, on their oath, present that the Fitchburg Railroad Company, a corporation duly and legally established in this Commonwealth, and duly authorized and empowered to propel engines and cars, by the power of steam, along, over and upon the railroad thereafter described, was on the seventh day of May, in the year of our Lord, one thousand eight hundred and seventy-four, as it still is, the owner of a certain railroad leading and extending from Boston, in the county of Suffolk in this Commonwealth, to and through the city of Somerville, in this said county of Middlesex, and further, and was then in full occupation, possession and use of said railroad, and was a common carrier, over, along and upon said railroad, of passengers and merchandise, and that said corporation, being such owner, and in such possession, use and occupation of said railroad, did on said seventh day of May, at Somerville aforesaid, by its servants and agents, they being there to direct it, and being then and there engaged in the business of said corporation, and while said servants and agents then and there were legally en-

1 ch. 63, sec. 98: "If by reason of the negligence or carelessness of a corporation, or if the unfitness or gross negligence or carelessness of its servants or agents while engaged in its business, the life of any person being in the exercise of due diligence, and not being a passenger or in the employment of such corporation, is lost, the corporation shall be punished by a fine not exceeding five thousand dollars nor less than five hundred dollars, to be recovered by indictment and paid to the executor or administrator for the use of the widow and children."

2 ch. 352, sec. 1: "If a person is injured in his person or property by collision with the engines or cars of a railroad corporation, passing over a grade crossing of a public way or traveled place, such as is described in section one of chapter eighty-one of the acts of the year eighteen hundred and sixty-two, and it appears that the corporation neglected to give the signals required by said section, and that such neglect contributed to the injury, the corporation shall be liable for all damages caused by the collision, or to a fine recoverable by indictment, as provided in the ninety-eighth section of the sixty-third chapter of the General Statutes, unless it is shown that, in addition to a mere want of ordinary care, the person injured, or the person having charge of his person or property, was at the time of the collision, guilty of gross or willful negligence, or was acting in violation of the law, and that such gross or willful negligence or unlawful act contributed to the injury."

Stat. 1862, ch. 81, sec. 1: "Every railroad corporation shall cause a bell, of at least thirty-five pounds in weight, and a steam whistle to be placed on each locomotive engine passing upon its road; and such bell shall be rung or such whistle sounded at the distance of at least eighty rods from the place where the road crosses a turnpike, highway or townway, upon the same level therewith; and in like manner when the road crosses any traveled place, over which a sign board is required to be maintained, as provided in section eighty-five of chapter sixty-three of the General Statutes; and such bell shall be rung or such whistle sounded, either one or the other, continuously or alternately, until the engine has crossed such turnpike, way or traveled place."

gaged in the business of said corporation, run, propel and drive by the power of steam, a certain locomotive engine over, along and upon said rail- and that by reason of the unfitness and gross negligence and carelessness of said servants and agents, while engaged in said business as aforesaid, said engine was then and there run, propelled and driven as aforesaid, rashly and without watch, care or foresight, and with great, unusual, unreasonable and improper speed, and that the said engine then and there was, by reason of such unfitness and gross negligence and carelessness of said servants while engaged in the business of said corporation, as aforesaid, driven at, against and upon the body of Charles Keniston, of said Somerville, he, said Keniston, being then and there in the exercise of due diligence, and not then being in or upon any car or vehicle of said corporation, and not then being a passenger of said corporation, and not then being in the employment of said corporation; and that said engine did then and there, while being driven as aforesaid, by said agents and servants of said corporation, violently strike Charles Keniston, and did then and thereby inflict divers wounds, bruises and injuries in and upon the head, body and limbs of him said Keniston, of which said bruises, wounds and injuries said Keniston then and there instantly died. And so the jurors aforesaid upon their oath aforesaid, do say that on said seventh day of May, in the year of our Lord one thousand eight hundred and seventy-four, by reason of the unfitness and gross negligence and carelessness of said servants and agents of said corporation while engaged in its business as aforesaid, the life of Charles Keniston, he said Keniston not then and there being a passenger of said corporation nor in its employment, and then and there being in the exercise of due diligence, was lost, in the manner and form aforesaid, whereby said Fitchburg Railway Company has become liable to a fine not exceeding five thousand dollars nor less than five hundred dollars, to be recovered by indictment and to be paid to the executor or administrator of said Charles Keniston, for the use of the widow and children of said Charles Keniston; and that Eliza Keniston of said Somerville, widow of said Charles Keniston has been duly appointed, and now is, the administratrix of the goods and estate of said Charles Keniston, and that said Charles Keniston had at the said time of his decease two lawfully begotten children, both of whom are now living. Against the peace of said Commonwealth, and contrary to the form of the statute in such case made and provided."

The second count was as follows: —

"And the jurors aforesaid, for the Commonwealth of Massachusetts, on their oath aforesaid, do further present, that the Fitchburg Railroad Company, a corporation duly and legally established in this Commonwealth, and duly authorized and empowered to propel engines and cars,

by the power of steam, along, over and upon the railroad hereinafter described, was on the seventh day of May, in the year of our Lord one thousand eight hundred and seventy-four, and still is, the owner of a certain railroad leading and extending from Boston, in the county of Suffolk, in this Commonwealth, to and through the city of Somerville, in this said county of Middlesex, and further, and was then in full occupation, possession and use, of said railroad, and was a common carrier, over, along and upon said railroad of passengers and merchandise, and that said railroad, in its line and course in and through said Somerville, then crossed and intersected, and now does a certain public highway, called and commonly known as Park Street, at the same level with said highway, and that then and there said Charles Keniston, of said Somerville, was traveling upon, along and over said highway at the point whereat said railroad then and there crossed and intersected the said highway as aforesaid, and was in the lawful use and occupation of said highway, and of said portion thereof where said railrord and said highway then and there crossed, and was then and there in the exercise of due diligence, and that said corporation did then and there, by its servants and agents, they being thereto directed and being then and there engaged in the business of said corporation, run, drive and propel, by the power of steam, a certain locomotive engine along, over and upon said railroad, and over, across and upon said highway at said point where said railroad then and there intersected said highway, and did, by reason of the unfitness and gross negligence and carelessness of its said servants and agents while being then and there engaged in the business of said corporation as aforesaid, then and there run, propel and drive said engine rashly, carelessly and negligently, and without watch, care, or foresight, at a great, unusual and improper speed, and did then and there, by reason of said unfitness and gross negligence and carelessness of said servants and agents while engaged in the business of said corporation as aforesaid, suddenly drive, run and propel said engine at, against and upon the body of said Charles Keniston, while the said Charles Keniston was traveling upon said highway as aforesaid, he being then and there in the exercise of due diligence, and not then and there being in or upon any vehicle of said corporation, and not being then a passenger of said corporation, and not being then and there in the employment of said corporation, and that said engine, being so driven as aforesaid did, by reason of said unfitness and gross negligence and carelessness of said servants and agents, suddenly and violently strike him said Keniston, and did then and there, and thereby inflict divers bruises, wounds and injuries in and upon the head, body and limbs of him said Keniston, of which said bruises, wounds and injuries, he said Keniston then and there instantly died. And so the

jurors aforesaid upon their oath aforesaid, do say that on 7th day of May, in the year of our Lord one thousand eight hundred and seventy-four, by reason of the unfitness and gross negligence and carelessness of said servants and agents of said corporation, while engaged in its business as aforesaid, the life of said Charles Keniston, he said Keniston not then and there being in the exercise of due diligence, was lost, in the manner and form aforesaid, and there being a passenger of said corporation, nor in its employment, and then and there being in the exercise of due diligence, was lost, in the manner and form aforesaid, whereby said Fitchburg Railroad Company has become liable to a fine not exceeding five thousand dollars, nor less than five hundred dollars, to be recovered by indictment, and to be paid to the executor or administrator of said Charles Keniston, for the use of the widow and children of said Charles Keniston; and that Eliza Keniston, of said Somerville, widow of said Charles Keniston, has been duly appointed, and now is the administratrix of the goods and estate of said Charles Keniston and that said Charles Keniston had at the said time of his decease two lawfully begotten children, both of whom are now living. Against the peace of said Commonwealth, and contrary to the farm of the statute in such case made and provided."

The third count was as follows: —

"And the jurors aforesaid, for the Commonwealth of Massachusetts, on their oath aforesaid; do further present that the Fitchburg Railroad Company, a corporation duly and legally established in this Commonwealth, and duly authorized and empowered to propel engines and cars, by the power of steam, along, over and upon the railroad, hereinafter described, was on the seventh day of May, in the year of our Lord one thousand eight hundred and seventy-four, and still is, the owner of a certain railroad leading and extending from Boston in the county of Suffolk, in this Commonwealth, to and through the city of Somerville, in this said county of Middlesex, and further, and was then in full occupation, possession and use of said railroad, and was a common carrier over, along and upon said railroad of passengers and merchandise, and that said railroad, in its line and course in and through said Somerville, then crossed and intersected, as now it does, a certain public townway of said Somerville, frequented by and open to all the good citizens of this Commonwealth, called and commonly known as Park Street, at the same level with said townway; that said corporation was then and there bound and required by law to give warning of the approach and passage of every locomotive engine there passing upon said railroad, by either ringing a bell or sounding a whistle from or upon such engine, giving either one of said signals continuously, or the one or the other alternately without cessation, during the passage of

each such engine, over the space of eighty rods in the course of such engine immediately preceding said intersection of said railroad and said townway, and that then and there one Charles Keniston, of said Somerville, was traveling over, along and upon said townway, being then and there seated in his carriage, and drawn by his horse, at and upon the point of said way whereat said railroad then crossed and coincided with the same, as aforesaid, at the same level therewith as aforesaid, and was in the lawful use and occupation of the said townway, and was not then and there grossly negligent, nor acting in violation of law; and that said corporation did then and there, by its servants and agents, they being thereto directed, and being then and there engaged in the business of said corporation, and while being engaged in said business, drive and propel, by the power of steam, a certain locomotive engine along, over and upon said railroad, from a point more than eighty rods distant from said townway, toward, upon, over and across said townway, at said point where said railroad and said townway then and there intersected as aforesaid, neither was the bell provided for said engine then and there rung continuously during the passage of said engine then and there over said space of eighty rods, in its course toward, and immediately preceding the said way, nor was any whistle upon, from, or connected with said engine, sounded continuously during said passage, nor was any continuous signal and warning given by said corporation or by any one, by either the ringing of such bell and the sounding of such whistle, alternately without cessation of warning, and, in fact, no bell was then and there rung, and no whistle was then and there sounded during said passage over said space of eighty rods; and that said Keniston being so lawfully traveling upon said way, as aforesaid, and not being then and there apprised of the approach of said engine, — the said engine, being then and there so driven at a great and unusual speed, did then and there, by reason of said failure to give said warning as required by law, surprise and suddenly strike and collide with said Keniston, then and there being drawn and traveling as aforesaid, and did then and there inflict divers fatal bruises, wounds and injuries upon the head, body and limbs of said Keniston, whereof he, said Keniston, then and there instantly died. And so the jurors aforesaid, upon their oath aforesaid, do say that said Keniston, on the said seventh day of May, in the year of our Lord one thousand eight hundred and seventy-four, was fatally injured in his person and thereby lost his life by collision with the said engine of said corporation passing over the crossing of said way by said railroad, at the same level therewith, and that said corporation's neglect, aforesaid, to give the signals afore specified, as required by law, contributed to said injuries and death, said Keniston not being at said time of said collision guilty

of gross or willful negligence nor then acting in violation of law, nor contributing in any way, either by gross or willful negligence or by any unlawful act to such collision or injury whereby said corporation has become liable to pay a fine not exceeding five thousand dollars, nor less than five hundred dollars, to be recovered by indictment and to be paid to the executor or administrator of said Charles Keniston, for the widow and children of said Charles Keniston; and that Eliza Keniston, of said Somerville, widow of said Charles Keniston, has been duly appointed, and now is, the administratrix of the goods and estate of said Charles Keniston, and that said Charles Keniston had at the said time of his decease two lawfully begotten children, both of whom are now living. Against the peace of said Commonwealth, and contrary to the form of the statute in such case made and provided."

Trial in the Superior Court, before ALDRICH, J., who allowed a bill of exceptions, which after stating that Keniston was killed at the time and place mentioned in the indictment, by a locomotive engine of the defendant, and that there was evidence that the said engine was going at great and unusual speed, and that no bell or whistle was heard by those near the place of the accident, at the time the locomotive engine approached and passed the crossing, set forth the evidence on the question of due care on the part of the deceased, and the evidence on the question whether Park Street had been established as a public way (which is omitted as immaterial to the point decided), and proceeded as follows: —

The judge instructed the jury that before they would be authorized to convict the defendant, upon the first count, they must be convinced by the evidence beyond every reasonable doubt that Keniston, at the time he lost his life was in the exercise of due diligence, and that his life was lost by reason of the gross carelessness and negligence of the servants of the defendant corporation; that the instrument contained no charge of negligence or carelessness on the part of the corporation itself or of unfitness on the part of his servants, and that therefore the jury, before they could convict on the first count must find that the gross carelessness or gross negligence of the servants of the corporation was the sole cause of the death of Keniston, and that his want of due diligence in no manner contributed to his death, that if they entertained a reasonable doubt as to the affimative proof of either of these propositions they should return a verdict of not guilty upon the first count, and that the burden of proof in support of both of the foregoing propositions was upon the prosecution.

In relation to the second and third counts, the jury were instructed that if they should be satisfied beyond a reasonable doubt, upon all the evidence, that the corporation did not give the signals required by the

statute of 1862,[1] (all of which was fully explained to the jury), and if they should in like manner be satisfied that the neglect on the part of the corporation to give said signals contributed to the loss of Keniston's life, they would be authorized to convict upon these two counts, unless they should also be satisfied by the evidence that in addition to a mere want of ordinary care (which was explained), Keniston, at the time of the collision, by which his life was lost, was guilty of gross or willful negligence or was acting in violation of law, and that such gross or willful negligence or unlawful act contributed to his loss of life.

The jury were directed to return their verdict on each count separately which they did accordingly, returning a verdict of guilty on each of the first three counts; and the defendant alleged exceptions.

The case was argued at the bar, and was afterwards submitted upon written arguments.

*G. A. Sombery* and *W. S. Stearns*, for the defendant.

*T. H. Sweetser* and *O. S. Knapp* (*C. D. Adams*, with them), for the Commonwealth.

LORD, J. The indictment in this case contained five counts, and, as appears by the bill of exceptions, all for the same offense, although it is not alleged, as sometimes it is, that the various counts are different modes of charging the same offense. It has long been the practice in this Commonwealth to charge several misdemeanors in different counts of the same indictment, and to enter verdicts and judgments upon the several counts, in the same manner and with the same effect as if a separate indictment had been returned upon each charge. It has also been long established that the same offense may be charged, as committed by different means or in different modes, in various distinct counts of an indictment, and that a general verdict of guilty upon such indictment and judgment thereon is a conviction of but a single offense, and is deemed to be upon that count of the indictment to which the evidence is applicable.

The first count charges generally a killing of the person named therein within the city of Somerville by reason of the gross negligence of the servants of the defendant in the management of a locomotive engine then in charge of said servants.

The second count charges the killing to have been by collision at the crossing at grade of a highway in Somerville, by reason of the same negligence.

The third count charges that the death was caused, either by the defendant's own neglect or the neglect of its servants, by collision at the crossing at grade of a town way in Somerville, and that it was by

[1] ch. 81, sec. 1.

reason of neglect of the servants and agents in charge to ring the bell or sound the whistle upon approaching said crossing as required by law.

It is not necessary to refer to the other counts, as there was a verdict of not guilty upon them.

The jury returned a verdict of guilty upon each of the first three counts. The court are all of opinion that this must be deemed to have been a mistrial. But one offense was charged, and the jury should have been instructed to return a general verdict of guilty or not guilty, upon the whole indictment as for a single offense, which would have been in conformity with the long and well established practice in this Commonwealth, or they should have been instructed to return a verdict of guilty upon the count proved, if either was proved, and not guilty upon all the others. As the record now stands, the defendant corporation was charged with five distinct misdemeanors, of three of which it was found guilty and of two of which it was found not guilty. The bill of exceptions, however, shows that but one offense was committed and it is suggested, that a *nolle prosequi* may be entered as to two of the counts and judgment upon the other. It is obvious that inasmuch as the several counts may be supported by different evidence, and as they are, at least to some extent, inconsistent with each other, it is impossible to determine which was proved, it being certain that all could not have been. The verdict must therefore be set aside.

Several questions were raised at the argument upon the sufficiency of the several counts of the indictment in the matter of form. In reference to the first count, whether it is sufficient in form, and, if not, whether the objection was open at the time of the trial, appear to the court upon consideration to be questions of much difficulty; and as a new trial must be had upon other grounds, in the course of which these questions may not be material, no opinion is expressed upon it.

As to the third count, it does not allege gross negligence upon the part of the servants of the corporation, except by implication. It charges that the death of the party was caused by the neglect of the servants to ring the bell or sound the whistle, but it does not charge that such neglect was gross negligence on the part of the servants.

The learned judge who presided at the trial correctly instructed the jury, that inasmuch as the first count of the indictment contained no charge of negligence on the part of the corporation or of unfitness of its servants, that count could be sustained only by proof of gross negligence by its servants. Such gross negligence must be averred if relied on. Mere neglect to ring the bell or sound the whistle may be the act either of the servant or of the corporation. If it be a corporate act, one done under the direction of the corporation, it is an act for

which the corporation might be responsible under an indictment. If the third count is to be construed as alleging that the corporation directed that no bell should be rung or whistle sounded, it is not necessary to aver gross negligence, but any neglect is sufficient. If, however, it is to be construed as alleging only neglect of servants acting under the general authority of the corporation, within the scope of their authority in the performance of their duty, then the act must be charged to be one of gross negligence of the servants. It is not perhaps entirely clear which is charged. The statute of 1871,[1] is not supposed by the court to intend to change the mode of charging the offense, so far as the acts of the defendant or its servants are concerned; whether or not it is necessary to change the form of pleading as to the conduct of the person killed, it is unnecessary to inquire.

In the second count, in which the collision is charged to have been at the intersection of a public highway with the defendant's railroad there was no charge that the bell was not rung or the whistle sounded. The bill of exceptions reports an instruction given upon the second count which we think must have been admitted by inadvertence. The instruction was, that if the jury were satisfied that the neglect on the part of the corporation to give the signals required by the statute of 1862,[2] contributed to the death of Keniston they would be authorized to find the defendant guilty upon the second and third counts, if the person killed was not in fault according to the meaning of the law. But the second count did not aver the neglect.

*Exceptions sustained.*

---

MANSLAUGHTER — RAILROAD CORPORATION — KILLING PASSENGER.

## COMMONWEALTH *v.* FITCHBURG R. CO.

[126 Mass. 472.]

*In the Supreme Judicial Court of Massachusetts, 1879.*

1. **Under An Indictment Against a Railroad** corporation under the Massachusetts Statutes which alleges as the only act of negligence that the servants[3] of the corporation ran a locomotive engine "rashly and without watch, care or foresight, and with great, unusual, unreasonable and improper speed," evidence is inadmissible to show that the servants neglected to ring the bell on the engine or to sound the whistle.

2. **An Indictment Against** a railroad corporation, on the General Statutes,[4] charging the killing of a person by reason of the gross negligence and carelessness of its servants

1 ch. 352.

2 ch. 81.

3 Gen. Stats. ch. 63, sec. 98; Stat. 1871, ch. 352. See the provisions in full, *ante*, p.

4 ch. 63, sec. 98.

while engaged in its business, by running a locomotive engine with great, unusual, unreasonable and improper speed, is not sustained by proof that at the time of the killing, the engine was run at a high rate of speed, in the absence of evidence that the servants in so doing were acting in violation of their duty.

3. If a Jury has once been impaneled in a criminal case, it is too late to move to quash the indictment for formal defects apparent on its face, although the motion is made before the impaneling of the jury for a new trial of the case, the former verdict having been set aside.

Indictment on the General Statutes,[1] and the Statute of 1871,[2] to recover, for the use of the widow and children of said Charles Keniston, a fine, by reason of the loss of his life, from being run over on May 7, 1874, by a locomotive engine and train of cars of the defendant, at a place in Somerville, where the defendant railroad crosses Park Street, so-called, at grade.

The first and second count of the indictment, upon which alone the case was tried, a *nolle prosequi* having been entered as to the third count, are given in full in the report of the case at a former stage;[3] and the material parts of them are stated in the opinion.

After the former decision, and before the jury were impaneled, the defendant filed in the Superior Court two motions to quash the indictment. PITMAN, J., overruled the motions. The case was then tried, the jury returned a verdict of guilty, and the defendant alleged exceptions, the substance of which appears in the opinion.

*G. A. Somerby* and *W. S. Stearns*, for the defendant.

*T. H. Sweetser* and *O. S. Knapp* (*C. D. Adams*, with them), for the Commonwealth.

MORTON, J. The first count of the indictment charges the killing of the person named therein, within the city of Somerville, by reason of the unfitness and gross negligence and carelessness of the servants of the defendant while engaged in its business.

The negligence alleged is that the servants who were running an engine, ran it "rashly, and without watch, care or foresight, and with great, unusual, unreasonable and improper speed." The second count varies from the first only in charging that the killing was by a collision at the crossing at grade of a public highway in Somerville, called Park Street.

Neither count alleges any negligence of the corporation; neither count alleges as negligence of the servants that they did not ring the bell or sound the whistle, as required to do at grade crossings; or that they did not seasonably close the gate at the crossing. Upon these last points evidence was admitted at the trial, and it was competent upon the issue whether the person killed was using due care; but it was not competent and could not be considered by the jury upon the issue

[1] ch. 63, sec. 98. [2] ch. 352. [3] 120 Mass. 372.

of the gross negligence of the servants of the defendant. The only negligence sufficiently charged is that the servants ran the engine with great, unusual, unreasonable and improper speed. The addition of the words "rashly and without watch, care or foresight," can not enlarge the allegation so as to make it equivalent to an averment that the servants neglected to ring the bell or sound the whistle. It does not inform the defendant with reasonable certainty that such negligence is intended to be charged.

It does not follow that the indictment is to be quashed. It contains the substantive allegation that the servants of the defendant ran the engine with unreasonable and improper speed; and no objection to the generality of the allegation having been reasonably taken, if the government can prove that such servants, in violation of their duty, ran the engine at great speed, under circumstances which made such running gross negligence on their part, a verdict of guilty might be justifiable, although such servants rang the bell and sounded the whistle, or although they were not required to do either. But the government is confined in its proofs to the allegations of the indictment, and having alleged one act of negligence, can not claim a verdict upon proof of another act not alleged.

We are thus brought to the question whether, upon such of the evidence in this case as was competent to be considered by the jury, their verdict was justifiable. The bill of exceptions purports to state all the evidence material to the exceptions. Upon a careful examination of this evidence, we find that all the competent evidence merely proves that, at the time of the accident, the servants of the defendant were running the engine at a great rate of speed. All that the evidence shows is that a detached engine was run at a high rate of speed over a crossing at grade of a traveled street in Somerville. But there was no evidence that the speed was greater than was allowed by the rules and regulations of the corporation, and, as evidence that the bell was not rung or the whistle was not sounded was not admissible upon this issue, there was no evidence that the servants in charge of the engine were acting in violation of their duty. In other words, there was no competent evidence of the gross negligence or carelessness of the servants of the corporation.

We apprehend that the real difficulty in this case is that the allegations of the indictment are not adapted to the facts in proof. It fails to allege the neglect to ring the bell or sound the whistle, which appears upon this bill of exceptions to have been the act of neglect of the servants of the corporation, but which, as we have before said, could not properly be considered by the jury upon this issue.

In regard to the defendant's motions to quash, they were both made

after a jury had been sworn in the Superior Court, and the objections to the indictment are for formal defects apparent on the face thereof. We are, therefore, of opinion that they were rightly overruled.[1]

As the view we have taken applies equally to the first and second counts, it is not necessary to discuss the question whether there was evidence of the establishment of Park Street as a public highway.

*Exceptions sustained.*

---

## MANSLAUGHTER — NEGLIGENCE OF SERVANTS OF RAILROAD — NEGLIGENCE OF RAILROAD.

## COMMONWEALTH v. BOSTON & MAINE R. CO.

[133 Mass. 383.]

*In the Supreme Judicial Court of Massachusetts, 1882.*

**An Indictment Against a Railroad** corporation under the Massachusetts Statute of 1874,[2] for killing a passenger which alleges that the death was caused by the failure of the corporation to reduce the rate of speed of one of its engines and to give certain signals, is not supported by proof that the servants of the corporation neglected to do so.

Indictment in four courts, on the statute of 1874,[3] to recover, for the use of the widow and only child of Sherburne T. Sanborn, a fine, by reason of the loss of his life, from being run over on September 22, 1880, at a place in Wilmington, where the defendant's railroad crosses a highway at grade.

At the trial in the Superior Court, before GARDNER, J., the judge submitted the case to the jury upon the third and fourth counts only. A general verdict of guilty on these counts was returned; and the defendant alleged exceptions, the substance of which appears in the opinion.

*D. S. Richardson* and *G. F. Richardson*, for the defendant.

*W. Gaston* and *L. J. Elder*, for the Commonwealth.

C. ALLEN, J. The first question to be considered in this case is, whether the third court of the indictment is good in itself, or is supported by the evidence. The court in substance charges that at a certain place the railroad crossed a highway upon the same level; that one Sanborn was traveling on the highway, and in the exercise of due diligence; the locomotive engine attached to a freight train was passing the place of intersection; that a locomotive engine was coming in the

1 Stat. 1864, ch. 250, sec. 1; Com. v. Brigham, 108 Mass. 457.

2 ch. 372, sec. 163.

3 ch. 372, secs. 163, 164.

opposite direction; that while the corporation was thus running the last named locomotive engine it was the duty of the corporation, when approaching said place of intersection, in view of the position of said first named locomotive and train of freight cars, to reduce its rate of speed and give proper signals and warnings; but that the corporation neglected to do so, and with said last named engine, ran over and killed said Sanborn.

This count is founded on the statute of 1874,[1] which imposes a penalty upon the corporation, if by reason of its negligence or carelessness, or of the unfitness or gross negligence or carelessness of its servants or agents while engaged in its business, the life of any person being a passenger or of any person being in the exercise of due diligence, and not being a passenger or in the employment of said corporation, is lost. The count, it will be observed, does not charge the unfitness or gross negligence or carelessness of servants or agents of the corporation, but negligence of the corporation itself.

The distinction between these different grounds of liability to indictment has been observed in all the earlier legislation upon this subject. The statutes respecting liability for the loss of life of a passenger were the statutes of 1849,[2] and the General Statutes;[3] those respecting liability for the loss of life of one not being a passenger, were the statute of 1853,[4] and the General Statutes.[5] These provisions were blended together in the statute upon which the present count is framed. In all of these statutes, the negligence or carelessness of servants or agents must be gross, while the negligence or carelessness of the corporation itself need not be gross, in order to make the corporation punishable by indictment. This distinction has also been observed in all of the cases which are reported, where indictments have been founded upon either of these statutes. In *Commonwealth* v. *Boston and Worcester Railroad*,[6] the indictment, which was founded upon the statute of 1840,[7] alleged gross negligence and carelessness of servants and agents in running a train. In *Commonwealth* v. *Fitchburg Railroad*,[8] the indictment which was founded upon the General Statutes,[9] contained similar averments. In *Commonwealth* v. *Vermont and Massachusetts Railroad*,[10] the indictment, which was founded on the General Statutes,[11] contained similar averments; as did also the indictments in *Commonwealth* v. *Fitchburg Railroad*[12] and in *Commonwealth* v. *Boston and Lowell Railroad.*[13] The indictment in *Commonwealth* v. *East Boston Ferry Com-*

1 ch. 372, sec. 163.
2 ch. 80.
3 ch. 63, sec. 97.
4 ch. 414, sec. 1.
5 ch. 63, sec. 98.
6 11 Cush. 512.
7 ch. 80.
8 10 Allen, 189.
9 ch. 63, sec. 98.
10 108 Mass. 7.
11 ch. 63, sec. 97.
12 120 Mass. 372.
13 126 Mass. 61.

*pany*[1] which was founded upon the General Statutes,[2] imposing a similar liability upon other carriers under like circumstances, set forth that the loss of life occurred through the negligence of the corporation itself, in not providing a suitable drop connected with the landing place, for passengers on the boats of the corporation.

It thus appearing that there is a distinction between the negligence or carelessness of the corporation itself, and the gross negligence or carelessness of its servants or agents while engaged in its business, it becomes necessary in framing an indictment, to select and set forth with accuracy the ground which is to be relied on. The negligence of the corporation itself is one thing, and the gross negligence of its servants or agents is another thing, and an averment of one is not supported by proof of the other. In many cases, it is true that, as a corporation usually acts by agents, an averment of neglignce on the part of a corporation may be supported by proof of negligence on the part of its agents. But this is not applicable to a liability imposed by statute which expressly distinguishes between the grounds of liability as does the statute now under consideration. In such a case as the present, negligence on the part of the corporation can not be estabtablished by showing negligence on the part of its servants or agents and by invoking the aid of a presumption that their negligence must be presumed to have been in pursuance of orders of the corporation itself. The statute makes a plain distinction; the pleader selects the ground on which the liability of the defendant is to be made to rest; a line of precedents recognizes and illustrates the distinction between the two grounds; and to allow the pleader to select the negligence of the corporation itself as the ground on which its liability is to be maintained, and to support it by proving merely the negligence of servants or agents, and by asking a court or jury to infer the existence of negligence on the part of the corporation from mere proof of negligence on the part of its servants or agents, would be to obliterate the distinction expressed in the statute, and to depart from the common rule of pleading.[3]

Looking at the third count of this indictment in the light of these principles, we are of opinion not only that it was unsupported by the evidence in the case, but that it is not a good count in itself. There was no proof, and there is no averment, that the corporation, by general rule or otherwise had given to its servants or agents any instructions which were improper or unsuitable, or had so far failed to give proper and suitable instructions that the omission could justly be attributed to it as negligence; but the evidence, and, by fair implication,

1 13 Allen, 589.

2 ch. 160, sec. 34.

3 See Com. v. Fitchburg Railroad, 126 Mass. 472.

the averment show that the negligence relied on was the omission to do what ought have been done under the peculiar circumstances of a particular occasion; that is to say, the occasion of a passenger train unexpectedly meeting a freight train at a highway crossing. There is no averment that the corporation fixed the rate of speed for either of the trains as it was run; or that, according to the rules or time-tables of the corporation, the trains are expected or likely to meet at that place; or that such an emergency was likely to happen, and that it was the duty of the corporation to make provision therefor, by suitable rules or instructions to its servants or agents, and that this corporation had neglected to do its duty in this respect; or that the corporation, in view of the special emergency, had it in its power to reduce the speed of the particular train or to give special signals; or that the corporation ought to have provided a gate or flagman at the crossing, for the better protection of travelers, but the averment of negligence is simply that it was the duty of the corporation, in view of the position of the freight train, to reduce the rate of speed of the passenger train, and to give proper signals and warnings. The negligence which is specified is simply the neglect to do what ought to have been done in view of a present emergency. These acts of negligence appear upon the face of the indictment to be acts of the servants and agents of the corporation, and not of the corporation itself. If the emergency called for a reduction of speed, and the giving of special signals and warnings, there is no presumption that the corporation forbade its servants or agents to make such reduction, or to give such signals and warnings; but it is plain that the omission to do such proper acts, if such omission existed, would *prima facie* be attributable to the servants or agents. If so, in order to hold the corporation responsible for their negligence, it would be necessary, under the statute, to aver and prove that such negligence was gross. In other words, an indictment, which sets forth only such acts of negligence or carelessness as are specified in the third count, must either charge them as acts of gross negligence or carelessness on the part of the agents or servants of the corporation, or must set forth other facts which will have the effect to make the corporation responsible as for its own negligence or carelessness.

If, passing from the averments of the third count, we look into the evidence by which it was sought to be supported, it appears, that in point of fact, the two trains were not expected to meet at the place where the loss of life occurred, and there was nothing to show that the corporation was responsible for the alleged failure to reduce the speed of the passenger train, or to give signals or warnings, except the evidence which tended to show an omission to do those acts on the part of

ts servants and agents, and the reference sought to be drawn from such omission.

It was suggested in the brief for the Commonwealth, that no motion was made to quash the indictment for informality, and that under the statute of 1864,[1] it was too late, upon the trial of the case, to raise the objection to this court. Under that statute, an objection for a formal defect, apparent on the face of the indictment, must be taken before the jury has been sworn. The objection to this court is not of that character. There is nothing on the face of this count which would enable the court, on inspection thereof, to determine what should be added or changed, to meet the case intended to be relied on. The statute on which the count is founded allows two kinds of negligence to be set forth; negligence of the corporation, and gross negligence of its servants or agents. Apparently, the pleader intended to rely on the former; and in that case, it is necessary to aver some substantive additional facts, in order to show such liability. If, however, the negligence of servants or agents of the corporation was intended to be relied on, the omission of a direct charge that there was gross negligence or circumstances on their part can not be considered as merely formal. In either case the objection was well taken at the trial.

---

## MANSLAUGHTER — CONDUCTOR OF RAILROAD TRAIN.

## COMMONWEALTH *v.* HARTWELL.

[128 Mass. 415; 35 Am. Rep. 391.]

*In the Supreme Judicial Court of Massachusetts, 1880.*

**The Prisoner, a Conductor of a Freight Train,** was indicted for manslaughter. The indictment charged that the prisoner negligently omitted while crossing with his train from the outward track of the road across the inward track to a side track, and again across the inward to the outward track, to send forward any signal to warn the driver of a passenger train which the prisoner well knew was due and about to arrive at that part of said railroad, whereby said passenger train collided with the prisoner's train, causing the death of a passenger. There was no proof given on the trial that the prisoner knew of the approach of the passenger train. *Held*, that the conviction could not be sustained.

ENDICOTT, J. This is an indictment for manslaughter in which the defendant is charged with negligence and omission of duty, as conductor of a freight train, whereby another train was thrown from the track, and a passenger thereon was killed.

[1] ch. 250, sec. 2.

The indictment recites that the defendant was a conductor in the employment of the Old Colony Railroad Company, and was on October 8, 1878, in charge of a freight train on the road of the company, which had been run over the outward track from Boston to the Wollaston Station in Quincy, under his direction; that the company had established for the guidance of its servants proper and sufficient rules and regulations, having relation to the crossing of the inward track, over which trains passed on their way to Boston, by locomotive engines and trains using or running upon the outward track, which rules and regulations were in force at the time and well known to the defendant, and that it became and was his duty not to conduct his locomotive engine from the outward track across the inward track, without first sending forward the proper signal to warn the driver of any train approaching on the inward track, that he could not safely pass without stopping.

The indictment then charges as follows: "Yet the said Hartwell, well knowing the premises, and well knowing that a certain train, to wit: a train consisting of certain other locomotive steam engine, and divers, to wit, twenty cars attached thereto and drawn thereby, was then and there lawfully traveling and being propelled on and along the said inward track of said railroad, and was then due and about to arrive at that part of said railroad in Quincy aforesaid near the Wollaston Station aforesaid, but disregarding his duty in that behalf did, 'at the same time and place,' willfully and feloniously, and in a wanton, negligent and improper manner, and contrary to his duty in that behalf, and while the last mentioned train was then and there due and about to arrive as aforesaid, conduct and drive, and suffer, permit and direct to be conducted and driven," his own locomotive engine across the inward track to a side track, and attached to it certain freight cars, and again crossed the inward track to the outward track, "thereby leaving the switch thrown out of line, so as to disconnect the rails upon the inward track, without first sending forward any signal whatever to warn the driver of said approaching train, so due as aforesaid," in accordance with the rules and regulations of the company.

The indictment, after again stating that this train of twenty cars was then due, and that the defendant neglected to send forward the required signal, proceeds to charge in substance that, by means of the premises and the felonious neglect and omission of the defendant, the driver of the approaching train, then due at Wollaston Station, was induced to believe that the inward track was unbroken and unobstructed, and that he might safely pass; that he did not stop, but continued on his course, and by reason of the misplacement of the switch, the train was thrown from the track, and a passenger therein, named Patrick Reagan, was killed.

It appeared in evidence that the train thus thrown from the track was an extra train, and that the defendant had a written notice from the superintendent of the company, that it would run on that day. The notice contained the time-table of the train, and it was due in Boston soon after five o'clock in the afternoon. The defendant's train left Boston on its regular time, at half-past six, more than hour after the extra train was due in Boston, and reached the Wollaston Station soon after seven. The extra train was then, according to the time-table contained in the notice received by the defendant more than two hours behind time.

The defendant, while at the Wollaston Station, in obedience to the directions from the freight agent, took the freight cars from the side track, crossing the inward track as set forth in the indictment, and without sending forward the required signal to warn any train approaching on that track. No evidence was introduced by the Government that the defendant knew that the extra train was then due and about to arrive at the Wollaston Station. On the contrary, it appeared by the evidence that he then understood it was in Boston, and stated to his engineer before he left Boston that it had arrived.

Among other instructions requested, the defendant asked the court to rule, that the averment that Hartwell well knew that a certain train "was then and there lawfully traveling and being propelled on and along the said inward track of said railroad, and was then due and about to arrive at that part of said railroad in Quincy aforesaid, near the Wollaston Station aforesaid," was a material averment, which must but proved by the Commonwealth, and there was no evidence in the case to support that averment.

The court declined to give this ruling; and it is contended by the Government that this averment need not be proved as laid, but can be rejected as surplusage. But we are of opinion that the ruling should have been given, and that the defendant's exceptions on this point must be sustained.

The precise question is whether this averment can be rejected as mere surplusage, or whether it is of such a character as not only to be descriptive of the negligence charged, but in its connection with the other parts of the indictment, is notice to the defendant of the exact charge which he has to meet.

The defendant is charged with the crime of manslaughter, and the specific nature of the charge is that, by reason of his culpable negligence and omission to perform his duty, Patrick Reagan was killed. His guilt, therefore, depends solely upon the question whether he was negligent, and failed to perform his duty upon a given occasion, and

and extent of the negligence, which connects him with the death of Reagan, fully and plainly, substantially and formally described to him in the indictment.

This the indictment does, or attempts to do, and charges in substance that, well knowing the rules of the road, and his duty in that regard, and what signals should be given when an engine or train from the outward track crosses the inward track, and also well knowing that this particular train was then due and about to arrive upon that track, he neglected to give the required signals, and the death of Reagan was the result. The pleader has made the knowledge of the defendant that the express train was due, as well as his knowledge of the rules and his duty in regard to them, an essential and material portion of the description of the acts and conduct of the defendant, which go to constitute the negligence charged, and the negligence charged is not merely that he failed to give the signal required to notify any approaching train, but that he failed to give it when he knew there was an instant and pressing necessity for so doing, this particular train was then due at that point.

This was not an impertinent averment, or foreign or inapplicable to the charge, because proof of such knowledge would establish the most culpable negligence. The gist of the indictment is the defendant's negligence; and in alleging it, this specific act of negligence, to wit, a disregard of his duty to warn this train, which he knew then to be imminent, is made a part of the description of that which is essential to the charge. The general neglect of duty is resolved into this particular manner of neglecting it; and, having charged a general neglect, the indictment notifies the defendant that the neglect of his general duty was in this specific mode. While it is unnecessary to decide whether or not it would be sufficient in this case to allege in general terms a neglect of duty, in not sending out a signal to warn any approaching train, without alleging that the defendant knew that the inward track was liable at any time to be used by an approaching train; it is clear that, when not merely general neglect of duty is alleged, but the particular in which it was violated is carefully and with precision set out, the defendant has the right to assume that the specific negligence thus alleged is the mode in which the general duty has been violated.

The government having selected the precise ground upon which to stand, in describing and expressing the nature and extent of the defendant's negligence, it must be confined to the limits which it has prescribed for itself. For it is well settled that an allegation must be proved which is descriptive of the identity of the charge, or of that which is legally essential to the charge; and when any allegation

under such circumstances that he may be held criminally responsible for the death. He is entitled, therefore, to have the nature, character narrows and limits that which is essential, it is necessarily descriptive.[1] The same principle has been recognized in those cases in this Commonwealth, in which it has been held that an averment might be treated as surplusage when not descriptive of the identity of the charge, or of anything essential to it.[2]

It is undoubtedly true, that when an indictment alleges the commission of an offense by various means, it is sufficient to prove enough of the means to constitute the offense; as in the familiar case of obtaining money by false pretenses, proof of all the pretenses charged is not necessary; it is sufficient if enough are proved to establish the charge. But when the indictment states a pretense in general terms and then specifies the particulars, it is the particular, and not the general statement which must be proved; as, for example, if it alleges that a defendant, as a representation of his ability to pay, stated that he owned a large amount of stock in corporations and then specifies a certain number of shares that he claimed to own in a particular stock, the allegation being thus qualified and limited, the proof must relate to that particular stock. In *Commonwealth* v. *Jeffries*,[3] the indictment charged that the defendant falsely pretended that he had an order from a certain person in New York, whose name he did not disclose, to purchase goods; the proof was that he falsely pretended that he had an order to purchase them, without stating that it came from a person in New York; and it was held that the variance was fatal, and there was evidence to support the charge.[4] And when a person is charged with stealing a white horse, the specific averment of color is not necessary, but, being descriptive of that which is material, it can not be rejected as surplusage, but must be proved as laid.[5]

In the case at bar, the negligence of the defendant is essential to support the charge of manslaughter. The specific averment, that he knew that this particular train was then due bears directly upon that question, and being set out in that part of the indictment which charges the negligence, it is descriptive of the facts and circumstances which surrounded the defendant at the time, in view of which he acted or failed to act, and of the kind and character of the negligence of which he is

1 Com. *v.* Wellington, 7 Allen, 299, and cases cited; Com. *v.* Jeffreys, 7 Allen, 548; Com. *v.* Hughes, 5 Allen, 499; Com. *v.* Gavin, 121 Mass. 54 and cases cited; U. S. *v.* Howard, 3 Sumn. 12; U. S. *v.* Porter, 3 Day, 283; Churchill *v.* Wilkins, 1 J. R. 447; Bristow *v.* Wright, 2 Doug. 665; 1 Chit. Cr. L. 294, 557; 1 Greenl. Ev., sec. 65.

2 Com. *v.* Pray, 13 Pick. 359; Com. *v.* Randall, 4 Gray, 36; Lyons *v.* Merrick, 105 Mass. 71; McNeil *v.* Collinson, 128 Mass. 313.

3 *ubi supra.*

4 See Rex *v.* Plestow, 1 Camp. 494.

5 3 Stark. Ev. (1st. ed.), 1531. See, also, State *v.* Noble, 15 Me. 476; Com. *v.* Gavin, 121 Mass. 54.

alleged to have been guilty. There being no evidence to support it, the conviction can not be sustained.

In this view of the case, it becomes unnecessary to consider the other questions fully and ably argued at the bar.

*Exceptions sustained.*

---

NOTES.

§ 677. **Murder — Violence Essential.** — Murder must be committed by some physical act of violence, and hence a death caused by grief or terror can not be murder.[1]

§ 678. **Murder — False Swearing.** — It is not murder to give false testimony whereby one on trial for a capital crime is wrongly convicted and executed.[2] At the Old Bailey, in 1754, one Joshua Kidden was tried before Mr. Justice FOSTER, for robbing Mary Jones, widow, on the highway of one guinea, a half crown, and two shillings and six pence. The prosecutrix swore very positively to the person of the prisoner, and to the circumstances of the robbery, in which she was confirmed by one Berry. The prisoner, on the evidence of these two witnesses, was convicted and executed; and on the first of March following, the reward of forty pounds, given by 4 and 5 William and Mary,[3] to those who shall convict a highway robber, was divided between the prosecutrix Mary Jones, John Berry, Stephen Macdaniel and Thomas Cooper. The history of this prosecution lay concealed in the minds of its fabricators until the 9th of August, 1754, when the high constable of the Hundred of Blackheath having taken up one Blee on suspicion of being a thief, it was discovered to have been a conspiracy and contrivance to obtain the reward.

Diligent search was accordingly made to apprehend the miscreants concerned in this extraordinary transaction; and at the old Bailey in June Session, 1756, Stephen Macdaniel, John Berry and Mary Jones were indicted before Mr. Justice Foster, present Mr. Baron Smythe, for the willful murder of Joshua Kidden, in maliciously causing him to be unjustly apprehended, falsely accused, tried, convicted, and executed, well knowing him to be innocent of the fact laid to his charge, with an intent to share to themselves the reward, etc. The prisoners were convicted, upon the clearest and most satisfactory evidence of the fact; and a sense of depravity was disclosed, as horrid as it was unexampled. The judgment, however, was respited upon a doubt whether an indictment for murder would lie in this case. The special circumstances were accordingly entered upon the record, together with an additional finding of the jury, "That justice Hall, in the Old Bailey, is situated within the county of the City of London; and that felonies committed in the county of Middlesex, from time immemorial have been accustomed to be tried there;" in order that the point of law might be more fully considered, upon motion in arrest of judgment. But Sir Robert Henley, the attorney-general, declined to argue it; and the prisoners were at a subsequent session discharged from that indictment.

[1] Com. *v.* Webster, 5 Cush. 295; 52 Am. Dec. 711 (1859).

[2] R. *v.* Macdaniel, 1 Leach, 52 (1756).

[3] ch. 9.

Sir William Blackstone, however, says, that there were grounds to believe, it was not given up from any apprehension that the point was not maintainable, but from other prudential reasons.

In May session, 1859, they were again put to the bar, upon an indictment for conspiracy to defeat the public justice of the kingdom, in causing Joshua Kidden to be executed for a robbery which they knew he was innocent of, with intent to get into their possession the reward offered by act of Parliament; but no evidence appearing, they were all acquitted.

§ 679. —— **New Born Infant — Infanticide.** — To constitute a human being, the subject of murder, an infant must be fully delivered, and have an independent circulation from that of the mother.[1] There must be an independent circulation in a new born child to make its killing murder; that it has breathed is not enough.[2]

§ 680. —— **Death Must Take Place Within a Year and a Day.** — "Murder is a complex term denoting several facts of which the death of the party is one of the most essential. The mortal stroke or the administering of poison does not constitute the crime unless the sufferer dies thereof within a year and a day."[3] The indictment must show that the death occurred within a year and a day after the wound or it will be bad.[4] The crime is committed not on the day when the victim dies, but on the day on which the fatal injury is received.[5]

§ 681. **Homicide — Death Must be in Consequence of Prisoner's Act.** — In *R.* v. *Hilton*,[6] the prisoner was indicted for manslaughter. It appeared by the evidence that it was his duty to attend a steam engine. That on the occasion in question, he had stopped the engine, and gone away; and that, during his absence, a person came to the spot, and put it in motion, and being unskilled was not able to stop it again. It further appeared that in consequence of the engine being thus put in motion, the deceased was killed. ALDERSON, B., stopped the case, observing that the death was the consequence, not of the act of the prisoner, but of the person who set the engine in motion after the prisoner had gone away. That it is necessary, in order to a conviction for manslaughter, that the negligent act which causes the death, should be that of the party charged.

§ 682. **Homicide — Death Occasioned Partly by a Predisposing Cause.** — In *R.* v. *Johnson*,[7] the prisoner was indicted for manslaughter. It appeared in evidence, that he had been fighting in the house where he lodged, at Knavesborough. In the scuffle he struck his antagonist, Edward Cattin, on the stomach, upon which he fell. The surgeon who opened the body, was examined and deposed as follows: "The muscles of the stomach were distended, and the vessels of the brain were in a like state. On the external surface of the stomach there was a slight discoloration; a blow on the stomach in this

1 State *v.* Winthrop, 43 Iowa, 519. And see Wallace *v.* State, 7 Tex. (App.) 570 (1880).

2 R. *v.* Enoch, 5 C. & P. 539 (1833); R. *v.* Poulton, 5 C. & P. 329 (1832); R. *v.* Sellis, 7 C. & P. 850 (1839).

3 Parker, C. J., in Com. *v.* Parker, 2 Pick. 558 (1824).

4 State *v.* Orrell, 1 Dev. (L.) 139; 17 Am. Dec. 563; People *v.* Gill, 6 Cal. 637 (1856); People *v.* Aro, 6 Cal. 208 (1856).

5 People *v.* Gill, 6 Cal. 637 (1856).

6 2 Lew. 214 (1838).

7 1 Lew. 164 (1827).

state of things, arising from passion and intoxication, was calculated to occasion death, but not so if the party had been sober."

HULLOCK, B., directed an acquittal observing, "that where the death was occasioned partly by a blow and partly by a predisposing circumstance, it was impossible so to apportion the operations of the several causes, as to be able to say with certainty that the death was immediately occasioned by any one of them in particular."[1]

§ 682*a*. **Homicide — Death Occasioned by One of Two Causes, But which Uncertain.** — In *R.* v. *Wrigley*,[2] the prisoner was indicted for manslaughter. It appeared that he had been fighting with the deceased, and, that, when the deceased was down, the prisoner struck his head against the ground. The deceased was afterwards laid at full length on a form or stool, from which he fell bodily to the ground.

The surgeon on his examination said: "I think it uncertain whether the deceased died in consequence of the bruises he had received, from his head being knocked against the ground, or from the subsequent fall from the stool; but that it was more probable he died from the knocking of his head against the ground."

BAYLEY, J., doubted whether this was evidence to go to the jury; but he allowed it to go to them, at the same time intimating, that in the event of the conviction, he would respite the judgment, and take the opinion of the judges. The jury acquitted the prisoner.

§ 683. **Homicide — Death from Subsequent Medical Operation.** — In *Coffman* v. *Commonwealth*,[3] in the Court of Appeals of Kentucky, the law was laid down as follows. The court said: "The evidence tended to prove that the appellant knocked the deceased down with his fist, and that he fell with his head against a post from which a nail protruded one-half or three-quarters of an inch, and that his head struck the nail and the scalp was cut; that the appellant stamped upon the body of the deceased with his foot, and that the latter was insensible from that time until his death, the symptoms indicating that there was compression of the brain. A medical witness testified that he cut into the skull at the wound made by the nail, but discovered no evidence of injury to the bone; but he, and other physicians, believing there was compression or extravasation of blood on the brain, and that the patient would die unless he could be relieved by trephining, they as a last resort sawed out a piece of the skull bone about an inch in diameter and removed it, and found clotted blood resting on the brain; that they did not remove the blood, but placed the piece of bone in the aperture and left it there. This was a day or two before the patient died. In view of this evidence the court gave the following instructions, viz.: 'The court instructs the jury that though they may believe the death of Harrison was caused by the surgical operation, yet if the operation was performed by physicians as

[1] NOTE. — the learned judge cited from his notes the following cases, viz.: —

*Brown's Case*, April, 1824. Indictment charged with killing, by striking. Jury found that the death was occasioned by over-exertion in the fight. The judges held that the prisoner was entitled to an acquittal.

*Anonymous*. Indictment charged with killing by striking with a brick. The jury found that the deceased was killed by falling upon a brick in consequence of a blow. The judges held, that the indictment was not supported by the finding.

[2] 1 Lew. 171 (1829).

[3] 10 Bush, 495. And see, Livingston's Case, 14 Gratt. 593.

a remedy for the wounds inflicted by the defendant, they can not acquit him on that ground.' We can not approve this as a principle of the law of the land. The mere fact that the operation was performed by physicians as a remedy for the wounds inflicted by the appellant, without any reference to the question whether such an operation was reasonably deemed to be necessary, or was performed by men of ordinary skill as surgeons, or in an ordinarily skillful manner, can not render the appellant legally responsible for the death of Harrison, if in fact the operation and not the injuries inflicted by him caused his death. The rule deducible from the authorities seems to be that where the wound is apparently mortal, and a surgical operation is performed in a proper manner, under circumstances which render it necessary in the opinion of competent surgeons, upon one who has been wounded by another, and such operation is itself the immediate cause of the death, the person who inflicted the wound will be responsible.[1] But if the death resulted from grossly erroneous surgical or medical treatment, the original author will not be responsible.[2] It should, therefore, have been left to the jury in this case to say whether the operation performed on the deceased was such as ordinarily prudent and skillful surgeons, such as were to be procured in the neighborhood, would have deemed necessary under the circumstances in view of the condition of the patient, and whether it was performed with ordinary skill; and they should have been told that if they found the affirmative of these propositions, the appellant was responsible, although the operation and not the wound inflicted by him caused the death; but that, if they found that the operation would not have deemed necessary by such ordinarily prudent and skillful physicians and surgeons, or if it would have been deemed necessary and was not performed with ordinary skill, and the death resulted from the operation and not from the injuries inflicted by appellant, they ought to acquit him, even though they might believe such injuries would eventually prove fatal. For the errors indicated, the judgment is reversed, and the cause is remanded for further proceedings not inconsistent with this opinion.

"*Judgment reversed.*"

Where a person *in loco parentis* whips a child and compels it to work beyond its strength, aud the child dies of consumption, its death being hastened by such treatment, it will not be murder in him, but manslaughter, although the punishment was cruel and excessive, if he believed the child was shamming illness and was able to do the work.[3]

684. —— **Improper Medical Treatment — Texas Statute.** — Under the Texas Criminal Code, if there be gross neglect or improper treatment, which aids the fatal effects of the injury, the death of the injured party is not murder in the party inflicting the original injury.[4]

§ 685. —— **Corpus Delicti Must be Proved.** — Before a conviction of homicide can be had, it must appear that the body of the murdered person has been

1 Com. v. McPike, 3 Cush. 181; Parsons v. State, 21 Ala. 300.
2 21 Ala. 300.
3 R. v. Cheeseman, 7 C. & P. 415, (1836).
4 Morgan v. State, 16 Tex. (App.) 593 (1884).

found, or his death proved by convincing evidence.[1] Confessions without proof of the *corpus delicti*, are not sufficient to support a conviction upon.[2]

§ 686. **Corpus Delicti not Proved — Nor that Death was Result of Crime — Lovelady v. State.** — In *Lovelady* v. *State*,[3] the indictment charged the appellant with the murder of Anna Lovelady, who from the évidence appears to have been his wife, in Wood County, Texas, on the thirtieth day of January, 1882, by striking her with an iron wedge, a hatchet, and a knife, and by throwing her bodily into a fire, wherein she was fatally burned. The trial, which was had on the twelfth day of December, 1882, resulted in the conviction of the appellant for murder in the first degree, with a life term in the penitentiary assessed against him as punishment.

T. B. Browning was the first witness introduced by the State. He testified, in substance, that he was at the time of the death of Mrs. Lovelady, in January 1882, a tenant of the defendant, and had then known him and the deceased about two years. The house then occupied by the witness stood about two hundred yards from that occupied by the defendant. On the night of the death of Mrs. Lovelady, between the hours of eight and nine, the witness, who, with his family, had gone to bed, heard the defendant calling him, saying, as he understood him, "Ben! Oh, Ben! Come here. My house is on fire." The witness dressed rapidly and went to the defendant, whom he found standing at his fence some twenty yards from his house. He found the defendant wringing his hands, one of which he had wrapped in a white cloth, and crying. The witness asked what was the matter, and he replied that his wife had fallen into the fire and had burned up.

The witness thereupon went into the house and found Mrs. Lovelady dead, lying back down and naked. Her head lay within one or two feet of the hearth; her feet lay extended towards the center of the room, and her arms were turned up at the elbow and looked stiff. The body lay angling rather than straight, and was badly burned. Neither lamp nor candle was burning, nor did the witness notice any smoke in the room. A bed of live coals, such as are produced by consumed sticks of small dimensions, was burning in the fireplace. Two or three unconsumed sticks of small size were on the coals. The witness prepared to go for John Richards, a neighbor who lived some two hundred yards away, but the defendant told him that neither Mr. nor Mrs. Richards was at home, and requested him to go for Mrs. Jenkins, another neighbor, which the witness did, and returned. The room in which the dead body lay was about sixteen or eighteen feet in size and had two doors, one of which opened into a shed room. The deceased was the defendant's third's wife, had been married to him some ten or eleven months, and at the time of her death was about seven months advanced in pregnancy. The defendant had three children by his first wife, the senior being then about twelve years old.

On his cross-examination, the witness stated that he and his family were asleep when the defendant called to and awakened him on the night in question. He could not be positive, but thought that it was near nine o'clock when he was awakened. When the defendant met the witness at his fence he placed his two hands upon the witness' shoulders and said, in answer to the witness' question, that his wife had fallen into the fire and burned. He was then crying or

[1] R. *v.* Bull, 2 Ir. L. T. Rep. 18; R. *v.* Burdette, 4 B. & A. 191; State *v.* German, 54 Mo. 526 (1874); Ruloff *v.* People, 18 N. Y. 178, (1858).

[2] Matthews *v.* State, 55 Ala. 187, (1876); State *v.* German, 54 Mo. 526 (1874).

[3] 4 Tex. (App.) 545 (1883).

appeared to be. The fireplace spoken of was deep, and about three and a half or four feet wide. The chimney was constructed of earth and sticks, with the backs and jambs of brick. The opening of this chimney in front was about four feet from the level of the floor. It was about two feet deep to the back, and it was about eighteen inches from the end of the floor to the jambs. The hearth had sunk down from three to five inches and was very uneven.

The witness, after he returned from Mrs. Jenkins' was requested by the defendant to go to Winnsboro and notify Mr. Carlock, the coroner, of the death of his wife, and to request his presence with a physician to hold an inquest. He requested also that the witness *en route* should go by Dock Lovelady's house and notify him. Accompanied by Jesse Robinson, whom the defendant provided with a horse, the witness complied with this request. As he and Robinson started they met Mr. Crane, who told them to charge Mr. Carlock to come to the house without fail, and to bring two good physicians. When the witness reached the defendant's house on his return, day had just broken, and a large number of people had collected. All of this occurred in Wood County, Texas.

James Grant, the second witness for the State, testified that he had resided in the northern part of Wood County between fifteen and twenty years. He was, however, a stranger in the neighborhood of the defendant's house at the time of Mrs. Lovelady's death. He was at the house of Mrs. Jenkins when Browning came for her on that night, and at the time was sitting by the fire with his family. He accompanied Mrs. Jenkins to the defendant's house. This was about nine o'clock. When he and Mrs. Jenkins arrived at the defendant's house, the defendant was standing on his gallery, dressed. He had on hat, pants and boots, but no coat. Three children, dressed, were standing near the back of the house. The deceased was lying on the floor near the fireplace with her limbs extended towards one of the beds. The limbs, except the feet, were then covered with a sheet. One bed was rumpled as though it had been occupied. The other, and remaining one, had the cover smoothly turned down as though it had been prepared for occupation. It did not look like it had been occupied since it was made up. A bucket half filled with water sat within four feet of the body. A large load of split wood was on the fire, and was slowly burning when the witness reached the house. It soon ignited and burned well. The witness remained with the crowd at the house all night. He had not previously known the defendant or the deceased.

Doctor T. N. Skeen, a graduated physician, was next introduced by the State, and examined as a witness and an expert. He testified that in January, 1882, he was called upon by Coroner Carlock to make a *post mortem* examination of the body of Anna Lovelady. He reached the defendant's house about two o'clock on the day after her death, and began the examination about three o'clock, in the presence of the jury of inquest. The body had been laid out, washed and dressed. Examination disclosed that the head, breast, the upper part of the back, arms and hands had been badly burned, in some portions to a crisp. On the left side of the cheek and near the ear, the witness found a small but deep, though not dangerous, wound, about which the blood had settled showing that it was inflicted by a blow or fall. The witness could not determine whether it was an old wound or one of recent date. The hair had been burned from the head. The witness found a second wound on the back of the head, just above the roots of the hair. This was a deep bruise as large as a man's hand, extending down the back. The blood had settled about it, and down the back and spinal column for several inches. The skin was broken to

the skull, leaving the skull bare over a space as large as a silver dollar. This wound, produced by whatever cause, whether by a blow, fall or effect of fire upon this part of the head, would have caused instantaneous death.

On the top of the head the witness found two cuts crossing each other at right angles. The one extended from the front to the rear and was about three inches long. The other, about two inches long, crossed the first, running in a direct line from ear to ear. These two were well defined smooth cuts to the skull, and gaped open along the edges. The corners at the crossing point turned up. They were cuts to the skull, but not such as would produce death, nor even such as would stun or fell the deceased. They appeared to have been inflicted with some sharp instrument. The witness was of the opinion that they were insufficient to stun deceased, because the skull was not fractured, and because no blood had settled about them. Neither the wound on the cheek nor those on top of the head produced death, but, in the opinion of the witness, death resulted from the wound on the back of the head.

Upon his cross-examination the witness reiterated that he did not regard the wounds on the cheek and on the top of the head as dangerous wounds, and they did not, in his opinion, contribute to the death of Mrs. Lovelady. He did not, at the time he made the examination, nor did he yet know, what caused the wound on the back of the head. He was and is still undecided as to how the wound was inflicted. It might have been inflicted by a fall or a burn. He could reach no conclusion about it that would satisfy his own mind. The skin, to the size of a silver dollar, was broken from this wound, and the skull was exposed just above the roots of the hair, where the skin over the skull is about one-sixteenth of an inch thick. The parts at this point were badly scorched and burned. The witness cut them away and found that blood had settled and coagulated near by and down the back for several inches. It was possible that this condition might have been produced by the action of the fire alone, the effect of a burn being to stop the blood and cause it to coagulate as it does in a bruise. The wound appeared to the witness more like a bruise than anything else. At this point the hypothetical question and answer quoted in the opinion were objected to and admitted.

Re-crossed by the defendant, the witness deposed as follows: "I have already stated that blood will settle and coagulate in the region of a severe burn just as it will in the region of a bruise. The settling of the blood down the back and the neck of the deceased may possibly may have been produced by the burn alone. The burn on the back of the head, that between the shoulders on the back, and that on the breast and the face, would, in this instance, have produced almost instant death, without any other cause. The deceased was terribly bruised; her face was burned to a crisp; her nipples were burned off, and she was burned to the hollow or inside both from the breast and the back, and would have died from this cause if there had been no other."

John Richards, the next witness for the State, testified that at the death of Mrs. Lovelady he resided on the defendant's place, about one hundred and fifty yards from the defendant's house. He went to the defendant's house that night about nine o'clock and saw the defendant at his fence. He was then making a noise as though weeping, but the witness saw no tears. Witness heard several persons talking about sending for a coroner to hold an inquest, but did not know who made the suggestion. He heard Crane say that if it was his case he would send to Winnsboro for Coroner Carlock and two of the best physicians to be had, and have the matter investigated. The defendant, in reply, complained

that to have two doctors from Winnsboro would involve him in too much expense, and suggested that Doctor Pevey, who lived some two miles distant, be seut for. A little later than this, the defendant invited the witness to walk with him a short distance from the house, where he asked the witness, "What in the d—l do you suppose Capt. Crane wants with a coroner's jury and two doctors from Winnsboro?" When the witness saw the body of the deceased it was wrapped in a sheet and lay on a plank in the back of the house. Cross-examined, the witness stated that he and his wife left home on the Saturday before Mrs. Lovelady's death, which occurred on Monday, and the defendant knew that fact. Witness and his family were the neighbors nearest to the defendant at the time of the death of his wife. The witness did not know whether or not the defendant was actually weeping at the fence. On the next day before the body was removed for burial, the defendant "got to carrying on" — cried or pretended to cry. Witness saw no tears, and to him defendant did not appear like a man weeping. The defendant then went to the grave with the burial party.

W. L. Stevenson next testified, for the State, to the effect that he lived near and worked for the defendant in 1881. He did not know that the defendant had any weapon about his place at the time of the death of his wife. He had an iron wedge, a hatchet and a pocket knife about his premises in 1881. The witness did not know that the deceased at any time left the defendant, though he was so informed by the defendant himself. The deceased came to the house of the witness during the fall of 1881, and got an umbrella, at which time the witness understood that she was leaving him. About plowing time during the summer of 1881 the defendant slapped the jaws of the deceased. The defendant told the witness that his wife quarreled at him for not helping her cook; that he tried to help her cook and undertook to grind some coffee, when his wife grabbed him and he threw her off; that she grabbed him again and he spilled the coffee, whereupon he slapped her jaws and she fell against the smoke house. Cross-examined, the witness stated he heard the slap given by the defendant to the deceased. He, the witness, was sitting on his gallery at the time, from a hundred to one hundred and fifty yards distant from the defendant. He did not and could not see the slap from where he was. He did not know that it was the defendant who did the slapping, or that it was the deceased who was slapped, until, as above stated, the defendant told him in the fall. At this point the witness was confronted with his written testimony given before the examining court, which on the subject in hand reads as follows: "I was coming through the field belonging to Capt. Crane, and heard a racket or noise toward Mr. Lovelady's house, and heard him slap his wife's jaws and her crying afterwards." Asked to explain and reconcile these two statements if he could, the witness replied: "I know I was sitting in my gallery leaning back against the wall. Capt. Crane's field is near defendant's house, and I heard the noise as I walked along, and when I got home I heard the lick or slap."

The witness stated that, as he had a defective memory, he could not now say exactly how the defendant came to confess to him that he had slapped his wife's jaws. It came about, however, in this manner: The witness went into the woods about a quarter of a mile from defendant's house, where the defendant was cutting blocks for house sills, and the defendant told him about the matter in the manner related in his testimony in chief. This was the only time defendant had ever told him about it. The witness was here requested to reconcile this statement with one he made before the examining court, which was read as

follows: "The defendant told me that he slapped his wife's jaws. He came to our house and there told me that he slapped her jaws the summer before; that she grabbed him while he was grinding coffee and caused him to spill it, when he slapped her jaws and slung her up against the smoke-house." The witness stated that his memory was bad and he could not explain the variance between the two statements. He was not mad at the defendant. On Saturday before the death of Mrs. Lovelady the witness attempted to obtain credit in Winnsboro, but was refused in default of an order from the defendant. The witness bought no goods on that day, nor did he utter threats against the defendant. He sent his mother to the defendant when he got home on that Saturday night, but made no threats. The witness left the defendant's premises and did no more work for him.

Green Pevey, the defendant's family physician, testified, for the State, that he was called to treat the deceased about the middle of September, 1881, and made one or two visits between that time and her death. She was a strong, healthy woman, but was then pregnant, and in the course of nature would have given birth to a child within two months later than the time of her death. About the middle of September, 1881, she came to the witness' house, sobbing and weeping, and apparently in great distress. She complained to the witness of a bruise on her left side. She remained at the witness' house that day and night, and next day until evening, when the witness persuaded her to return to her home, which she did, or at least she started in that direction after the witness refused her request to remain at his house until she should recover from her bruised side. She was then suffering from hemorrhages of the womb, caused, the witness believed, by the bruise on the side, which then seriously threatened abortion. The witness treated her for this disarrangement, off and on, up to the day of her death, and prevented abortion with great difficulty. Up to the time that she received this bruise she was free from hemorrhage or other symptom of abortion. The witness did not examine the bruise on the day that the deceased came to his house and informed him of it, but in a month or two thereafter the witness visited her and examined it. It was then about the size of a silver dollar, and was of a blue or dark color. The witness treated her for hemorrhage of the womb for four or five months, and up to the day preceding her death. She and the defendant were separated on the occasion of her visit to the witness, but they afterwards became reconciled and lived together. The witness attended upon her on the day before her death by direction of the defendant, and left six doses of Dover's powders for her to take leaving directions as to how they should be taken. The witness knew the deceased before her marriage to the defendant, when she was Miss Anna Wood. She lived with the defendant then, who waited on her and paid her bills — at least he paid her doctor's bills. The defendant always appeared to be a kind and affectionate man to his wife and family, so far as the witness, who had good opportunities for doing so, could judge. The families of the witness and the defendant were intimate. The six powders left with the deceased by the witness were intended to allay pain and to prevent abortion.

Mrs. Lizzie Richards, for the State, testified that in October, 1881, the deceased passed her house, weeping bitterly. On the Sunday week before her death, witness called upon her at the house of the defendant, and found her sitting by the fire weeping. She displayed, and complained very much of a red bruise on the side of her face near the ear. She had her head tied up, but exhibited the bruise to the witness. The defendant was not in the house at the

time. On the Friday following the deceased was at the house of the witness and the bruise was not then visible. On Saturday, which was two days before her death, the defendant passed the house of the witness very early after daylight, going from home. Some hours later, at about eleven o'clock, the witness saw the deceased going towards her home. She was weeping violently and, seemed in great distress. She said she was going then to get her clothes. Mrs. Stephens, a neighbor, persuaded the deceased to remain and not to leave the defendant. Cross-examined, this witness stated that she did not see the deceased leave home on the Saturday before her death —only saw her as she was returning. Witness did not know of her own knowledge that the deceased had then separated from the defendant.

Mrs. Etha Browning testified, for the State, that she went to the defendant's house on the night of the death of Mrs. Lovelady. She saw no weapons at the house. She saw, but did not particularly notice, an iron wedge which was picked up near the bed. She also saw some smoothing irons, but saw no hatchet or knife. The deceased was at the house of the witness some time during the fall before her death. She came one evening during the absence of he witness, and the witness did not see her until next morning. She said that tshe came from Doctor Pevey's. When she met the witness next morning she threw her arms around the witness and wept violently and begged the witness to go home with her. She at the same time showed the witness a bruise on her side, of which she complained very much. It was then uncovered, having neither plaster nor medicine on it. After remaining at the house of the witness for a while the two started to the defendant's house. When they got there the defendant was in the field, but being called by one of the children, he came to the house, when the deceased, who was then crying, told him that she had come for her things and was going to leave him forever. The defendant began crying and begged her not to leave him. The deceased replied that he had so abused her she could not live with him; that he had kicked her out of the door and made that bruise on her side, which had nearly killed her; that he had always imposed upon her, and made his daughter Luella abuse and mistreat her; that if she remained with him he would eventually kill her. She told the witness in the presence of the defendant that the defendant was good and kind to her in the presence of company, but at other times was abusive and cruel. The defendant did not deny or reply to any of these reproaches, but hung his head, and appeared to be crying. Witness left the deceased talking, and both of them crying. Cross-examined, the witness stated that she looked at the bruise on the morning of the occurrences deposed to. It was on the side, above the hip, and appeared to be nearer the back than the stomach. The deceased then walked without assistance, and did not appear crippled. She did not limp. The witness accompanied her to her house at her request.

W. F. Richards testified, for the State, that he reached the defendant's house on the night of his wife's death at about nine o'clock. While the crowd were standing about the fire discussing what was best to be done, Captain Crane suggested that the coroner and two of the best doctors in Winnsboro be sent for. The defendant, in an aside, asked the witness, "Why in the d—l does Crane want the coroner and two doctors?" The witness thereupon called Crane, and the defendant said that Winnsboro two doctors would cost too much —, that Doctor Pevey, who lived near, would answer every purpose. The defendant had both hands wrapped up, and complained more of them than anything else. During the night the witness asked the defendant for an account of his

wife's death, and heard him give three separate and different accounts of it. One of the accounts was to the effect that all of his family had gone to bed, himself and his wife sleeping together; that some time after he retired his daughter Luella aroused him, when he found the house full of smoke; that he sprang from his bed, opened the door and then discovered his wife in the fire and pulled her out. A second account which he gave to Willis Richards was that when his daughter awakened him, he immediately discovered his wife in the fire, her clothes burning, when he pulled her out. His third account was that, when aroused, he was enabled to see his wife in the fire by a small blaze, when he sprang up, dragged her out and then opened the door and gave the alarm. During the night the defendant "took on and made a great fuss" over his hands. Just before day the defendant requested the witness to select a convenient place to bury the body, and to get it interred as soon as possible. This was after Browning and Robinson had returned from their trip to Winnsboro after the coroner. The witness did not see the deceased until she was taken from the fireplace and laid out.

C. B. Gorman testified, for the State, that as one of the coroner's jury, in company with Mr. Carlock and Doctor Skeen, he reached the body in the afternoon on the day following the death. The witness assisted Doctor Skeen in making the examination, and first called the doctor's attention to the bruises on the face, head and neck. The bruise just below the cheek bone was nearly as large and wide as the witness' hand. It was a very severe bruise, blue or black of color, and extended below the cheek bone. The doctor lacerated the bruise disclosing, after cutting through the bruised parts, white flesh that resembled pork fat. The black spot on the back part of the head commenced just above or a little below the point where the hair is usually "done up." It was longer than a man's hand, and ranged down the back of the neck between the shoulders and immediately over the back bone. At its topmost point a space the size of a silver dollar was cut to the skull. The bruise itself was very deep, the flesh was reduced to a jelly or mush, and was black with bruised blood. This condition was confined to the circle of the bruise. When the knife passed from this circle, the flesh, as to color and solidity appeared natural. The cuts on the top of the head formed a complete cross, and were well defined, clean and clear, and conformed to the description given by Doctor Skeen. No bruises, black or mashed spots, were found near the cross cuts. The chimney, to the fireplace, was constructed of sticks and earth, except the back, jambs and hearth, which were of brick. The hearth had sunk some four or five inches below the level of the floor. There were no rough places anywhere about the fireplace. The fireplace contained two old andirons, the end feet of which were broken off. The andirons, though somewhat rough at their broken parts, had no sharp edges. The witness examined for but found no weapons, other than an iron wedge, such as are in use for splitting wood or rails. This was either a new one or it had been recently "set." Its head was square and unbattered, and the point so sharp for an iron wedge that the witness believed that it had never been used in splitting wood. The witness examined but found no blood on the wedge, or elsewhere in the house, save a very little on the hearth. Cross-examined, the witness stated that the wound on the back of the head was at least three inches wide. He inserted his finger to the distance of an inch or more and extracted clots of blood and hair. It extended fully six inches down, and when cut the flesh all fell out. The skin was not cut off all around this bruise. At the point where it was cut to the skull, the wound was filled with hair and blood —

the fire having left the hair longer at this point than elsewhere on the head The skin was not burned. At this point the State closed.

Mrs. R. M. Pedeu, the mother of the defendant's first wife, testified, for the defence, that she had known the defendant since he was four years of age. He lived in her household for three years, in Mississippi, and the witness had lived in his, in Texas, for two years. She had always known him as a peaceable man and as a quiet, kind and affectionate husband and father. The witness visited the defendant and the deceased in August, 1881, remaining with them three weeks. She saw them daily, and throughout her stay with them the deceased appeared cheerful and content. The witness did not hear during that time a single word of discord between her and defendant. The witness visited them again some time after this, and found them living together pleasantly and agreeably. She had never heard anything of the sickness or bruises of the deceased. The witness lived within three miles of the defendant during the deceased's lifetime. She visited them no oftener than stated, because she was in bad health and had no means of transportation. She lived with the defendant during the lifetime of his first wife, who was the witness' daughter. She had no hard feelings against the defendant's second or third wives.

Captain F. M. Crane was the next witness for the defence. He testified that, being sent for, he arrived at the defendant's house about nine o'clock and found the body lying on the floor near the fireplace, with the feet extended towards the back of the house. He described the chimney, fireplace, hearth, etc., as they had been described by other witnesses. A slow wood fire was burning when the witness arrived, and the defendant was wringing his hands and crying. Some one, the defendant perhaps, suggested the propriety of sending for the coroner and two doctors. While this suggestion was being discussed, Buck Richards, who was then talking with the defendant, called the witness, and the defendant complained that two Winnsboro doctors would entail too much expense, and asked why Doctor Pevey would not do. The witness merely replied that if he were defendant he would have the coroner and the two best physicians obtainable. Later, Browning and Robinson started to Winnsboro for the coroner and doctors. The witness followed them to the fence and directed them what to do. The witness knew nothing about the separation of the deceased and defendant, and knew nothing about how they had got along together. He did not know who directed Browning and Robinson to go to Winnsboro. He did not, in the first instance, but advised with them after they had started.

J. A. Lovelady, the defendant's brother, testified that he was told of the death of the defendant's wife about twelve o'clock on the night that it occurred, by Browning and Robinson. He started at once to his brother's house, but changed his mind because of high water in the creek, and then pursued and overtook Browning and Robinson *en route* to Winnsboro, and traveled with them until their return to defendant's house at daylight, when he found his brother's wife dead. This witness, who had occupied the defendant's house since his arrest, described the chimney, fireplace and hearth as they were described by other witnesses, except that he stated that some few bricks were loose in the fireplace. The defendant and his wife always got along well so far as he could see or knew. He knew nothing of his own knowledge of a separation between them.

Luella Lovelady, the thirteen-year-old daughter of the defendant, testified, for the defence, that on Saturday, the second day before the death of Mrs. Lovelady, the defendant went to Quitman and remained all day. If the deceased

abandoned the defendant that day or entertained an idea of doing so, the witness knew nothing about it. She, the deceased, followed the defendant to the gate, and afterwards went to Mrs. Stephens' house and got two smoothing irons, with which on her return she went to ironing. The defendant was told to go by Doctor Pevey's place and send him to see the deceased, who was then, and had been for some time, quite ill. Doctor Pevey arrived at the house later, and left six doses of powders for the deceased to take. These were placed on the mantel piece, and two of them were taken by the deceased during the next day. On Monday the deceased was worse than usual, and walked about the house only with the assistance of the witness. She had swimming of the head. She lay down shortly before night, and the witness did not see her get up again. The defendant worked about the place all of that day, returning before night and assisting in the preparation for supper. The witness' two little sisters went to bed shortly after supper, occupying places in the witness' bed. The defendant next went to bed with the deceased, occupying the front part of the bed. The witness read her school book awhile, and having latched the front door, retired and went to sleep.

There were two beds in the room on the same side. The one occupied by the witness and her sisters stood in the corner, with the head towards the fire-place and the foot towards the back of the house. The one occupied by the defendant and the deceased stood with the foot towards the foot of the witness' bed, and the head against the side of the house. When the defendant went to bed he asked his wife how she felt, and she replied that she felt worse, and was in great pain. The defendant asked her where the pain was located and she told him. The witness did not hear them speak again.

After a time, she did not know how long, the witness was awakened by a smoothering sensation, and found the room full of smoke. She called twice to the defendant before he awakened. He sprang from his bed, ran to the door, opened it, and then exclaimed: "Lord, have mercy! Anna is in the fire!" He then pulled the deceased from the fire on to the floor, burning his hands severely. The clothing around the deceased's neck was then burning, making a faint light. The defendant then blew a horn from his door to arouse the neighbors Mr. Browning arrived shortly, and was followed by others after a while. Three doses of the powders were found on the mantel piece.

Cross-examined, the witness stated that the bedsteads were low — not above eighteen inches in height. The footboards were low. The deceased, as usual, slept behind that night, and the witness could not say how she got out of bed without awakening the defendant. There was an iron wedge in the house used for propping the door open. There were two borrowed smoothing irons in the house. The defendant owned a hatchet, which was in the yard on that night.

The motion for a new trial averred that the proof failed to show the use by the defendant, or other person, of any of the deadly weapons charged in the indictment; a total failure to show express malice; and that the evidence, in its circumstantial or other character, was insufficient to inculpate the defendant beyond a reasonable doubt.

WILLSON, J. I. It was not error to permit the State's witness, Doctor Skeen, to answer the hypothetical question propounded to him by the district attorney. That question was as follows: "Suppose that a person should strike another on the back of the head at the place described by you, where the skin was off the size of a dollar on the back of the head of deceased, with the large end of an iron wedge, sufficiently hard to tear off the skin and open

the wound to the skull, and produce a bruise down the back of the neck several inches long, so that the blood would settle there, would such a blow produce death?" This question was answered by the witness as follows: "Of course such a blow would produce death instantly. At this particular portion of the cranium is the seat of life; a concussion here will injure the spinal column and produce paralysis and death." It was objected to the question that it was hypothetical, and not based upon a state of facts already in evidence; and that it did not involve a question of science or skill such as would warrant the admission in evidence of the opinion of the witness.

In putting hypothetical questions to an expert witness, counsel may assume the facts in accordance with his theory of them; it is not essential that he state the facts to the witness as they have been proved.[1] Of course, as stated by Mr. Wharton, if the facts on which the hypothesis is based fall, the anfalls also.[2] Nor would it be a proper practice to allow hypothetical questions having no foundation whatever in the evidence in the case.

In the case at bar, the witness was shown to be a medical expert, and it was further shown that there was a severe wound upon the back of the deceased's head, which could have been inflicted with an iron wedge, and that an iron wedge was found near the body of deceased shortly after her death. We can not say that the hypothetical question objected to had no foundation in the evidence in the case. It was the theory of the prosecution that deceased was killed by a blow inflicted upon the back of her head with an iron wedge in the hands of the defendant, and it was proper to submit this theory to be supported by the hypothetical question objected to. As to the other objection to the question, it is also untenable. This precise question is discussed and settled in *Waite* v. *State*,[3] in which case the authorities in support of the admissibility of such evidence are cited.

II. We now approach the principal and most difficult question in this case. It is as to the sufficiency of the evidence to support the conviction. Circumstantial evidence alone is relied upon by the prosecution. Is it of that cogent, satisfactory and convincing character which the law demands to sustain a conviction of crime? It is unnecessary for us to reiterate the rules of the law in regard to the nature, strength, sufficiency, etc., of circumstantial evidence. They have been so often and so fully stated and explained in previous decisions, that we need only refer to the case of *Pogue* v. *State*,[4] where the authorities upon the subject will found cited.

In prosecutions for murder, the State must establish clearly and satisfactorily the *corpus delicti*. This *corpus delicti* consists of two things: first, a criminal act; and second, the defendant's agency in the commission of such act. Thus, in the case at bar, the burden of proof was upon the prosecution to establish, first, that Anna Lovelady was dead, that her death was produced by the criminal act of some one other than herself, and was not the result of accident or natural causes; and second that the defendant committed the act which produced her death.[5] Mr. Wharton says: "It has been already stated that the *corpus delicti* includes two things; first, the objective, and then the subjective elements of criminality; in other words, first, that the overt act took place;

1 Guiterman *et al.* *v.* Liverpool, etc., Steamship Co., 83 N. Y. 359; Cowley *v.* People, *Id.* 464; 1 Greenl. Ev. 440.

2 Whart. Cr. Ev. 418.

3 13 Tex. (App.) 179.

4 12 Tex. Ct. (App.) 283.

5 Whart. Cr. Ev., sec. 325; 1 Bish. Cr. Proc., sec. 1056.

secondly, that it took place through criminal agency. Of homicide, therefore, it must be held essential to a conviction, first, that the deceased should be shown to have been killed; and secondly, that this killing should have been proved to have been criminally caused. And on the well known principle that in capital cases this crimiual agency of the defendant can not be proved on his confession alone, without proof of the *corpus delicti*, it must not only be shown, to justify a conviction in such a case, that the deceased was dead, but that his death was criminally produced. Unless the *corpus delicti*, in both these respects is proved, a confession is not by itself enough to sustain a conviction."[1] It is perfectly competent to establish the *corpus delicti* by circumstantial evidence,[2] but, as is well said by Mr. Bishop, "special care should be exercised as to the *corpus delicti*, and there should be no conviction except where this part of the case is proved with particular clearness and certainty."[3]

What is the evidence relied upon by the prosecution in this case to establish the *corpus delicti?* We will refer to it, and analyze it in detail. It establishes beyond any doubt the death of Anna Lovelady. This part of the *corpus delict* is therefore beyond controversy. What produced the death? This is the first question to be solved, and unless it is clearly and satisfactorily settled by the evidence that the death of Anna Loveday was produced by the criminal act or agency of some person other than herself, we need proceed no farther with the consideration of the case; for if this important matter be left in doubt, the foundation of the prosecution is fatally insufficient, and the superstructure can not stand. It is shown by the evidence that the deceased was in an advanced state of pregnancy — that she had been in a delicate state of health for some months prior to her death; that she had been afflicted with excessive hemorrhage from the womb; that she was uuder the treatment of a physician, and had for several months been threatened with abortion; that she was weak, aud unable at times to walk about the house without help; that on the day of her death she had been taking medicine prescribed by her physician; that on the night of her death she complained of being worse, and in much pain; that she had not finished taking all the medicine prescribed by her physician; that he had prepared six powders or doses of medicine for her to take; that she had taken two of the doses, leaving four yet to be taken, and these were upon the mantelpiece over the fireplace. When her dead body was found, it was upon the floor of her house in front of the fireplace and near to it; the clothing had been burned off the body, and the body itself was terribly burned; the hair was all burned from the head, and the body was in places, both on the back and in front, burned to the hollow and the breasts were consumed by the fire. Bruises and wounds were discovered upon the body, one of the cheeks was badly bruised; there were two cuts on the top of the head, crossing each other at right angles, which were apparently produced by some sharp instrument. There was a severe wound or bruise on the back of the head and neck, just where the head joins the neck; this wound laid bare the skull, and was as large as a silver dollar, and the blood in the region of it, and extending for several inches down the back and coagulated, discoloring the body at that place. None of the wounds upon the head produced a fracture of the skull.

A physician, an expert, testified that the cuts upon the top of the top of the head were not sufficient to produce death, or to stun or fell the deceased, but

[1] Whart. on Hom., sec. 641.

[2] 1 Bish. Cr. Pr., 1057.

[3] 1 Bish. Cr. Pr., sec. 1059.

that the wound upon the back of the head was sufficient to cause death. This physician also stated that he did not know what caused the wound at the back of the head; he had examined the wounds, and he says: "I am now, and have always been undecided as to how any of the wounds came there. It may have been done by a fall or burn. It is possible it may have been done by the fire. I am unable to decide how, satisfactorily to my own mind."

Again he says: "The settling of the blood down the neck and back of deceased may possibly have been produced by the burn alone. The burn on deceased at the back of the head, also between the shoulders on the back, and that on the breast and face, would have produced death almost instantly without any other cause."

This constitutes the only expert testimony as to the probable cause of the death of the deceased. What does it establish? Nothing more than that there were wounds upon the body which might have been produced by violence inflicted by another, or by an accidental fall, or by burning. There is no certainty in testimony like this, and it is entitled to but slight consideration. This expert was present soon after the death, and examined the dead body and surroundings, and he candidly admits and states in his testimony that his mind has never been satisfied as to how the wounds upon the body were produced. We certainly can not hold that the testimony of this witness establishes the essential fact that the death of deceased was caused by the criminal act of another person.

What other evidence is there in the case tending to establish that fact? It was proved that some months prior to the death of deceased, her husband, the defendant, had ill-treated her; had in fact struck and kicked her; that her death occurred early in the night, between eight and nine o'clock; that the bed upon which the defendant claimed to have been sleeping on the night of her death was found to be smooth and unrumpled when the neighbors reached the scene on that night; that there was an iron wedge found in the house that night, which instrument was capable of inflicting such wounds as were found upon the body of deceased; that the children, who were claimed by defendant to have been asleep in the house at the time of the tragedy, were up and dressed and had on their shoes when the nearest neighbor reached there that night; that the body of deceased was cold and stiff when the neighbors reached it between eight and nine o'clock at night, and that there was no fire in the fireplace except a bed of live coals. We have recited in substance every fact testified to, as presented in the record before us, which in our judgment even remotely tends to prove that the death of deceased was caused by the criminal act of another. Unexplained, this state of facts might be held sufficient proof that deceased lost her life by the criminal act of another. We are not called upon, however, to determine this question. Much of this evidence, which might otherwise appear inconsistent with the innocence of the defendant, is, to our minds, explained in a manner which very much weakens its cogency. Thus it is shown that there was a live bed of coals of fire in the fireplace on that night; that the fireplace was a large one; that the hearth was lower by four or five inches than the floor of the room; that there was a mantel-piece above the fireplace on which were the four doses of medicine which the deceased had yet to take; that after her death three only of the four doses of medicine were found upon the mantel; that the back and jambs of the fireplace were brick, and the brick were broken out of the back and had fallen into the fireplace;

that there were two broken andirons in the fireplace, and one or two old iron plow-shares.

It is the theory of the defence that the deceased got up from her bed, went to the fireplace to get a dose of the medicine and swooned and fell into the fire, and that the wounds upon her body were produced by falling upon the broken andirons, plowshares and brick in the fireplace, or by the action of the fire. Is this theory improbable or unreasonable when propounded upon this state of facts? Might not such an accident occur under such circumstances? It was proved that the iron wedge which was found in the house had been kept there to prop open the door, and that it was carefully examined and no blood or other indication of having been used in inflicting wounds was found upon it. It was claimed by defendant that when he awoke the body of deceased was in the fire and burning, and that he pulled it from the fire on to the floor and in doing so burned his hands severely, and that he also procured water and threw it upon the body to extinguish the fire. In corroboration of this, it was proved that a bucket with some water in it was setting near the dead body, and that the defendant's hands were severely burned. It was also proved by the thirteen-year-old daughter of defendant, who was in the house on that night, that when she awoke the house was filled with smoke, and she awoke her father, and he sprang out of his bed and pulled the body of deceased out of the fire, etc. In regard to the bed in which the defendant claimed that deceased and himself were sleeping on that night being smooth and unrumpled, there is no explanation in the evidence. The condition of the bed is testified to by but one witness, and there is opposed to this testimony the positive testimony of defendant's daughter that her father and deceased had gone to bed in that bed, and also by the statements of the defendant which were admitted in evidence as part of the *res gestæ*.

After a very careful consideration of all the evidence, we find our minds in the same condition as that of the physician, Doctor Skeen. We are unable to determine from the facts before us in what manner or by what means the death of the deceased was produced, whether by natural causes, accident, or the criminal act of another person. There is certainly, in the evidence presented to us, not that moral certainty, that conclusive force, that the death was produced by the criminal act of another, which the law in all such cases imperatively demands in support of a conviction. We must presume the defendant innocent until his guilt is established by competent evidence beyond any reasonable doubt. This presumption of innocence must be met and overthrown by the State, if overthrown at all, not by mere possibilities, probabilities, conjectures, or suspicious circumstances, but by clear, forcible, consistent and satisfactory evidence, which excludes from the mind every reasonable doubt arising from the evidence of the defendant's guilt. In this case we are compelled to say that such is not the character of the evidence relied upon by the State to support this conviction. We always hesitate to disturb the verdict of a jury upon the facts of a case, and we never do so where there is sufficient evidence to sustain the verdict, even where the great preponderance of evidence is against the verdict. But, where, in our judgement the evidence is wholly insufficient to support a conviction; where it falls short of the positive demands of the law and of reason; where it leaves the issue of guilt in great doubt, and presents a reasonable theory of defendant's innocence, as we think it does in this case, this court, and the Supreme Court of this State, have uniformly considered it not only within their province, but their imperative duty, to interpose between

the State and the citizen and guarantee to the latter a fair and impartial trial in accordance with the full measure of the law. By pursuing this course guilty persons may and do sometimes escape the punishment which they deserve, but it is far better that it be thus than that the innocent should be condemned.

Believing that the evidence in this case is insufficient to establish the *corpus delicti*, in that it fails to satisfactorily prove that the death of the deceased was caused by the criminal act of another, it becomes unnecessary for us to consider the case further, and the judgment is reversed and the cause is remanded for another trial.

*Reversed and remanded.*

§ 687. **Murder — Intent to Kill Essential.** — To constitute murder an intent to kill is essential.[1]

§ 688. —— **Murder by Poisoning — Knowledge must be Proved.** — To constitute murder by poisoning, knowledge of the prisoner of the former character of the article used which produced the death, must be proved; that he knew the article was not harmless is insufficient.[2]

§ 689. —— **Symptoms.** — And symptoms of poisoning alone are not sufficient on which to found a conviction.[3]

§ 690. —— **Intent to Commit Felony — Misdemeanor.** — A killing while the person is engaged in committing a misdemeanor is not murder, it is only manslaughter; to constitute murder the intent must be to commit a felony.[4]

§ 691. —— **Malice When not Presumed.** — There is no legal presumption of malice where the facts are sufficiently disclosed to show the motive.[5]

§ 692. —— **Intent to Take Life — Murder.** — An intent to take life is essential under the New York statute.[6]

§ 693. —— **Degrees of Murder.** — There were no grades of murder at common law. By the statutes of many of the States the crime of murder has been divides into degrees, the first only being punished capitally. The statutes are in some respects similar and in others different in their language and effect.[7] It is believed, however, that all of them require — as to murder in the first degree — the elements of intent, deliberation and premeditation.

§ 694. —— **Degrees of Murder — Intent Requisite.** — To constitute murder in the first degree under the American statutes the killing must be willful, there must be specific intent to take life.[8]

1 Wellar *v.* People, 30 Mich. 276.

2 People *v.* Stokes, 2 N. Y. Crim. Rep. 382. (1882).

3 Joe *v.* State, 6 Fla. 591; 65 Am. Dec. 519 (1856).

4 Smith *v.* State, 33 Me. 48 (1851). And see State *v.* Shock, 68 Mo. 555.

5 State *v.* Coleman, 6 Rich. (S. C.) 185.

6 2 Rev. Stats. 657; Darry *v.* People, 10 N. Y. 210 (1854).

7 For a collection of these statutory provisions see, 18 Am. Dec. 774 *et seq.*, note to Whiteford *v.* Com., 6 Rand. 721; 18 Am. Dec. 771.

8 Fields *v.* State, 52 Ala. 348; Keenan *v.* Com., 44 Pa. St. 51, 55.

§ 695. —— **Deliberation and Premeditation Essential.** — But intent alone is not sufficient. To amount to murder in the first degree, there must also be premeditation and deliberation.[1]

§ 696. —— **A Killing not Prima Facie Murder in First Degree.** — *Prima facie* a killing is murder in the second degree; and the *onus* is on the prosecution to raise the offense to the first degree.[2]

§ 697. —— **Murder in the Second Degree — Premeditation.** — Premeditation is essential to murder in the second degree; and there can be no murder of this grade without this requisite.[3]

§ 698. **Implied Malice — Erroneous Instruction.** — In *Pickett* v. *State*,[4] on a trial for murder the jury were instructed that "whenever it is conclusively shown that one person has killed another, and does not appear beyond a reassonable doubt from the evidence that the killing was in pursuance of a design deliberately formed, as hereinbefore defined to you, and where there is no evidence which reduces or tends to reduce the killing to manslaughter or negligent homicide, or which excuses or justifies the killing, the killing is deemed in law to have been done with express malice." On appeal this was held error, the court saying: —

HURT, J. The appellant Pickett was convicted of murder of the first degree, his punishment being assessed at confinement in the penitentiary for life.

Upon express and implied malice the court below charged as follows: "4th Express malice is when one, with a calm and sedate mind and a deliberate and formed design, in pursuance of such design, doth kill another; which condition of mind is usually evidenced by external circumstances, such as lying in wait, antecedent menaces, former grudges, deliberate acts of preparation, etc. You will notice from the foregoing definition of express malice, that in order to constitute a killing upon express malice, the mind of the slayer must be cool and sedate, and while in this condition he must have formed the design to kill, and have actually killed the party in pursuance of such formed design; or, if the design to kill was formed when the mind was excited and agitated, then, in order to make the killing upon express malice, there must have been time for the mind of the slayer to cool and for him to deliberate upon the character of the act he was about to commit, before the killing occurred. And if the killing occurred while the mind of the slayer was agitated from any cause, so that the same was incapable of good reflection upon the character of the act he was about to commit, then the killing could not be upon express malice. By the words 'calm, cool and sedate' is not meant that the mind must be entirely free from agitation, but only sufficiently so for it to understand and reflect upon the nature of the act.

[1] People *v.* Sanchez, 24 Cal. 17 (1864); Palmore *v.* State, 29 Ark. 248; State *v.* Foster, 61 Mo. 549; People *v.* Walworth, 8 Alb. L. J. 19; People *v.* Batting, 49 How. Pr. 392; People *v.* Foren, 25 Cal. 361; State *v.* Brown, 12 Minn. 538; Fahnstock *v.* State, 23 Ind. 231; Nye *v.* People, 35 Mich. 16; Sullivan *v.* People, 1 Park. C. C. 347 (1852); Clark *v.* People, 1 Park C. C. 356 (1852); People *v.* Mongano, 1 N. Y. Cr. Rep. 411 (1883); People *v.* Conroy, 2 N. Y. Cr. Rep. 247 (1884); State Curtis, 70 Mo. 54; State *v.* Sharp, 71 Mo. 218.

[2] McDaniel *v.* Com., 77 Va. 281 (1883); Pliemling *v.* State, 46 Wis. 516.

[3] State *v.* Robinson, 73 Mo. 306; State *v.* Curtis, 70 Mo. 54.

[4] 12 Tex. (App.) 86 (1882).

"5th. Implied malice is where one party kills another without the circumstances and formed design as are required to constitute a killing upon express malice, but under such circumstances as do not reduce the killing to manslaughter or negligent homicide, or which excuse or justify the killing.

"6th. Whenever it is conclusively shown that one person has killed another, and it does not appear beyond a reasonable doubt from the evidence, that the killing was in pursuance of a design deliberately formed, as hereinbefore defined to you, and where there is no evidence which reduces or tends to reduce the killing to manslaughter or negligent homicide, or which excuses or justifies the killing, the killing is deemed in law to have been done with express malice."

This sixth paragraph is clearly erroneous; so palpably so that it requires no analysis to make the error appear. If implied instead of express had been inserted, it would not have been objectionable as a charge upon implied malice. From the preceding paragraphs and its own context, we believe this charge was intended to apply to implied malice, and that the word express was not intended, or that there was a mistake in the transcript. We, however, must be governed by the record. Assuming this charge to have been given, which we are compelled to do, the judgment must be reversed."

§ 699. **Implied Malice — Erroneous Charge — Whitaker v. State.** — In *Whitaker* v. *State*,[1] the conviction below was for murder in the second degree. On appeal the following opinion was delivered by the court: —

Willson, J. The law of this case can not be properly discussed and understood without first reciting the facts in evidence. In September, 1873, E. Townley died at a store or grocery house kept by one John Henderson, in Denton County. For the purposes of this opinion it will be assumed as a fact that his death was caused by a wound inflicted upon his head with a rock weighing two or two and a half pounds, and that the fatal blow with the rock was stricken by the defendant. The deceased went to Henderson's grocery on the morning of the day of his death, and drank whisky until he became somewhat intoxicated. Henderson, Hood, Snider, Adkins and Horton were at the grocery. It seems that all these parties were more or less under the influence of liquor, and Snider, Horton and the deceased were very much under its influence. Horton and deceased had a fight, which resulted in Horton's getting whipped. This occurred before defendant went to the grocery. Horton was defendant's brother-in-law. Defendant went to the grocery in the afternoon, and after reaching there took two drinks of whisky, one a large drink. He remarked when he first went to the grocery that he had heard that some of them had been imposing on Horton while he was drunk, and that they couldn't do that while he was there. Henderson told him that no one had imposed on Horton — that it was a drunken row, and that Horton had only got what he deserved. The defendant replied then that it was all right. Deceased, at the time of these remarks, was playing on a fiddle, and if he heard the remarks, seemed to pay no attention to them. Snider, being quite drunk and boisterous, Henderson proposed to tie him. Snider went to a tree and told Henderson to come and tie him. Henderson took a rope and wrapped it around Snider and the tree. This was all in fun. Hood and deceased started to go to Snider to untie him. Henderson and defendant interposed to prevent them from untying Snider.

[1] 12 Tex. (App.) 436 (1882).

Hood and Henderson scuffled with each other — all in fun — Hood trying to get to Snider to untie him, and Henderson to prevent it. The defendant was sitting in the door of the house when Hood and deceased started to untie Snider. He got up, and after going about eight feet stooped and picked up a rock or rocks. Witness thought that he had a rock in each hand. Deceased went to Snider as if to untie him. Defendant went up to deceased with the rocks in his hand and said, "You shan't untie him." Deceased said he reckoned he would. Defendant then pushed deceased back, and said he'd be d—d if he should untie him. Deceased started again towards Snider, when defendant pushed him back the second time. Deceased started again toward Snider, and witness then states as follows: "I looked and saw defendant with his right hand, with a rock in it, raised up as if to strike. I did not see Townley at this time — did not see his hands, and don't know what he was doing. I saw defendant make a motion forward with his right hand. He held his hand up over his shoulder, within about three inches of his head, and made a motion as if to strike with the rock or toss it, holding the palm of his hand to the front. I saw Townley sink down on his knee and fall to the ground. I did not see him hit, nor did I see the rock leave defendant's hand." There was but one wound upon deceased, which was on the left side of the head, above and behind the ear, and was about one and a half inches long, and the skull appeared to have been broken. This occurred about 3 o'clock p. m., and he died about 9 o'clock p. m. Defendant remained with deceased, got water and bathed him, sent for a doctor, and waited on deceased until he died. A doctor came and examined deceased, and said he would be all right as soon as the whisky died in him. One witness stated that when he got to the grocery, after the death of Townley, defendant was sitting by the side of Townley, and looked up at witness and laughed and said: "Get down and see what you you think of this case." The deceased was a strong, muscular man, weighing about 150 or 160 pounds; he was a little lame in one leg. The defendant at the time of the homicide, one witness says, was about sixteen years old and weighed about 115 pounds; other witnesses stated that he was twenty-one years old or over, and weighed about 135 pounds. The defendant left the country immediately after the killing, and was arrested in Missouri, in 1879, and brought back and tried upon an indictment for the murder of Townley, filed 19th of September, 1879, and was convicted of murder in the second degree and his punishment assessed at five years' confinement in the penitentiary.

No less than twenty errors are assigned by defendant's counsel, in the proceedings in the court below. We do not think it necessary to discuss and determine all the questions thus raised and argued by counsel, and shall confine our opinion to such of the assigned errors as we deem of importance with reference to this particular case.

One error assigned points to a portion of the charge of the court which is as follows: "If an injury be inflicted in a cruel manner, which results in the death of the party injured, though it was inflicted with an instrument not likely to produce death under ordinary circumstances, the killing will be murder if committed upon implied malice as heretofore defined to you in fifth section of these instructions; and if you believe from the evidence that the defendant, with his said implied malice, did in a cruel manner inflict upon said E. Townley, with the rock mentioned in the indictment, an injury from which he died, you will find the defendant guilty of murder of the second degree." This charge was excepted to at the time of the trial, as shown by defendant's bill of exceptions.

We think the charge is correct as an abstract proposition of law.[1] "Implied malice" is malice presumed by law from the commission of any deliberate and cruel act, however sudden, done or committed without just cause or excuse.[2] If the injury which caused the death was inflicted in a cruel manner, the law would certainly imply malice, notwithstanding the instrument used in inflicting the injury be one not likely to produce death. It is the cruel manner in which the act is committed that stamps it as malicious. If, then, the evidence in the case before us warrants the charge under discussion, we are of the opinion that it is unobjectionable. But it is contended that there are no facts in this case which authorize such a charge, and that therefore, it was error to give it.

We have searched the statement of facts carefully to find evidence which would authorize the court to submit to the jury the issue as to whether or not this homicide was perpetrated in a cruel manner. We can see nothing in the facts and circumstances of the killing which give to it the character of cruelty, any more than is found in most cases of homicide. It is cruel in one sense to take human life under any circumstances. But when we speak of the cruel manner in which a homicide was committed, we mean that the killing was done in an unusual way, — that there were circumstances surrounding the tragedy which rendered the act peculiarly heinous, and showed in the slayer a wicked, malicious heart, — a mind fatally bent upon mischief. In the case before us the defendant struck the deceased but a single blow, and made no attempt to strike again. He might have stricken other blows; there was nothing to prevent his doing so. The manner in which he inflicted this single blow did not evince cruelty in the sense in which the law regards that word. As soon as deceased fell, and the defendant ascertained that he was injured, he at once busied himself to assist him, and sent for a physician, and stayed by the wounded man, nursing and caring for him the best he could until he died. We can not agree that these facts justified the charge in the language in which it was given, and we think it was well calculated to mislead and prejudice the minds of the jury, to the injury of the defendant's rights.

And what makes this portion of the charge more objectionable than it otherwise would be is the fact that it is followed by another paragraph embodying to some extent the same idea, thus: "When the circumstances attending a homicide show an evil or cruel disposition on the part of the party committing the homicide, or that it was the design of the person offending to kill the deceased, and if he commit the homicide upon his implied malice, he is guilty of murder in the second degree, although it may appear that the means he used were not in their nature calculated ordinarily to inflict death." This is also a correct law, and would have been unobjectionable in this case if it had omitted the word cruel; but in using that word it submitted to the jury an issue which was not raised by the evidence, and following as it did the previous paragraph in which the cruelty of the manner of committing the act of homicide is referred to, it made the feature of cruelty still more prominent and was calculated to impress the jury with the belief that the court viewed that particular homicide as a cruel one, and therefore murder in the second degree. The tenth subdivision of the charge upon this branch of the case was a proper charge, applicable to the facts, and was entirely sufficient.

The charge of the court is also objected to because it does not sufficiently define murder in the second degree. It very fully and clearly defines murder in

[1] P. C., arts. 614–617.

[2] Jordan *v.* State, 10 Tex. 479.

the first degree, and instructs the jury that under the evidence the defendant is not guilty of murder in the first degree. It then proceeds to explain implied malice as follows: "Implied malice is where one doth intentionally kill another without the formed design and deliberate mind required to constitute a killing on express malice, but under such a state of circumstances as do not reduce the killing to manslaughter or negligent homicide, or which do not excuse or justify the killing." This is the whole of the definition of murder in the second degree as given in the charge. The jury are nowhere instructed as to the state of circumstances which would reduce the killing to manslaughter. It is contended by counsel for defendant that the definition of murder in the second degree, as given in the charge, is imperfect without a further definition of manslaughter. We are of the same opinion. How could the jury know, without instruction from the court, what state of circumstanees would reduce the homicide to manslaughter.

This charge, in effect, tells the jury that the homicide is not murder in the second degree if it is manslaughter, negligent homicide, or excusable or justifiable homicide. Having told the jury this much, it seems to us that, to have enabled them to determine whether or not it was murder in the second degree, they should have been further instructed as to the state of facts which would constitute all the lower degrees of homicide.

It is also objected to the charge upon negligent homicide that it concludes by instructing the jury that, if they believe from the evidence that the defendant was guilty of negligent homicide, they would acquit him, as that offense was barred by the statute of limitation. It is contended by defendant's counsel that this was a charge upon the weight of evidence, and calculated to injure the defendant by telling the jury, in effect, that unless they convicted the defendant of murder in the second degree they must acquit him entirely. There was evidence in the case to show that immediately after the homicide the defendant left the country, and was for awhile in Austin, Travis County, and after that absent in the State of Missouri until after the filing of the indictment in September, 1879, — the homicide having been committed some six years before the indictment was presented. It is provided by article 202, Code of Criminal Procedure, "That the time during which a person accused of an offense is absent from the State shall not be computed in the period of limitation." Negligent homicide being a misdemeanor, a prosecution for the offense would be barred by the lapse of two years after the commission of the offense.[1]

We think the charge upon this subject, while it was favorable to the defendant, assumed as a fact that the offense was barred, when the evidence left that question a doubtful one which should have been submitted to the jury for their determination, and was therefore a charge upon the weight of evidence. While we would not be inclined to reverse the judgment for this error, yet the charge, having been excepted to by the defendant at the time, the statute in such case positively demands a reversal of the judgment.[2]

There are other questions in this case which we will not discuss, as they are not likely to occur upon another trial. And it is not necessary to a determination of this case that they should be decided.

*Reversed and remanded*

§ 700. **Implied Malice — Erroneous Charge — Reynolds v. State.** — In *Rey-*

[1] Code Cr. Proc., art. 200.

[2] Code Cr. Proc., art. 685.

*nolds* v. *State*,[1] the indictment charged the appellant with the murder of J. H. Barnes, on the eighteenth day of September, 1878, in Frio County, Texas. His trial resulted in a conviction of murder in the second degree, and he was awarded a term of five years in the penitentiary as punishment.

W. C. Daugherty was the first witness for the State. He testified that he was in the town of Frio on the eighteenth day of September, 1878, when the defendant shot and killed James H. Barnes. The witness went down into the cellar under Bibb's store just before the shooting. On coming up he saw the defendant sitting on his horse in front of the store. The defendant spoke to the witness as the latter came up, and said: "What kind of people have you got here that they will beat up an old man like the one over at the grocery?" About that time the deceased, who was drinking, and, in the opinion of the witness, drunk, came up to the witness and the defendant, and of the latter asked: "Do you take it up?" The defendant replied: "I don't know but what I do." It was the impression of the witness that the defendant then took out his pistol. The deceased then laid his right hand upon or around the horse's neck, and his left hand on the defendant's leg about his pants' pocket, of which he took hold. The defendant once, or perhaps twice, ordered the deceased to release him which he did not do. Thereupon the defendant struck the deceased over the head with his pistol. The deceased released the horse's neck and the defendant's leg, and caught the bridle reins of the defendant's horse with both hands. The horse wheeled around and the defendant fired, the ball taking effect in the shoulder and near the neck of the deceased and ranging downward. The witness took hold of the deceased and eased him down, and with the assistance of other parties carried him into a house near Bibb's store. He never spoke after he was shot, and was dead by the time the parties got him into the house. The pistol which was here exhibited to the witness was the pistol which was worn by the deceased at the time he was shot. Then, as now, it was tied into the scabbard with large white buck skin thongs, without untying and removing which it could not be withdrawn from the scabbard. The deceased was in his shirt sleeves when he was shot, and his pistol so tied in the scabbard was plainly in view. The deceased made no effort to strike the defendant nor to draw his pistol, nor other hostile demonstration that the witness saw, nor did he make any other remark than that stated. The defendant lived at that time in Uvalde County, and was but slightly acquainted in Frio County. The witness saw the defendant and the deceased together that day, and saw them take a drink together.

D. J. Feehan testified, for the State, that he was present when the deceased was killed by the defendant. While the witness was standing in front of Bibb's store, the deceased passed along in front of the store, going from the direction of Harkness' grocery. He passed around the corner of the store, and out of sight for the time. He was drunk and staggering. A short time later the defendant rode up to the front of Bibb's store from the same direction, and the witness heard him speak to some one. The deceased, who had returned from behind the store, walked up to the defendant, and put his right hand on the horse's neck, and his left on the defendant's thigh. The witness did not hear what was said by the parties, but saw the defendant strike the deceased over the head with his pistol, knocking the ramrod and guard off the weapon. The deceased staggered back and fell in front of Bibb's

[1] 14 Tex. (App.) 427 (1883).

store. He got up and started to the horse again, and the defendant fired, striking the deceased in the shoulder near the neck. Witness, Daugherty and others took the deceased into the house. He died very soon after he was shot. The witness did not see Daugherty take hold of the deceased until he went to assist in carrying him in after he was shot. He, witness, was looking at the parties all the time. He did not see the horse turn around at all. He did not know that the defendant drew his pistol when the deceased first approached him. Witness first saw the pistol when the defendant struck the deceased on the head with it. The deceased made no effort to draw his pistol, to strike the defendant, or to do him violence of any character that the witness saw. Deceased was drunk. Bibb's store and Harkness' saloon were about fifty or sixty yards apart. Witness knew nothing about the deceased and any other party having a difficulty the same day.

T. B. Bibb, for the State, gave substantially the same account of the affray as that given by Daugherty, adding that the defendant several times repeated his order to the deceased to release him and his horse, before he fired. His testimony, however, is set out in full in the opinion of the court.

A. S. Curetan, a justice of the peace at the time of the killing, testified, for the State, that he was not in town when the shooting occurred, but reached town just afterward. He was told of the shooting, and was getting ready to go and arrest the defendant, who was then sitting on his horse in front of Bibb's store, when he, defendant, turned and with pistol in hand rode toward the house where witness was. He rode in this direction some distance in a slow gait, but presently, striking a gallop, he called to Ben White: "Come on Ben; I am the best G—d d—d man who ever struck Frio town." He then rode off, going north.

Jerome Ridley testified, for the State, that he was in Harkness' saloon when the defendant rode up to the door and saw old man Everett lying on the floor, where he had been knocked down. The defendant said: "Whoever did that is a d—d coward, and I can whip him." Witness said to him: "I would not do it, Bill; it has been done now, and can not be helped." The defendant then said that he would not. He then rode off, saying that he was going to see Bill Daugherty. The witness heard a shot in a short time. He did not tell the defendant who the man was that had been knocked down. Cross-examined, the witness said that old man Everett was the man lying on the floor. He was very bloody. He had been knocked down by the deceased a short time before. The witness did not think that the defendant and Everett were acquainted.

J. C. B. Harkness testified that shortly after the deceased left his saloon the defendant rode up and spoke to Ridley, and then rode on to Bibb's store. Witness was induced by what Ridley said to look after defendant. He saw him strike the deceased over the head, and stagger him, and then shoot. Parties rushed in and around the deceased, and the defendant rode off up Frio River. The witness went into Bibb's store and saw the deceased dead.

John Henman testified that he was present and saw the shooting. He gave, in detail, an account similar to that given by the witness Daugherty, except that he said nothing about the words imputed to the parties by Daugherty. Deceased made no hostile demonstrations towards the defendant that the witness saw. Witness knew that the deceased's pistol was tied in the scabbard, for he saw the deceased tie it to prevent it falling from the scabbard while riding. Cross-examined, the witness said that he had testified in this case before, but

had never said that the deceased attempted to draw his pistol. The deceased was drunk when he was shot.

The motion for new trial assailed the charge of the court, and attacked the verdict as unsupported by law or evidence.

HURT, J. This is a conviction for murder of the second degree, the punishment being assessed at confinement in the penitentiary for five years.

It is frequently the case that there is evidence tending to present different degrees of culpable homicide. And in this case it was insisted, in the motion for new trial, that the court erred in its charge upon implied malice, and in failing to charge the law applicable to manslaughter, evidently upon the supposed ground that there was evidence preseuting manslaughter. If there was evidence tending to present the issue of manslaughter, an erroneous instruction or definition of implied malice may have worked an injury to the defendant; and if there was such evidence, most evidently a failure to charge the law applicable to that degree of culpable homicide was calculated to injure defendant, such an omission having the effect to coufine the jury to the higher degrees, and to force them to convict of the higher or acquit altogether.

The charge of the court upon implied malice is as follows: "Implied malice is malice presumed by law from the commission of any deliberate and cruel act however sudden, done or committed without legal excuse or justification. This kind of malice is not a question of fact for the jury to decide like express malice, but it is an inference or conclusion of law drawn from or founded upon particular facts and circumstances which the jury ascertain to exist from the evidence before them. For example, if a homicide is committed and there is not evidence to show express malice, nor to excuse or justify the act, the law presumes malice, which is termed implied malice, and the killing is murder in the second degree. So also, when a person takes the life of another without deliberation and premeditation, and when he is not excused or justified by law, but upon the spur of the moment in a sudden inconsiderate transport of passion, the law under such circumstances will imply malice, and the homicide would be murder in the second degree."

Let us take the illustrations given by the learned judge, and see if they portrayed to the jury, or were calculated to convey to the jury, a correct knowledge of implied malice. The first is: "If a homicide is committed and there is not evidence sufficient to show express malice, nor to excuse or justify the act, the law presumes malice, which is termed implied malice, and the killing is muder in the second degree." A homicide may be committed under the exact state of case given in the above (example) illustration, and yet the deduction therefrom of malice or murder in the second degree would not of necessity follow. Both kinds of negligent homicide, as well as manslaughter, are homicides "without evidence sufficient to show express malice, or to excuse or justify the act."

Second illustration: "So also when one person takes the life of another, without deliberation and premeditation, and when he is not excused or justified by law, but upon the spur of the moment, in a sudden inconsiderate transport of passion, the law under such circumstances will imply malice." * * * That depends most clearly and emphatically upon the existence or non-existence of other facts in the case. If the passion arose from an adequate cause given at the time, and the killing was caused by the passion, and the passion was not the result of a former provocation, etc., the law would not imply malice, and the homicide would not be murder in the second degree, but manslaughter, Hence the absolute necessity, in defining the lower boundary line of murder,

when there is evidence tending to raise an issue upon lower degrees, to wit, negligent homicide or manslaughter, to make that degree (tended to be presented by the evidence), as well as excusable or justifiable homicide, a part of the boundary line. This subject, we think, is elaborately discussed in *Neyland* v. *State*,[1] decided at last Galveston term.

We have been proceeding upon the assumption that manslaughter is an issue raised by evidence in this case. For if no such issue is presented by evidence, there being no objections made to the charge, and no instructions asked by defendant, we would treat the case from quite a different standpoint. The question would then be — all lower degrees being out of the case — whether a failure to submit a perfectly correct charge upon implied malice, or upon malice of the second degree, wrought an injury to defendant? Let us now proceed to ascertain if there was evidence presenting manslaughter as an issue in the case; for if so, the charge of the court was evidently calculated to injuriously affect the rights of defendant.

It appears from the statement of facts that an old man by the name of Everett had been knocked down by Barnes, the deceased, in Harkness' saloon, and while he was lying upon the floor the defendant rode up, looked in the saloon and, seeing the old man lying upon the floor, said "whoever did that was a d—d coward, and that he (defendant) could whip him." The witness Ridley spoke to defendant, "telling him that he would not do so, as it was done and could not be helped." Defendant replied that he would not, stating that he wanted to see Bill Daughtery, and rode over to Bibb's store. When defendant got to Bibb's store he spoke to Daughtery, and said: "What kind of people have you got here that will beat up an old man like the one over at the grocery?" About that time, Barnes, the deceased, came up, and asked defendant if he took it up. The witness Daugherty thinks the defendant replied: "I don't know but what I do." As to what followed the witnesses are not harmonious.

T. B. Bibb, a witness for the State, swore: "I was present when James H. Barnes was killed. Deceased and Henman came in town that day on business. When I came up out of the cellar, I found there was a difficulty on hand. Mr. Reynolds rode over to the store and spoke, I think, to Mr. Daugherty, and asked if that was the way they treated old men here in Frio; and Mr. Barnes asked him if he took it up, and started toward Mr. Reynolds, and caught Mr. Reynold's horse by the mane or neck, with one hand, and with the other he took hold of him somewhere on the thigh or hip; and the horse Mr. Reynolds was on whirled around once or twice, and Mr. Reynolds told Mr. Barnes to turn him loose. Barnes did not do it, and defendant struck him over the head with his pistol, and when he struck him Mr. Barnes staggered back toward the gallery, and still held on to the bridle of Mr. Reynold's horse, with both hands; and it seems to me the horse pulled back and Mr. Barnes came up again, and the horse whirled around two or three times, and Mr. Reynolds told him several times to turn him lose; and Mr. Reynolds fired and Mr. Barnes sank down, and some one, I think Mr. Daugherty, caught him and laid him down. I do not know whether he died there or whether he died after we carried him in the house. When we got him in the house he was dead."

Cross-examined by the defendant, the witness testified: "I was there when Mr. Reynolds came up. I was talking to Henman and trying to get him to take Barnes out of town, for I thought he would get into trouble. The reason I

[1] 13 Tex. (App.) 536.

thought he would get into trouble was on account of what occurred with Barnes and old man Everett. When Reynolds came up he spoke to Mr. Daugherty. When deceased went toward Mr. Reynolds he went in a southwest direction from my store. He came from a northeast direction, and caught the horse of Mr. Reynold's by the mane or bridle with one hand. Mr. Reynolds tried to pull the horse loose from him, and I don't think he turned the bridle loose. I don't know whether he was trying to get hold of Reynolds or the pistol; it looked to me like he was trying to get hold of Reynold's pistol. After he was struck I can't say what. I do not know exactly how long I have known the defendant. I think I met him some time after I came to Texas, which was several years ago. I do not remember how long it is. I had known Barnes several months; he lived at Mr. Crouch's ranch in this county. Reynolds is a cattle man, and lives at Uvalde. Mr. Barnes was not drunk when he left my store. I hallooed at Mr. Reynolds not to shoot, but he did not hear me, for just as I spoke the pistol fired."

Instead of proving that defendant knew that Barnes was the party that knocked old man Everett down in the saloon, the evidence leads to different conclusion. It will also be borne in mind that defendant made the remarks to Daugherty in reference to this matter, and not to the deceased.

But suppose there is evidence tending to prove that defendant provoked the difficulty, this would only present another phase of the case. The question that is decisive of this case is whether there is evidence tending to raise the issue of manslaughter. Suppose the jury should take the view of the case which is presented by the testimony of the Bibb? Or, to present the point in another light, suppose the evidence of Bibb constituted the case the whole case? Would it not have been the duty of the trial judge to have submitted to the jury, by proper instructions, the law of manslaughter? We think so. Defendant was seized by Barnes, he, Barnes, being armed with a pistol, and his (defendant's) own weapon being attempted to be taken from him. He demanded repeatedly to be released, and to effect his release, struck Barnes with his pistol. This failing, he shot him.

While it may be true that Barnes' pistol was fastened to its scabbard so that it could not be drawn, this fact is not shown by the evidence to have been known by the defendant. He may or may not have known it. The testimony being silent at this point, what is the presumption? It is in favor of the defendant, as all presumptions are in his favor until they are eliminated by proof.

We will not enter upon a discussion of the facts, but will say that in our opinion they tend to present the question of manslaughter. This being the case, what is the rule?

We do not believe that a clearer statement of the correct rule upon this subject can be made than is made by Mr. Thompson in his little work on charging the jury. He states it thus: —

"The judge instructs hypothetically upon whatever state of facts there is evidence tending to prove. It is error for him to submit to the jury a fact or state of facts which there is no evidence tending to prove, or to give an instruction with reference to a state of facts not in evidence. But, in order to justify him in giving an instruction predicated upon a supposed state of facts, it is not necessary that he should be entirely satisfied of the existence of such facts; but, if there is evidence from which the jury may infer them to be true, it is his duty to declare the law thereon, and it is not error for him to do so even when the evidence is very slight." The principles enunciated by Mr. Thompson

are sustained by a long line of decisions by our Supreme as well as this court.

Because the court erred in its charge upon implied malice, and because the law of manslaughter was not given in charge to the jury, the judgment is reversed and the cause remanded.

*Reversed and remanded.*

**§ 701. Evidence Insufficient to Convict of Murder in First Degree — Cox v. State.** — In *Cox* v. *State*,[1] the indictment charged the appellant with the murder of P. W. Randolph, on February 8, 1878. The State first introduced James Randolph, a cousin of the deceased, who testified that himself, his brother John, and one Bob Wiley were present at the mill of witness' father, in Walker County, when the killing occurred. Wiley was in or about the mill, and witness, his brother John, and the deceased were lying on the ground, whittling with their pocket-knives, when the appellant came up behind them and said they ought to pay him for the turkey which the dogs of the party had killed. Deceased replied: "Our dogs did not kill your turkey; it was my dog that did it." Appellant said that he was in the habit of killing dogs that killed his turkeys, and that if he was not paid for this turkey, somebody's dog would come up missing. Deceased then said, "If you kill my dog, you had better hunt your hole." When the deceased said this, appellant came around by witness, drawing his knife — a pocket-knife with a blade about the length of witness' finger — holding it with the blade to the back of his hand, and stopped in front of deceased, a step or two distant. He appeared to be very angry, and said, "G—d d—n it, I will tell you I am a man, and won't be run over by any set of men." Witness then got up and asked appellant what he meant by cursing and cutting up so. Witness' brother John then told appellant to go away; but he did not go. Deceased then got up from the ground and pushed the appellant with his left hand, holding his pocket-knife in his right hand, down by his side, which knife had both end-blades open, and which were broken off and blunt, — the third of each blade broken off. Deceased did not hold the knife in a threatening attitude; did not strike with it, or attempt to, or do more than push appellant with his left hand. Appellant then cut and stabbed deceased in the right breast, striking one lick. Deceased said he was killed. Appellant, at the time, held the knife at about right angles to his body, his arm being drawn forward in a striking attitude. The blood spurted out from the wound, and deceased died in about two hours. The appellant's knife was drawn and presented in a threatening attitude when deceased got up. Appellant left, after the stabbing, and was afterwards arrested in Leon County. The deceased, when he got up, did not appear angry, nor did he speak in an angry manner when he told appellant he would have to hunt his hole if he killed his (deceased's) dog. Appellant did not retreat or give back during the difficulty. The witness was present some three weeks before, when deceased's dog killed or injured the appellant's turkey. They were driving stock by appellant's house, when the dog got after the turkey and crippled or killed it. Deceased whipped the dog and tried to pull him off from the turkey. During the conversation on the evening of the killing, appellant said he ate the turkey; and deceased, after telling him that he whipped the dog at the time, and tried to keep him from injuring the turkey, said he did not think, since appellant had eaten the turkey, that he (deceased) ought to pay for it.

[1] 5 Tex. (App.) 493 (1879).

On cross-examination, witness said that both appellant and deceased cursed a good deal. Witness' brother John called to witness and told him to come away or go away, and have nothing to do with the difficulty. Wiley was in the mill during the occurrences narrated. Witness, when he got up from the ground, had his knife in his hand. Deceased did not strike appellant, but pushed him with his left hand, when appellant stabbed him.

John Randolph testified, for the State, that he was present at the killing. Some three weeks previous, himself, James Randolph, and deceased were driving stock past the house of the appellant, when deceased's dog ran after appellant's turkey, and either killed or crippled it. Deceased whipped the dog, and tried to pull him off the turkey. On the evening of the killing, the same three were lounging on the ground in front of the mill, where they all worked, whittling with their knives — two blades of the knife of deceased opened at either end of the handle, and about one-third of each was broken off. Appellant came up behind them, and said their dogs had killed his turkey and he ought to be paid for it. Deceased said, "Don't say 'we;' it was my dog that did it." Appellant said he was in the habit of killing dogs that killed his turkeys. Deceased answered that he had beaten his dog and tried to keep him off the turkey. Appellant answered, "As it was your dog, I'll reckon I'll have to let him off," and turned away. Deceased said, "I reckon you will have to let him off;" and appellant turned back and said, "If I don't get pay for my turkey, somebody's dog will come up missing;" to which the deceased answered, "You kill my dog and you had better hunt your hole." Appellant then cursed, and said, "By G—d, gentlemen, I'll let you know I am a man," and came back from behind; when witness' brother James got up, and appellant drew his knife, opened it, and took position about two steps in front of deceased. Witness' brother James then asked, "What do you mean cursing and cutting up so?" Witness then told appellant to go away. Deceased then got up with his knife in his right hand, which hung down by his side. Witness went between the parties, and again told appellant to go away. Witness then passed on, and did not see the cutting. Saw that deceased had been stabbed, and heard him say that he was killed. Appellant was not employed at the mill, and had no business there.

On cross-examination, witness did not remember that he told his brother James to go away, or call him away, but might have done so. Deceased may have advanced towards appellant two steps, but witness is not positive. Did not see the deceased either strike or push the appellant. Bob Wiley was present. Appellant worked in witness' father's shop, about one hundred yards from the mill. Both appellant and deceased cursed each other.

Phelan Randolph, for the State, testified that at the time of the killing, appellant was working at Mr. Clinton Randolph's shop, near the mill. Witness, from what appellant had previously said to him, judged that he was very much displeased about the killing of his turkey, and seemed to think that he ought to have been paid for it. He had been working at the shop for about twelve months before the stabbing.

Bob Wiley, for the defendant, testified that at the time of the killing he was in the mill of Mr. Clinton Randolph, and from there saw a part of the difficulty. The hands had just quit work, but witness was getting extra pay to keep up a fire under the boiler. Deceased, James and John Randolph were lying on the ground near the mill, with their knives out, whittling. Appellant, who had been working at the shop, came by the mill and lit his pipe at the furnace, which he was in the habit of doing every evening after the day's work was over.

He lived about one mile from the mill and workshop. After lighting his pipe, he went up to where deceased and the others were lying on the ground, and entered into a conversation with them. Witness did not hear any more of the talk before the difficulty than that the appellant said he "ought to be paid for it." After some further conversation, witness heard appellant say, "As this is your dog, I will let you off;" to which the deceased responded, "You will have to." Appellant then said, "somebody's dog might come up missing," and turned off. Deceased then said, "If you kill my dog, G—d d—n you, you will have to hunt your hole." Appellant then turned round and said, "Gentlemen, what I first said was in a joke; but, by G—d, I can let you know I am a man." James Randolph then got up, with his knife in his hand, and asked appellant what he wanted. Appellant then pulled out his knife and opened it. Deceased then got up and said, "You d—d black son of a b—h, do you draw your knife on me?" and advanced towards appellant with his knife in his hand. John Randolph called to his brother to have nothing to do with it. Witness did not see the killing, but saw appellant giving back. Deceased advanced on appellant, with his knife drawn, some twelve or fifteen feet. Saw deceased after he was cut. He went into the mill, and sent for his uncle, Clinton Randolph. Witness was then and is now in the employ of Clinton Randolph, at the mill.

On cross-examination, witness states that the reason he says it was twelve or fifteen feet that deceased advanced, is because it is that distance from where the difficulty first commenced to where the deceased was when he said he was killed. Appellant then picked up his hat and went off. Don't know that he went home; knows that he ran off, as he was arrested in Leon County; has not seen appellant since the difficulty until in court, at the time of the trial. Witness never told Phelan Randolph that he did not see the difficulty, and knew nothing about it; but did tell him that he did not see the killing. Has talked to no one about this affair until with Capt. Hightower (defendant's attorney), this morning. No one of the parties attempted to use his knife or cut the appellant, so far as witness knows. When James Randolph got up, he did not advance on appellant, nor attempt to use his knife, but appellant did back off and open his knife.

It is deducible from the testimony that the appellant is a negro. The jury found him guilty of murder in the first degree.

Ector, P. J. The defendant was indicted for the offense of murder, charged to have been committed with express malice, and on the trial thereof was convicted of murder in the first degree, and adjudged to be executed. A motion was made for new trial, which was overruled, to which ruling the defendant excepted, and gave notice of appeal to this court.

The main question to be decided in this case is: Does the evidence in the record make out a case of murder committed with express malice? In this State, all murder committed with express malice is murder in the first degree, and all murder not of first degree is murder in the second degree.

"Express malice is where one with a sedate, deliberate mind, and formed design, doth kill another; which formed design is evidenced by external circumstances discovering that inward intention,—as, lying in wait, antecedent menaces, former grudges, and concerted schemes to do him some bodily harm." [1]

[1] 4 Bla. Com. 198.

Where one man, with a cool, composed mind, in pursuance of a formed design to kill another, or to inflict upon him some serious bodily harm which would probably end in depriving him of life, does kill such person in the absence of the circumstances which reduce the offense to negligent homicide or manslaughter, or which excuse or justify the homicide, such killing would be a murder committed with express malice. In looking through the evidence in the record, we are not satisfied that it makes out a case of murder in the first degree under the law.

Because the verdict is against the weight of the evidence, the judgment of the District Court is reversed and the cause remanded.

*Reversed and remanded.*

§ 702. **Evidence Insufficient to Convict of Murder in the First Degree — Benevides v. State.** — In *Benevides* v. *State*,[1] the indictment charged the appellant with the murder of Pedro Garcia, in McMullen County, Texas, on the thirteenth day of July, 1882. The conviction was for murder in the first degree, and the punishment awarded was a life term in the penitentiary.

Hamp. Kuykendall was the first witness for the State. He testified that on or about August 15, 1882, he found a wallet in the mesquite brush, about two and a half miles northwest from Tilden, in McMullen County, Texas. The wallet was spread out upon the ground, and was covered with a piece of brown paper, upon which lay a piece of sun-wilted cheese. It was evident to the witness that some party, or parties, had stopped there to eat. This was on the McKinnon ranch, in a chapparel thicket, about three-quarters of a mile from a road leading from Tilden to Kuydendall's ranch. About fifteen feet distant from the wallet, paper and cheese, the witness found a bullet hole in a mesquite brush, which indicated that the ball was fired from a slanting direction with a downward range. In the wallet the witness found a leather-back memorandum book, which he here identifies, containing a note written in Spanish and a pencil memorandum for merchandise, which two papers the witness also here identifies. Some fifty steps distant from where the witness found the wallet, he found a black "slicker," which he here identifies.

On or about September 26, 1882, the witness found a human skeleton, about one hundred and fifty yards from where, on August 15, 1882, he found the wallet, paper and cheese. Near the skeleton, he found a light colored hat with a powder burned bullet hole near the band, a butcher knife, a pair of shoes containing the bones of the feet, and to which was attached a pair of unmatched spurs, and a pair of ducking pants with blood on the legs. These various articles were here exhibited to the witness and identified by him. A forty-four or forty-five calibre ball had entered the back of the head and gone out between the eyes. The articles described were so scattered as to indicate that the deceased had run in a zig-zag course from the wallet to the place where he was shot, or, rather, to the place where the skeleton was found. On finding the skeleton, the witness went to Tilden, reported, and returned with the jury of inquest. The deceased had been dead, the witness judged from appearances, about three months when the skeleton was found. The skeleton was almost entirely fleshless.

Andrew McKinnon testified, for the State, that he knew Pedro Garcia before his death, and for three months prior to that event he had the same Pedro in in his employ on his sheep ranch. On the twelfth day of July, 1882, he sent

[1] 14 Tex. (App.) 378 (1883).

Pedro Garcia to Tilden, McMullen County, to employ a shepherd. Pedro rode a noted horse belonging to the witness, and wore a white colored hat. The hat found by Kuykendall near the skeleton was here exhibited to the witness, and was identified by him as the hat worn by Garcia on the trip to Tilden. The witness knew the hat well, and identified it by the brand "D. and A. Oppenheimer," and by stains of sheep wash, which he exhibited to the jury.

The witness gave the deceased a thirty-dollar check on San Antonio, the day the latter started to Tilden. The deceased was to return to the witness' ranch, on the boundary between McMullen and Atascosa Counties, on the day after he started to Tilden. He did not return as expected and arranged, and the witness went to Tilden himself on the next day to find out the cause of delay. He learned in Tilden that the check was cashed at Jordan's store, and that the deceased, Pedro Garcia, started back to the witness' ranche. The witness never saw Garcia after he started to Tilden, on July 12. The witness recovered his horse afterwards, in the country where he was taken up, but has not since seen the bridle and saddle. The witness made out the memorandum here exhibited which calls for one pair number ten and one pair number six shoes, and two boxes of forty-four calibre cartridges. Witness had known Pedro Garcia as a shepherd before he employed him.

F. H. Cromwell testified, for the State, that he found the horse described by the witness McKinnon among his, witness' gentle horses, on July 16, 1883. This was about one mile southeast of Tilden. There was no bridle or saddle on the horse.

John Young testified, for the State, that he was one of the jury of inquest which went to view the remains of the dead man found in the chapparel some two and a half or three miles northwest of Tilden. He identified the hat exhibited as the hat which was found near the body. The brand of "D. and A. Oppenheimer," was stamped on the lining, as seen then and as seen now. The bullet hole was in it when found and is there now. A bullet entered the head of the deceased from behind and emerged near an eye, as indicated by the skull of the skeleton. A bullet hole was found in a mesquite bush near where the wallet was said to have been found. A pair of pantaloons, bloody inside, encased the legs of the skeleton. Watermellon seeds lay around the place, and some were found in that part of the skeleton which had been the stomach.

Benito Rodriguez testified, for the State, that he knew Pedro Garcia in his lifetime, and that he and Garcia worked for Mr. Andrew McKinnon. McKinnon dispatched Garcia to Tilden on July 12, 1882, to employ shepherds, and the witness was placed in charge of the herd of sheep over which Garcia had control, until the latter should return. When Garcia started to Tilden, the witness got Mr. McKinnon to make out for him a memorandum for a pair of number ten shoes, a pair of number six shoes, and two boxes of forty-four calibre cartridges. The witness here identified that order as the one in evidence, and also, the hat offered in evidence, as the hat which belonged to and was worn by Garcia. The shoes he also identified as Garcia's. Before or just as Garcia started to Tilden, the witness loaned him a knife, a pair of unmated spurs and a slicker. The witness first described certain peculiarities of these articles, and was then shown the knife, spurs and slicker found near the skeleton, and identified them by those peculiarlties as those he loaned Pedro Garcia on the morning the latter started to Tilden. The witness also loaned Garcia a six shooter, which he, Garcia, wore when he started to Tilden, and the witness has not seen it since.

R. Jordan testified, for the State, that he knew Pedro Garcia before his death. Garcia came to witness' store in Tilden, McMullen County, on the twelfth or thirteenth of July, 1882, and said he came to town to employ shepherds for McKinnon. He then handed the witness a check on San Antonio for thirty dollars, which the witness cashed, partly in currency, and partly in silver. The defendant Benevides, was not present when the witness cashed this check, but the witness saw him and Pedro together at his store shortly afterwards. The witness knew the defendant before, and identified the man, Sylvester Benevides, now on trial, as the man he saw talking with Garcia in his store at the time mentioned. Witness did not see defendant and Garcia leave town.

Roque Elisondo testified, for the State, that he gave Pedro Garcia a paper, written in Spanish for him by Francisco Bella, on the thirteenth day of July, 1882, in Tilden, McMullen County, Texas. The paper was an order to collect for the witness the sum of six dollars, which was due him by one of the shepherds on McKinnon's ranch. The witness gave Garcia this order at Bella's house, just as the latter was ready to start back to McKinnon's ranch. The defendant was at Bella's house with Garcia, and started off with him in a northwesterly direction. Witness saw them traveling together for about fifty yards and noticed them no further. Garcia left on horseback, and the defendant on foot, walking by the side of the horse. Antonio and Francisco Bella were present when the defendant and Garcia left together.

Antonio Bella, testified, that he kept an eating house in Tilden, McMullen County, Texas. He knew the defendant, and also Pedro Garcia in his lifetime. Garcia and the defendant were at the witness' house on July 13, 1882, and left the house together on the afternoon of that day. Garcia was riding and the defendant walking. Garcia had a pistol on that day.

Francisco Bella testified, for the State, to the same facts stated by Antonio Bella, and, in addition stated that he wrote a note in Spanish for Roque Elisondo, authorizing Garcia to collect six dollars from a shepherd at McKinnon's ranch. He recognized the paper in evidence as the one he wrote.

John Kaltener testified, for the State, that Garcia came to his house in July, 1882, and paid him three dollars and a half for making him some clothes. He, Garcia, had two ten dollar bills in a small leather memorandum book similar to that in evidence. He had in all about twenty-four dollars when he left the witness' house. The witness saw Garcia and the defendant together that evening at Bella's eating house. They were then on the eve of leaving town together. Witness asked if Garcia was going to take the defendant to the ranch as a shepherd. Both answered "no," but that defendant was going out on a short pleasure trip. Defendant tied a bundle on the horse behind the saddle. He had his coat and a pistol over his shoulder. The two left town together, going in a northwest direction. The witness saw them together until they got into the chapparel on the edge of town. This was on the evening of July 13, 1883.

R. C. Holland testified, for the State, that he lived in McMullen County, about three quarters of a mile northwest from Tilden, near where the San Antonio and Kuykendall ranch road forks. He saw the defendant and the deceased about three-quarters of an hour before sunset on the evening of July 13, 1883. They passed his house, both riding the McKinnon bay horse, the deceased in front, and the defendant behind. The defendant was very well dressed and had a pistol buckled around him. The deceased had on a light colored hat like that in evidence, and a pair of ducking pants. If he had a pistol witness did not see

it. When they reached the fork of the road they took the branch leading to Kuykendall's ranch. The witness was one of the jury of inquest. He saw the ducking pants which were found on the skeleton. They were bloody inside. The skeleton had a bullet hole through the skull, from behind through to the front. Witness knew the McKinnon horse well. Shortly after the day on which these parties passed his house, the witness saw McKinnon's horse at a water-hole about one mile from where the body was found. The body was found between two and three miles from where the witness saw these two men on the McKinnon horse. The defendant was then and is now a one-armed man.

L. A. Scoggin, deputy sheriff and jailor, testified that the hat, slicker, shoes, spurs, memorandum book, etc., in evidence, were turned over to him by the present sheriff, and were in the same condition as when he received them.

Sheriff Martin testified that he received the articles from Mr. Morgan, the deputy of his predecessor in office, and immediately turned them over to Scoggin.

John Morgan testified that he delivered the articles in evidence to Mr. Martin, sheriff elect, just as he received them from the coroner's jury. He, witness, arrested the defendant at Hall's ranch, in LaSalle County, on a *capias* charging him with the murder of Pedro Garcia.

Frank Hall testified, for the defence, that for the two years he had known the defendant the latter had borne a "generally good character." He left the employ of the witness to work for L. M. Campbell on May 25, 1882, and returned to work for witness on December 25, 1882. When he left witness in May, witness gave him fifty dollars with which to pay an amount he said he owed Campbell. He afterward brought that money back to the witness, saying that Campbell did not want it, but wanted him to work out his debt. He promised witness to return to his employ when he had worked out that debt. This he did on September 25, 1882, and remained with the witness until his arrest on October 5, 1882.

J. M. Campbell testified, for the State, that the defendant had worked for him at different times since 1877. He last worked for witness in July, 1882. Witness settled with him on the twelfth day of July, 1882, paying him forty-one dollars and five cents; since which time he has not worked for the witness. Speaking of his character, the witness said: "The Mexicans call him lightning."

R. S. Ray testified, for the State, that the reputation of the defendant as a citizen was very bad. He was considered reckless, and "ready to make desperado plays with his six shooter, drawing readily and for trivial things. He is considered a dangerous man."

The motion for new trial assailed the verdict as unsupported by law or evidence, and denounced as error the failure of the court to charge upon murder in the second degree.

Hurt, J. This is a conviction of murder of the first degree, the punishment being assessed at confinement in the penitentiary for life.

The trial judge failed to submit to the jury a charge upon the law governing in cases of murder upon implied malice and murder of the second degree. Defendant moved a new trial, and in his motion this is expressly made one of the grounds. It being the duty of the trial judge, in felony cases, to charge the law applicable to the case, whether asked or not, the question here presented is, does the case — that which is made by the evidence, the whole evidence — require a charge upon murder of the second degree? If the case is such, or,

what is the same thing, if the evidence is of that character as to place it alone within the sphere of murder in the first degree, and that the killing was upon express malice, or done in the perpetration, or the attempt at the perpetration, of certain offenses named in article 606 of the Penal Code, the trial judge should confine the charge to such a case, so made by the evidence, omitting instructions applicable to all lower grades.

From the above proposition it follows that the correct rule is this: To relieve the trial judge of the duty of charging upon lower degrees of culpable homicide, the evidence (the case) must establish the highest degree. For, if there be reasonable doubt, the court can not solve the doubt; this must be done by the jury. We believe this rule to be correct, whether applied to cases of homicide or to all cases in which the greater includes lesser degrees of culpability.

To establish murder in the first degree under the evidence in this case, the State relied, and was forced by the case to rely, upon proof of express malice, or that the killing was done in the perpetration or attempted perpetration of robbery. Hence the State must prove one or the other of these grounds so conclusively as to place the existence of one or the other beyond a reasonable doubt. The burden is upon the State, not only to prove that defendant killed deceased, but, where she demands a conviction and punishment for murder of the first degree, to prove that the killing was with express malice or in the perpetration, etc., of some of the offenses specifically mentioned in the Code.

When the trial judge comes to submit his instructions to the jury, he should carefully look to all of the evidence, analyze and weigh the same, and if the killing is not shown to have been with express malice, or under the circumstances which would make the homicide murder of the first degree, he should charge upon the lower degree or degrees, as indicated by the evidence. To justify an omission to instruct upon lower degrees, he should be able readily, without pressing or straining facts, to grasp the facts or circumstances which place the case alone within the sphere or boundary lines of the highest degree. No presumption from facts or a combination of facts can be indulged, unless they lead to the conclusion sought, and to no other. For if such cogency is wanting, the jury might doubt; or if the evidence or any part thereof lead to other conclusions, uncertainty appearing, the jury might take that which is not so unfavorable to defendant, or might have a reasonable doubt as to which is the correct conclusion.

Looking, then, to the record in this case, can we point to a fact or a combination of facts or circumstances which lead to the conclusion that the defendant is guilty of murder of the first degree? Does this appear so evidently and conclusively as to justify the court below in withholding this matter from the consideration of the jury? We think not.

In order that there may be no misunderstanding of our views upon this subject, we will illustrate.

1. Suppose the case is one in which murder of the first degree is clearly and conclusively established in the opinion of the trial judge, but there is evidence tending to rebut this conclusion or to establish murder of the second degree. Should the judge submit a charge upon the lower degree? Unquestionably he should. Why? Because it is the province of the jury, and not that of the court, to pass upon the credibility of the witnesses and the weight of the evidence. 2. Suppose the evidence is of that character as to leave no doubt that the homicide was of the first degree, and there is no evidence tending to reduce

the offense. Must the trial judge submit a charge upon the lower degree? We think not.

Hence, if there be a want of evidence to prove the first degree, or if the evidence be doubtful or conflicting, though deemed conclusive by the trial judge to establish the first degree, nevertheless instructions must be given upon the lower degree; and these rules apply to all degrees from the highest to the lowest embraced in the charge. These rules are to govern the court, and by them the judge is to determine the necessity of submitting charges upon the different degrees, or the different offenses contained in the charges preferred by the bill of indictment.

They are not rules for the guidance of the jury trying the case. The jury will not, because instructed upon the higher or lower degree, infer that the presiding judge believes the one or the other way in regard to the evidence. Their duty is quite distinct from that of the judge. Theirs it is to determine the guilt and the degree of the guilt of the defendant, from the law as given them by the court and the evidence adduced upon the trial. They can judge of the credibility of the witnesses and the weight to be given to the evidence. This can not be done by the trial judge. It is his duty to submit the law applicable to every phase of the case presented by the evidence, viewed as a whole or in its parts.

We will not discuss the evidence, believing that more light can be had upon another trial. (The reporters, however, will give a statement of the facts.)

Because the court failed to charge the law applicable to murder of the second degree, the judgment is reversed and the cause remanded.

*Reversed and remanded.*

§ 703. **Evidence Insufficient to Convict of Murder in First Degree — Robinson v. State.** — In *Robinson* v. *State*,[1] the prisoner was convicted in the District Court of Falls County, of murder in the first degree, perpetrated upon one Jane Washington, on the second day of November 2, 1883. A life term in the penitentiary was the punishment awarded. The defendant and the deceased were both negro women.

Winnie Payne testified, for the State, in substance, that, at the time of the death of Jane Washington, on Friday, November 2, 1883, the defendant and her daughter, Nancy Glass, and Dave Warren lived together in a house on Mr. Battle's place, in sight of and in hearing distance of the house on the same place occupied by Henry and Jane Washington. The defendant and her idiotic daughter, Nancy Glass, went to Henry Washington's to wash on the fatal Friday. Before the witness got her dinner, the defendant returned and asked if witness was a good hand to keep secrets. Witness replied that she could keep secrets if they weie not bad ones. Defendant replied: "You are not the woman I am looking for." Witness said to her: "You have told me secrets and I have kept them." She replied: "Yes, you have, and I think you are a good woman. Well, don't you think that devil (meaning Henry Washington, witness' brother) hit that woman over the head last night and liked to have killed her?" Witness then said: "O, Lord! did Henry do that? I am going right down to see about it." Defendant then said: "Don't go; I was not telling you the truth; I don't know why I told you that lie." Defendant then went back toward Henry's carrying a bundle of clothes with her. Some time

[1] 16 Tex. (App.) 347 (1884).

later George Ann O'Neal and Nancy Glass came to witness' house, and said that Jane Washington was burned up. Witness immediately started to the house and *en route* met the defendant, who asked what witness had been told. The defendant caught witness and told her not to go to Henry's, that she would injure herself, as she was then far advanced in pregnancy. The witness, on reaching the house, found no one but Henry Washington at first, but soon discovered the deceased lying in the fire. She called to Henry to pull his wife out of the fire, but he did not do it then. Jim Freeman being called, ran into the house, and he and Henry pulled Jane out. She was dead. During an acquaintance of fifteen or twenty years, the witness had never known the deceased to have fits. She had not, however, lived near the witness for some time until the year previous to her death. The deceased and the defendant lived in constant trouble about Henry Washington. Witness had a conversation with the defendant on the day before Jane's death. She said that Jane had filed a complaint against her at Marlin, and that they (deceased and defendant) would never meet at a trial. Witness looked hard at defendant when the remark was made, and defendant said, "You think I am going to hit that woman, but I am not. I am going to lay in my bed and pray to God to kill her." In this same conversation defendant said that deceased had gone to Marlin and slandered her, and that if she could kerosene the deceased and burn her up without destroying Mr. Battle's house, she would do so. Cross-examined, the witness stated that she had never observed any undue intimacy between Henry and the defendant, and had seen no conduct of theirs to justify Jane's jealousy. Henry worked land on Mr. Battle's place, and the defendant and her children were in Henry's employ. He could not have worked that land without their help. Witness' pregnancy was the reason the defendant assigned for not wishing witness to go to Henry's house at the time of Jane's death. Witness described the fire-place in which the death occurred as large, and stated that she smelled nothing like kerosene.

George Ann O'Neil was the next witness for the State. She testified that she had known deceased as a healthy, robust woman for a long time, and had never known her subject to fits. The witness was near the house at the time deceased was burned to death. About one o'clock witness heard the defendant calling her and Buck Payne. She went to Henry Washington's house, where she saw deceased lying dead in the fire, her clothes smoking. The defendant, Henry Washington, Nancy Glass and Dan Warren were at the house. Witness left shortly, and returned in about an hour, when she found that the body had been dragged from the fire. She met Winnie Payne when she left the first time. Winnie, being told what had happened, went to Henry Washington's house. Witness had heard the defendant and the deceased quarrel about Henry Washington. The deceased was a very jealous woman. Witness had never heard the defendant utter threats against the deceased. Cross-examined, the witness stated that while going to the house on the first occasion mentioned (on being called), she met the defendant in the lane near the house. Defendant was then very much excited. The deceased frequently accused the defendant of improper intimacy with Henry, which the defendant invariably denied. Defendant and deceased were both women of about fifty or sixty years of age. Witness heard that during the August preceding her death, the deceased fell in a faint on the road from church. She never heard of her falling on any other occasion. Jane was dead when witness first reached the house. Defendant was very much excited, and said in reply to questions: "That woman is in the fire,

I did not know it until Henry opened the door and told me." The chimney was on the north side of the house. The smoke from the chimney drifted southwards. The defendant that day washed on the north side of the chimney. The substance of the testimony of G. B. Robbins, one of the jury of inquest, was that from impressions in the ashes the body of the deceased must have lain in the fire, head first, face downwards, with her limbs extending toward the opposite door. A pot and oven stood in the right hand space of the fire-place. The nose, lips and skin on the face were burned off. None of the burns extended to the hollow, but reached to the waist. A wound an inch long was discovered on the top of the head of the deceased. Some blood from the ear had evidently trickled over the cheek. The wound on the head had been dressed with a rag, saturated, evidently, in sugar and turpentine. Witness saw no other wounds, smelled no kerosene, and, though he examined closely, discovered no evidence of oil about the body or house. Nothing with which a wound could have been inflicted was found in the house save a shovel, and that had neither blood nor hair on it. The burns were sufficient in themselves to produce death.

C. A. Pruitt, a member of the coroner's jury, testified as did the last witness, except that, though not certain, he thought he detected the odor of kerosene on a small fragment of cloth which he took from under the body. He found no indications of oil about the body or premises.

Doctor Price testified, in substance, that he exhumed the body and made a *post mortem* examination of the skull, in the presence of the jury of inquest. The scalp was burned from the forehead, and there was a small laceration through the scalp on the top of the head. The effect of fire and sun and heat is doubtless the same, both capable of producing heatstroke. Heatstroke is most frequently very sudden, causing instantaneous loss of motion and self-control, and in cases where the patient recovers at all, the recovery is complete within a few hours. Unconsciousness and even death very frequently ensue as an instantaneous result of heatstroke, and diseases of this and like character, which result in sudden death, such as catalepsy, epilepsy, aneurism of either heart or brain, asphyxia, etc., are not usually preceded by promonitory symptoms. The witness discovered no evidence of a blow on the skull. Epilepsy, catalepsy, aneurism of the brain are generally discoverable from a *post mortem* examination of the brain. Witness did not examine deceased's brain.

Hall Taylor, another member of the coroner's jury, testified, in addition to what was stated by the previous witnesses who were members of that jury, that he positively smelled coal oil on the rag smelled by Pruitt, and that he saw a small grease spot on the floor, that smelled like coal oil. He saw a four-inch wound on the head, into which he inserted his finger and found the skull broken. Lewis Maxwell, another member of the coroner's jury, testified to the same effect.

Tilda Washington, wife of Henry Washington's brother Sank, testified, in substance, that on the night before Jane's death, she, Jane, came to witness' house near by, and asked her to bind up a small gash in her head, which she said had been inflicted by Henry. Witness bound it up next day with a rag, sugar and turpentine. Witness saw the wound on the head after death. It was the same wound she had bandaged. She at no time regarded this wound serious; it was nothing more than a small gash, She was at Henry's house and saw the body after death. She smelled no coal oil, and saw no evidence of coal oil about the body or house. Defendant and Jane appeared perfectly friendly on Thursday evening before the death of the latter.

Fred. Berry testified that he had heard the deceased and defendant more than once quarrel about Henry Washington, and in one quarrel heard defendant threaten to kill deceased.

Kiah Washington, Henry's brother, testified for the State, in substance, that he was at and in the house, examined the body, and both saw and smelled coal oil on the body after death. When he remarked, after examining the body: "The Lord Jesus Christ! This woman is murdered; and furthermore, she is kerosened," Henry Washington put his hand in his pocket and said: "Shut up, I don't want such talk around here." Witness was not on good terms with his brother Henry. Neither Sank nor Sandy Washington were at Henry's house while witness was there. Some time prior to Jane's death, defendant told witness that Jane had gone to Marlin and abused her, and that she would kill Jane in less than three months.

The substance of the testimony of Peter Crutchfield, for the State, was that he passed Henry Washington's house between one and two o'clock on November 3, 1883, and saw defendant and her daughter washing some fifteen or twenty steps from the house. The house was closed. Considerable smoke was floating out of the chimney, and the witness smelled a strange odor, like rags and meat burning.

The material part of the testimony of Dick Payne, a witness for the State, was, in effect, that he occupied a portion of the house occupied by defendant. He knew that the defendant and Henry Washington were very intimate. Henry paid her attentions usually paid to a wife. Witness had never seen Henry and defendant in bed together, but had often gone to bed leaving them in defendant's room together. The defendant and deceased were constantly quarreling about Henry. Witness had heard the defendant threaten to kill the deceased. On one occasion, in May, 1883, defendant, with a hatchet and blanket, went to George Ann O'Neal's house looking for Jane. On her return she said that she wished God would provide her a dark night, that she might put on a black dress and have her aim. Witness had never told this until now. Henry's attention to defendant was rather constant. Henry and the defendant had a quarrel on the day of Jane's death. Defendant came out of her house with a knife, about breakfast time, cursing Henry. She said she would do murder that day — would kill from the largest to the least. Jesse Blocker testified, for the State, that some time before Jane's death he saw defendant standing in the road with a club in her hand, daring Jane to breathe. He remembered the occasion when Freeman brought the deceased to his house, suffering from a fit into which she had fallen on her way home from church. Tony Grant testified, in substance, that he was at Henry Washington's house on the day that Jane was burned, and before that event took place. Jane and the defendant were in the house quarreling. He then went to Henry Washington, who was with Dave Warren in the field. Hannah Blocker testified, in substance, that the deceased was brought to her house one day in August by Jim Freeman, having fallen in the road on her way from church. Deceased told the witness that Henry Washington had beat her nearly to death. The complaint against the defendant made by Jane Washington, referred to in the opinion, was next introduced in evidence by the State.

The justice of the peace who presided at the inquest testified, for the defence, that he failed to detect, by any means, the presence of kerosene about the body or premises. The jury was divided as to whether a certain rag smelled like it had been saturated with kerosene.

Alex. Washiugton testified, for the defence, that he went to Henry's house with the State's witness, Kiah Washington. Kiah did not go into the house at all. He merely opened the door, looked in and said: "Lord have mercy! This woman has been murdered; and, more, she has been kerosened." Jane's body was then covered with a sheet. Dave Warren testified, for the defence, that Henry Washington visited defendant very often, but he knew of no love affair between them. Defendant and Henry had a quarrel early on the morning that deceased was burned. Witness went to the field with Heury on that morning. In about an hour's time Henry left the field, going towards his house. He was gone about an hour. Haywood Douglass came into the field during Henry's absence. Henry, on his return, asked Haywood to pick cotton. In a short time Henry went across the field, he said, to get a melon. Haywood left on Henry's return. After a short time Henry and witness went to weigh cotton. Henry emptied his cotton and told witness to go and see what was the matter about the house. Witness went, found the door locked, returned and informed Henry. Henry replied: "Oh, yes. I have the key." The witness and Henry went to the house together. Henry unlocked the door, and, speaking to the defendant, who was near, said: "Sister Pleasant, here is this woman in here burning up." Defendant replied: "O! O! O! You are the very man that killed her." Harry said: "You hold your peace," and pushed the defendant back as she started in the house.

The witness did not know how far across the field Henry went when he went after the melon. The cotton was too tall for him to see. He did not know what Haywood came to the field for. Tony Grant came to the field after Haywood left. When the witness first went to the door of the house, the defendant was coming in the gate, with a bundle of clothes, from the direction of Winnie Payne's. She went to the wash place in the rear, and was returning toward the door when Henry unlocked it. This was but a short time after Tony Grant came to and left the field.

James Freeman testified that, about four o'clock on a warm evening in August, the deceased fell in the road on her way home from church, the witness supposed from heat. Se became perfectly helpless, but retained consciousness. Witness and Dick Payne took her to Jesse Blocker's in their arms. Witness had never known of her having another attack of that kind. Witness assisted to take the deceased out of the fire. He neither saw nor smelled coal oil. This witness corroborated Alex. Washington respecting Kiah Washington's actions and statements at the house.

Sanford Washington testified, that he talked to the defendant on the night after Jane's death. The defendant protested that she was perfeetly ignorant of of how the burning happened.

WILLSON, J. 1. For the purpose of showing a motive on the part of the defendant to kill the deceased, it was not error to admit in evidence the affidavit made by deceased a short time before her death, charging the defendant with a violation of law, which affidavit was made for the purpose of having said defendant arrested and tried for said violation, and was pending at the time of deceased's death.[1]

2. It was error to permit the witness Hannah Blocker to state what the deceased told her concerning Henry Washington's beating her nearly to death.

[1] Taylor v. State, 14 Tex. (App.) 340; Rucker v. State, 7 Tex. (App.) 549.

This was hearsay, and was no part of the *res gestæ*, and in no way connected with or bearing upon the issue of defendant's guilt. It does not appear that what deceased said was in explanation of her then sickness, and was a part of the *res gestæ* of such sickness.[1]

3. It is not claimed by the appellant's counsel that the court erred in its charge to the jury, or in refusing special instructions requested by the defendant. We have, however, examined the charge of the court and the special instructions which were refused, and we are unable to see that any error has been committed in giving to the jury the law of the case. We think the charge given was correct, and contained all the law applicable to the evidence, and this seems to be conceded by appellant's counsel, as they have not directed the attention of this court to any supposed defect in the same.

4. Appellant's counsel rely for reversal of the judgment mainly upon the ground that the verdict of the jury is not supported by the evidence. We have given to the statement of facts a most careful consideration, and we are clearly of the opinion that the evidence is insufficient to support the conviction. We will not recite the evidence, as the reporter will collate and publish the same in connection with this opinion. It is not shown by the evidence certainly, and beyond a reasonable doubt, that deceased came to her death by the criminal act or agency of any one. There were no marks of violence upon her person, except those produced by the fire, and an old wound on the top of the head, which was shown to have been made some time prior to her death. There were no indications in the house of a struggle having taken place — in fact, no signs or evidences whatever that violence had been used upon the deceased. Deceased made no outcry that was heard, and no unusual noise was heard at or about the house at the time of her death; and yet there were several persons within hearing of the place of her death at the time. She was a woman who weighed one hundred and thirty or one hundred and forty pounds, and was apparently in good health. It is not reasonable to conclude that she could have been murdered without a struggle or an outcry on her part, and without the least evidence of violence being left upon her person.

It was the theory of the prosecution that kerosene oil was thrown upon her, and that she was then thrown into the fire and burned to death. While it is possible that this theory is correct, it is not established by the evidence, but, on the contrary, to our minds, the evidence renders it improbable that her death was thus produced. There was but little fire in the fire-place, but one chunk of fire, as some of the witnesses testify; there were no indications in or about the fire-place of a struggle; a pot and a skillet, containing food which was being cooked, were in the fire-place, and were undisturbed. No kerosene oil was found about the house, though some of the witnesses testified that they smelled it, and one witness said he saw some on the floor. Other witnesses, however, testified that they examined closely and saw no oil upon the floor, and could smell none about the body. But, it is said, perhaps she was killed, or nearly killed, and then saturated with oil and placed in the fire. If such had been the case, it is reasonable to suppose that if external violence sufficient to kill or render her helpless had been used, some evidence of such violence would have been found upon her dead body, and the testimony is conclusive that no such evidences were found then, nor subsequently, when the dead body was ex-

1 Hammel *v.* State, 14 Tex. (App.) 326.

humed and particularly examined by an expert for the purpose of discovering indications of violence.

On the other hand, it appears from the evidence of a physician who testified in the case, that there are various diseases, and some of which are not infrequent, that produce death or unconsciousness suddenly, without any premonition. Among these he mentions heatstroke, catalepsy, epilepsy, hemiplegia, asphyxia, aneurism of the heart or brain. Would it not be as reasonable to suppose that the deceased was suddenly stricken down by some one of these diseases, and fell upon the fire, as to conclude from the evidence that she was murdered by the defendant or any other person? Would not this supposition, that her death was thus naturally produced, account for the absence of all external evidences of violence inflicted upon her? And is not this theory perfectly consistent with the innocence of the defendant? Is there anything unreasonable in such a theory? In connection with this hypothesis, it is worthy of notice and consideration that, in August previous to the death of deceased in November, while she was returning home from church, she suddenly fell in the road, helpless and unconscious, and in this condition was conveyed to a house near by, where she was attended to, and in a little while restored to health. This sudden attack was at the time supposed by those who witnessed it to be heatstroke, the weather at that time being very warm. Might she not on the occasion of her death have been heatstricken? Her death occurred near midday, and while she was apparently engaged in cooking over the fire, and the physician who testified in the case informs us that fire, as well as the heat of the sun, may produce heatstroke.

Giving to the evidence before us full credit and weight, admitting as true every portion of the State's evidence, we think it falls far short of establishing with that degree of certainty which the law demands that the deceased came to her death by violence inflicted upon her by another. And it further falls far short of proving that if such violence was inflicted it was inflicted by the act or agency of the defendant. In short, we are of the opinion that the evidence, instead of clearly and satisfactorily establishing the *corpus dilecti*, leaves it in great doubt and uncertainty, and is altogether too uncertain and inconclusive to warrant this conviction.[1]

We think the court erred in refusing to grant the defendant's motion for a new trial, and because of such error the judgment is reversed and the cause remanded.[1]

*Reversed and remanded.*

§ 704. **Murder in Second Degree — Evidence Insufficient.** — In several cases, also in the appellate courts, the evidence has been reviewed and held insufficient to convict of murder in the second degree.[2]

§ 705. **Murder in Second Degree — Evidence Insufficient.** — In *Holly* v. *State*,[3] TURLEY, J., delivered the following opinion of the court: "We have been much astonished at the verdict upon which judgment in this case has been given. The prisoner, a youth of some fifteen years of age, has been found guilty of murder in the second degree; to constitute which crime, malice afore-

1 Lovelady *v.* State, 13 Tex. (App.) 545; Walker *v.* State, *Id.* 609.

2 Turner *v.* State, 16 Tex. (App.) 433 (1884); Treadwell *v.* State, 16 Tex. (App.) 560 (1884); Nolen *v.* State, 14 Tex. (App.) 474 (1883); State *v.* Packwood, 26 Mo. 340 (1858).

3 10 Humph. 141 (1849).

thought is a necessary ingredient, under circumstances from which, in our judgment, it not only can not be inferred, but which, indeed, directly disprove its existence. It appears that the prisoner, with some other youths of his own age, was playing marbles, when the deceased, a full grown man, interfered in the game, and upon being remonstrated with for doing so, became turbulent, and commenced inflicting personal chastisement upon one of the boys; that while he was in the act of doing this, the prisoner threw a stone at him, which struck him on the head and inflicted a wound of which he afterwards died. That the prisoner had no previous ill-will against the deceased, and that the blow struck was not upon premeditation, but the result of sudden excitement produced by the misconduct of the prisoner himself, can not be questioned; and the weapon used was not, in the hands of the person using it, of a dangerous character, and one well calculated to produce the result which followed its use. The result must have been wholly undesigned and accidental; the same boy or any other might have thrown the same stone, or one like it, with the design of inflicting injury a thousand times or more, without producing death; and yet, the jury have thought it proper to hold the youth responsible as for murder. This can not be permitted; for murder has not been committed either in design or by implication of law. A boy who, from being provoked wantonly and improperly by a man, becomes excited and throws a stone at him, and it accidentally so falls, as in violation of all reasonable calculation of chances to kill him, is to be held guilty of murder and punished as a murderer. This would be cruelty and not justice. It is true that the kind of murder of which the prisoner has been found guilty is not now punished by death; but that it is not so is owing to the interposition of a statute, for it is murder as described at common law, and it is requisite yet that it should have been perpetrated with malice aforethought, either expressed or implied.' There is no express malice; and it can not be implied from the nature of the weapons used. The Attorney-General argues that a very serious wound was inflicted, one which did produce death, and that it is a fair implication that the weapon used was of a character to produce the effect it did. This is ingenious, but fallacious; for the same thing might be argued of any case in which death accidentally ensued from the use of a weapon not calculated to kill. And, moreover, the wound of which the deceased died is shown to have been of such a character as to make it, to say the least of it, problematical whether it was inflicted by the stone thrown by the prisoner. We have no hesitation in saying that the prisoner is not guilty of murder, though the deceased died of the blow struck by him. Whether he be guilty of manslaughter or not is a question depending upon other propositions for its solution, and to be submitted to a jury, with all other matters in connection with the transaction, upon a new trial. Judgment reversed and case remanded."

GREEN, J. In this case I think the throwing the stone by the defendant was clearly unlawful, and, as death ensued, it is a clear case of manslaughter. MCKINNEY, J. Not being present in court when this case was heard, I decline any expression of opinion upon the point in respect to which my associates disagree.

§ 705*a* **Evidence Insufficient to Convict of Murder in Second Degree. — Nolen v. State.** — In *Nolen* v. *State*,[1] the indictment charged the appellant with the murder of Sandy Winn, on April 6, 1879. The conviction was for murder

[1] 14 Tex. (App.) 475 (1883).

of the second degree, and the punishment awarded was a term of twelve years in the penitentiary.

Ben White was the first witness introduced by the State. He testified, in substance, that on the morning of April 7, 1879, he was informed of the discovery of traces of a "drag" in his neighborhood, in Medina County. He went to the place indicated, and found an abandoned camp, which had been occupied by a party of men with a wagon. Investigation disclosed a pool of blood near where the wagon had stood. It had been covered with dirt, evidently with the view of hiding it. A "drag" of some heavy body or object led off from the blood spot. The witness and his companions followed this drag a distance of about five hundred yards up a rocky, brushy hill, and found the dead body of a man lying face downwards with the feet up and the head down the hill. Examination disclosed that the head from the ears forward had been crushed by a blow from some heavy instrument. All appearances indicated that the body had been dragged to the spot feet foremost. The clothing had been torn by the brush and drawn up on the body. The "drag" led back from where the body was found to where the wagon stood. It was evident that it had been dragged by two horses, of which one was shod all round. From the body the witness and his party followed the tracks over the brow of the hill and around its base, back in the direction of the camp. The trail of the wagon and of a number of horses led off in a southeasterly direction. The trail of the wagon indicated that the hind wheel on one side did not follow directly in the track of the front wheel, and this peculiarity was sufficiently marked to enable any one to follow the trail readily. The places where both the camp and the body were found are in Medina County, near the Uvalde County line, about two and a half miles southeast of the residence of Sam Johnson.

Henry Shane, the next witness for the State, corroborated the testimony of White as to the appearance of the camp and body, and testified in addition that, in company with Sergeant Caruthers of the State force, he followed the trail of the wagon and horses from the camp where the blood was discovered in a southeasterly direction to the house of Jeff Johnson, where the wagon had evidently stopped. Thence he followed the trail to a point near the residence of Captain Toms, in Wilson County, where he and Caruthers found the wagon and a bunch of horses in the possession of one Ed Swift. The horses and wagon were the property of the defendant, or were claimed to be. Thence the witness and Caruthers went to the residence of John Camp, on the San Antonio River, near Floresville, where they found the defendant on the gallery. He had slept there all night, and was pulling on his boots when witness and Caruthers arrested him. This was between daylight and sunrise. From here, which was some ninety miles distant, the witness and Caruthers took the defendant to the camp where the blood was found. The defendant, who was under arrest, manifested great emotion when the camp was reached, the tears running down his cheeks. The wagon was a home-made vehicle. One wheel did not track accurately, and the trail was easily followed. Witness saw this wagon a few days before the killing. It was then at the defendant's camp. The defendant, deceased and Ed. Swift were then with it.

Sam. Johnson testified, for the State, that in the early part of the year 1879 the defendant passed his house with a herd of horses and cattle, going northwest, and the witness believed that the deceased was with him at that time. About April 1, thereafter, the defendant in company with the deceased and Ed. Swift, returned to the witness' neighborhood with a wagon and twelve or

thirteen head of horses and mules, camping in the neighborhood for a week or two, during which time the defendant went to Nueces cañon, in Uvalde county. Before going to the cañon, the defendant came to the witness and requested the loan of sixty or seventy dollars, which he said he owed the deceased aud was anxious to pay, as the deceased, who wanted to go to Fort Clark, was annoying him about it. He proposed to transfer horses to the witness to raise the money. Witness had never heard the defendant speak unkindly of the deceased. The defendant came to the witness' house on the morning of April 7, 1879, with Ed. Swift, who was driving his wagon, and asked witness to guide him to the road leading to Jeff. Johnson's neighborhood. The witness sent Danzer, a man in his employ, to guide defendant and Swift as requested, and to drive up a yoke oxen on his return. The deceased was not then with the defendant. Witness rode off after giving Danzer directions, and seeing him saddle his horse to go with defendant and Swift. This witness corroborated Shane and White as to the finding of the body and camp and the appearance of each. The body of the deceased was found about three miles southeast of the residence of the witness, in the direction of Jeff. Johnson's on the evening after the defendant passed the witness' house going eastward.

On cross-examination, the witness stated that Danzer returned home late in the evening, stating that he had been hunting oxen. This man Danzer had been working for the witness about a month, and, the witness thought, was unacquainted with the defendant. Their actions did not indicate an acquaintance. In a day or two after the discovery of the body, Danzer, without giving notice, quit the employment of the witness and left the country, riding a gray pony which he owned, since which time he has never been seen or heard of. Danzer owned a rifle, but no pistol. The witness had often seen the deceased about the neighborhood. He invariably carried a pistol, and generally rode a small blue mare. Danzer was a loose character, and was liable to quit working for a man at any time.

Jeff. Johnson testified, for the State, that he lived about twenty miles southeast of Sam. Johnson, on the road leading from Sam. Johnson's to Camp's place, near Floresville, in Wilson County. About the time of the murder of the deceased, in April, 1879, two men, with a wagon and a herd of twelve or thirteen horses and mules, camped near the house of the witness. They came late in the evening, and left next morning about suurise. Two days later, Henry Shane came by the witness' house in pursuit of a party with a wagon and bunch of horses and mules. The witness did not know the campers.

George Stokeley, for the State, testified that he had seen the deceased In the employ of the defendant. On or about the fifth day of April, 1879, the defendant sold a stock of cattle to witness' father, in Nueces cañon, Uvalde County, receiving therefor a check for about fifteen hundred dollars, and an order on the witness for a lot of horses and mules, to be delivered to the defendant at John Camp's, in Wilson County. Witness went to Camp's to deliver the animals, and was there when the defendant was arrested by Caruthers and Shane.

W. S. Hiler testified, for the State, that he was present when the defendant was brought to the place of the homicide Defendant looked dejected, downhearted and sorrowful. He was then tied on his horse, and was under arrest. The State rested at this point.

George Brown, the first witness for the defence, testified that he saw the defendant in company with the deceased about April 1, 1879. They camped, with a wagon and a bunch of horses, for a week or two, near Sam Johnson's. Dur-

ing this time the defendant made a trip to Nuences cañon. The witness was present at Sam Johnson's on the morning of April 7, 1879, when the defendant and Swift, with the wagon, horses and mules, came to Sam Johnson's and asked for a guide to the road leading to Jeff. Johnson's. Johnson directed Danzer to guide the defendant as requested. The defendant at that time stated that the deceased was at the camp, and had lost his mare, and that he, the defendant, had promised to return and assist him in his search for her. Witness was then starting on a cow hunt. As he left, he noticed that Danzer had turned the horses out of the lot, and the wagon, driven by Swift, was on the point of starting in a southeasterly direction. The defendant had started back towards the old camp. The deceased claimed a blue roan mare, shod all around, and always went armed with a six shooter. When the body was found, arms of no kind were found abont it.

Robert Richter testified, for the defence, that he lived some twenty-five or thirty miles from Sam Johnson's, and was acquainted with Bill Danzer. On or about April 10, 1879, Danzer came to witness' house on foot, and told witness that his horse had given out, and that he wanted to make a horse trade. Witness went with Danzer to a point a mile or two distant, and was shown a small blue roan mare, shod all around, which Danzer claimed, stating that he got her from his partner, Bill ———, on the Nueces River. Witness traded with Danzer, giving him a fresh horse for the mare. Danzer also offered to sell a pistol to the witness. When Danzer left he went in a northerly direction, towards Center Point, in Bandera County. Witness had never seen or heard of him since.

By a number of citizens of Lavaca County, who had known the defendant for periods ranging from ten to twenty-five years, the defendant proved his reputation in that county to have been excellent as a humane, peaceable and quiet man.

The opinion states the testimony of Shane on being recalled, which testimony raised the question principally discussed in the opinion. The motion for new trial raised the questions treated in the opinion.

WILLSON, J. Defendant appeals from a third conviction of murder in the second degree, the two former convictions having been set aside upon appeals to this court.[1] As the case is now presented there are but few questions necessary to be considered.

1. We think there was no error in overruling defendant's application for a continuance. Such of the facts as were material, which defendant alleged he expected to prove by the absent witness, are shown by the evidence to have been within the knowledge of other accessible witnesses, and it does not appear at all probable that any injury resulted, or could have resulted, to the defendant by the refusal of the court to grant him a continuance.

2. We find in the record the following bill of exceptions: "Be it remembered that on the trial of the above styled cause, and after the State and defendant had closed their evidence, and the opening arguments for both State and defendant had been made, the State, through her district attorney, asked leave to recall the witness Henry Shane, and to prove the acts of defendant when brought back to the spot where the homicide was committed; to which proceeding the defendant, by counsel, objected, and said objection being overruled by the court, said witness was recalled, and was asked by the district attorney

[1] 8 Tex. (App.) 585; 9 Tex. (App.) 419.

what was said to defendant after he was brought back to said spot where the murder was committed. Witness replied that he asked the defendant what had been done with the body, to which the defendant replied by pointing to the hill where the dead body of deceased had been previously found. Defendant was under arrest at the time, and had been for two or three days previously. Said defendant and Swift had been handcuffed together, and part of the time tied with a rope. Witness had talked with defendant about the murder of deceased, and defendant was informed of what he was under arrest for. Defendant was not cautioned that his admissions might be used against him. To all of which proceedings, and to the testimony of said recalled witness, defendant, by counsel, excepted," etc.

It was within the discretion of the court to admit further testimony necessary to a due administration of justice, at any time before the argument of the cause was concluded, and the exercise of such discretion will not be revised by this court unless it plainly appears to have been abused.[1]

But the question remains, was this evidence admissible at any time? It is very clear that under the circumstances, if the defendant had confessed his guilt, such confession would not have been admissible against him. It was so determined by this court on a former former appeal of this case.[2] But does the rule which excludes confessions which are not brought within the exceptions of the statute,[3] also apply to and exclude the acts of the defendant done under the same circumstances? This is the question directly presented by the defendant's bill of exceptions, and is one upon which we find some conflict of opinion. It was the opinion of the learned judge who tried this case, that, while the statements or confessions of defendant made while under arrest were not admissible against him, yet the acts performed by him were admissible; and, holding this view, he allowed the prosecution to introduce the evidence objected to by defendant, and set forth in the bill of exceptions we have quoted. This opinion of the learned judge was no doubt based upon the opinion of this court in *Rhodes* v. *State*,[4] where it is said: "A distinction has always been made between acts performed and confessions made by a defendant while under arrest. The former are admitted, whilst the latter are not, unless coming srictly within the letter of the statute." In this *Rhodes' Case*, the defendant was charged with the theft of money and was under arrest, and, while under arrest, she was taken to the house where the stolen money was supposed to be concealed, and there she pulled up a plank in the floor of the house and looked under the floor as if she was looking for the money, but produced nothing. These acts of the defendant were proved by the State over the objections of defendant, and this court held that such evidence was admissible. In support of the doctrine announced in that case the court, in its opinion, cites *Elizabeth* v. *State*,[5] *Walker* v. *State*[6] and *Preston* v. *State*.[7] and the first named case is especially referred to as a case in point.

That case, *Elizabeth* v. *State*, was a trial for murder of a child. While the

1 Code Cr. Pr., art. 661; Kemp *v.* State, 38 Tex. 110; Bittick *v.* State, 40 Tex. 117; Goins *v.* State, 41 Tex. 334; Moore *v.* State, 7 Tex. (App.) 14; Hewitt *v.* State, 10 Tex. (App.) 501; Cook *v.* State, 11 Tex. (App.) 19; George *v.* State, *Id.* 95; Bostwick *v.* State, *Id.* 126; Grosse *v.* State, *Id.* 364; Donahoe *v.* State, 12 Tex. (App.) 297.

2 Nolen *v.* State, 8 Tex. (App.) 585.

3 Code Cr. Pr., art. 750.

4 11 Tex. (App.) 563.

5 27 Tex. 329.

6 7 Tex. (App.) 245.

7 8 Tex. (App.) 30.

defendant was under arrest she told her guard that she could show the dead body of the child, which at that time had not been discovered; she then walked up a ravine which was close by, and walked into a hole of water, saying that the child was in there, and brought out the dead body of the child. It was held, over the objections of the defendant, that the prosecution might prove the above stated facts. We have no doubt of the correctness of that ruling. We think such testimony was strictly within one of the exceptions of the statute, because it was in consequence of the defendant's acts, that the dead body of the murdered child was discovered, and it was upon this ground that the Supreme Court held it to be admissible.

Upon a careful examination and thoughtful consideration of the *Elizabeth's Case*, we are of the opinion that it does not support the opinion of this court in the *Rhodes Case*. There is a marked and very material distinction in the two cases. In the *Elizabeth Case*, the acts performed by the defendant, led to the discovery of the dead body of the child. In the *Rhodes Case*, the acts performed by the defendant, did not lead to the discovery of the stolen money. We will refer to this distinction more fully in a subsequent portion of this opinion

*Walker* v. *State*, cited as supporting the Rhodes decision, is, we think, essentially different from the *Rhodes Case*, and does not support it. While under arrest upon a charge of murder, and during an examining trial upon the charge before a justice of the peace, the defendant Walker was caused by the magistrate to make tracks in the ashes and sand, and a measure was applied to these tracks which fitted exactly, and this measure was of tracks found at the place of the murder. These facts were proved over the objections of defendant upon his trial after indictment; to which he objected, and upon appeal, this court held the evidence was admissible, quoting at length from the opinion in *State* v. *Graham*,[1] where the identical question was presented and determined, and a portion of which opinion we here quote: "The object of all evidence is to elicit the truth. Confessions which are not voluntary, but are made either under the fear of punishment if they are not made, or in hope of escaping punishment if they are made, are not received as evidence, because experience shows that they are liable to be influenced by those motives, and can not be relied on as guides to the truth. But this objection will not apply to evidence of the sort before us. No fears or hopes of the prisoner could produce the resemblance of his track. This resemblance was a fact calculated to aid the jury, and fit for their consideration."

It will be perceived from the foregoing extract, that the admissibility of the testimony as to the tracks, was founded upon the reason that no hopes or fears of the prisoner could produce a resemblance of his tracks, while confessions are excluded because experience shows they are liable to be influenced by such motives, and are therefore not always truthful.

In the *Preston Case*,[2] we find nothing in support of the broad doctrine laid down in the *Rhodes Case*, that the acts of the defendant are never to be treated as confessions so as to render them inadmissible as evidence, but that such acts are admissible, under circumstances which would exclude confessions. We have found no authority, which in our judgment upholds the doctrine of the *Rhodes Case*, to the extent that it seems to reach.

Mr. Wharton says that "confessions may be by acts as well as words,"[3] and

1 74 N. C. 646.
2 *supra*.
3 Whart. Cr. Ev., sec. 683.
4 *Id.*, sec. 679.

even silence under certain circumstances is taken as a confession.[4] Suppose a prisoner charged with murder is asked the question, "Are you guilty of murder?" and instead of saying "I am," he makes an affirmative movement of his head. Would this movement of the head be admissible evidence, while his confession by words would be inadmissible? Suppose he were told, "You murdered the deceased; you crushed in his head with an axe; you dragged him into yonder thicket and left him, after having robbed him," and in response t this charge, the prisoner had not uttered a word, but had nodded his head in assent to the truth of the same; will it be contended that the act of nodding his head, because it is an act and not a statement or declaration, is competent evidence against him when if he had confessed the charge by words, such confession would have been excluded? We are unable to perceive the reason of the rule which admits the acts while it excludes the words. Acts, it is said, speak louder than words, and thus being generally true, they should be regarded as confessions, as much so as words, and the law does so regard them. Acts are but a kind of language, expressing the emotions and thoughts of the person performing them, more forcibly and convincing sometimes than words, but still like words, only a mudium through which the inward feelings, thoughts or intents of the person are outwardly indicated.

In the case before us, the prisoner pointed in the direction of where the body of the deceased had been found, when asked what they had done with deceased. Instead of this response to the question, suppose he had said: "We left the dead body of deceased on yonder hillside." Would this answer have been admissible? We think not under the long line of decisions in this State. How, then, can it be said that his gesture is competent evidence? Upon what principle is this distinction founded? Can a confession be indirectly admissible which would not be directly so? Would not such a construction of the law defeat its purposes? Would it not probably lead to great evils? Under such a rule, extorted confessions of guilt, made by nods, winks, gestures, and other acts would be frequently paraded in cases to supply the absence of sufficient evidence to establish the guilt of the accused. Such evidence would be easily attainable in most cases, and would be as unreliable and objectionable in every respect as confession by words. As said by Roscoe and Greenleaf: "The influence which might produce a groundless confession might also produce groundless conduct."[1] In this case, for illustration, the same influences which might have prompted the defendant to confess by words that he had committed the murder might also have prompted him to point in the direction of where the dead body of the murdered man had been found. Both the above quoted standard authors lay down the rule that the acts of the prisoner are in such cases placed upon the same plane with his words, and where the one is inadmissible, so also is the other.

We are of the opinion that the rule announced in the *Rhodes Case* is in conflict with the authorities and with the reasons which support the law governing the admissibility of confessions, and we must therefore overrule that case upon this subject.

3. Another serious question here presents itself. It appears that the defendant pointed in the direction of where the body of the deceased had been found. It was not in consequence of anything said or done by the defendant that the

1 Rosc. Cr. Ev., sec. 51; 1 Greenl. Ev., sec. 232.

dead body was discovered, or that any fact connected with the homicide was discovered. A confession is admissible against a defendant when he makes statements of facts or of circumstances that are found to be true, which conduce to establish his guilt; such as the finding of secreted or stolen property, or instrument with which he states the offense was committed.[1] Does this mean facts or circumstances which have, prior to and independent of the confession, been found to be true, or is it confined to such facts or circumstances as are, in consequence of and by means of the information afforded by the confession, found to be true?

Upon this question we find the authorities uniform. Mr. Greenleaf states the rule in the following language: "Where, in consequence of the information obtained from the prisoner, the property stolen, or the instrument of the crime, or the bloody clothes of the person murdered, or any other material fact is discovered, it is competent to show that such discovery was made conformably to the information given by the prisoner."[2] Mr. Phillips states the rule in substantially the same words.[3] Mr. Roscoe says: "Although a confession obtained by means of promises or threats can not be received, yet, if in consequence of that confession certain facts tending to establish the guilt of the prisoner are made known, evidence of those facts may be received."[4] Mr. Bishop announces the same doctrine.[5] Mr. Wharton says: "Although confessions made by threats or promises are not evidence, yet if they are attended by extraneous facts which show that they are true, any such facts which may be thus developed, and which go to prove the existence of the crime of which the defendant was suspected, will be received as testimony; *e.g.* where the party thus confessing points out or tells where the stolen property is, or where he states where the deceased was buried, or gives a clue to other evidence which proves the case. But if, in consequence of the confession of the prisoner thus improperly drawn out, the search for the property or person in question proves ineffectual, no proof of confession or search will be received."[6]

We believe it will be found upon examination that the decisions of the courts of this State have uniformly been in accord with the rule as stated by the elementary authors we have cited. We have found no case in which a contrary doctrine has been addopted. In *Massey* v. *State*,[7] this court said: "Confessions made under arrest, unless voluntary and after warning, may be used to the extent that the party made statement of facts and circumstances found to be true, and no further. Beyond the facts stated, and as far as they furnish information, other portions of the confession would not be admissible." In *Davis* v. *State*,[8] the doctrine we have quoted from the text books is fully and plainly approved and adopted.

We hold it to be settled, then, that the statement of facts or circumances which are already known to exist, and which statement does not lead to any information connecting or tending to connect the defendant with the crime, will not be admissible in evidence against the defendant, if made while under arrest, unless it is made admissible under some other exception in the statute.

Applying the rules we have discussed to the evidence of defendant's act in pointing in the direction of where the body of deceased had been previously

[1] Code Cr. Pr., art. 750.
[2] 1 Greenlf. Ev. sec. 231.
[3] 1 Phil. Ev. 554.
[4] Rosc. Cr. Ev. 50.
[5] 1 Bish. Cr. Pr., sec. 1242.
[6] Whart. Cr. Ev., sec. 678.
[7] 10 Tex. (App.) 645.
[8] 8 Tex. (App.) 510.

found, we are of the opinion that it was not competent evidence, because it was a confession by act of a knowledge of facts, which knowledge tended to connect defendant with the murder, and was made while he was under arrest, without his being first cautioned that it might be used against him, and without being accompanied by a statement of any fact or circumstance found to be true which conduced to establish his guilt. While the learned judge who tried the case was fully authorized by the opinion of this court in the *Rhodes Case* in admitting this evidence, we must now hold this court was mistaken in the rule laid down in that case, and that the admission of the testimony was error, for which the judgment must be reversed.

4. But, even if this evidence had been competent, we do not think we could have approved the verdict and judgment upon the evidence as presented in the statement of facts. While the circumstances pointing to the defendant's guilt are cogent, and render it quite probable that he participated in the murder, they do not impress us with that force and conclusiveness which should produce upon the mind a moral certainty of his guilt, to the exclusion of every other reasonable hypothesis. These same circumstances point to the man Danzer even more directly and more strongly as the murderer, than they do to this defendant. But it is not necessary or perhaps altogether proper that we should discuss the evidence. Upon another trial of the case, the prosecution may be able to adduce testimony more satisfactory, and amply sufficient to support a conviction.

Because the court erred in admitting the evidence complained of in defendant's bill of exception hereinbefore quoted, the judgment is reversed and the cause remanded.

*Reversed and remanded.*

§ 706. —— **Intent to Kill Essential in Manslaughter.** — And to constitute manslaughter an intent to kill is essential.[1]

§ 707. —— **Provocation Reduces Crime to Manslaughter.** — A voluntary homicide is not murder if it consists of a blow or assault made after an act committed by the deceased which the law deems adequate to excite sudden and angry passion in the slayer. It is then only manslaughter.[2] Provocation by blows and words may reduce a killing to manslaughter.[3]

§ 708. —— **Provocation — Heat of Passion.** — If passion has not had time to cool after a provocation, it is manslaughter.[4]

In *State* v. *Morris*,[5] a person who was violently beaten and abused made his escape, ran to his house eighty yards off, got a knife, ran back, and upon meeting the deceased stabbed him. This was held not murder, but only manslaughter. In charging the jury, the court said: "The great distinction between murder and manslaughter is this: manslaughter is committed under the operation of furious anger, that suspends for a time the proper exercise of reason and reflection, and which hath been stirred up by some great provocation, for there are some provocations that are not indulged with an allowance of exciting the passions to such excess, and thus a distinction is formed between

1 People *v.* Freel, 48 Cal. 436 (1874).

2 Com. *v.* Webster, 5 Cush. 295; 52 Am. Dec. 711 (1850); R. *v.* Kirkham, 8 C. & P. 115 (1837).

3 R. *v.* Sherwood, 1 C. & K. 556 (1844).

4 R. *v.* Lynch, 5 C. & P. 325 (1832); McCann *v.* People, 6 Park. 629; State *v.* Moore, 69 N. C. 267 (1873); U. S. *v.* Rice, 1 Hughes, 560 (1875).

5 1 Hayw. 429; 1 Am. Dec. 564 (1816).

the different degrees of provocation. If it be by words or gestures only, it will not be sufficient to mitigate homicide into manslaughter; but if it be a provocation by some great indignity offered to the party killing, as by spitting in his face or the like, or by falling out and fighting, so that in either case it may reasonably be presumed the blood is heated, and the passions raised to such a degree as to suspend the proper operation of the reasoning powers, the exercise of judgment and reflection, such provocation will be a sufficient one to extenuate the offense into manslaughter. But although a sufficient provocation be given, and the passions greatly excited, yet if a sufficient time intervene for the passions to subside and cool, and after that the party provoked killeth the other, the law will deem it murder; as having not been an effect of ungovernable passion, and from the frailty of human nature, but upon a principle of revenge after reason had assumed its proper station. What is a sufficient time for this purpose, hath never, as I know of, been precisely ascertained. It hath been adjudged that an hour is more than sufficient time. It seems to depend greatly upon the nature of the provocation, and must be left to the jury to decide. If in the case before them they think sufficient time did intervene, they should find the prisoner guilty, though he had been greatly provoked before; if otherwise, they should find him not guilty of murder, but of manslaughter only. Also, although the slayer hath been greatly provoked, and was agitated by resentment and anger in the highest degree, and hath not had a sufficient time for cooling before the fatal stroke given, yet if in fact he appears to be possessed of deliberation and reflection, when or just before the time he gives the mortal blow, it will be murder. As where two men quarrel and agree to fight, and the one observes to the other he must first change his shoes, as they would render him less expert with the sword, and they afterward go out and fight, and he kills the other, it is murder, because the remark he made shows deliberation and reflection. For always it is to be observed that the law allows the offense to be extenuated only upon the ground that the slayer has not the free and proper exercise of his rational faculties, owing to the fury of resentment not unreasonably conceived.

"There are other distinctions between murder and manslaughter, not necessary to be now taken notice of, as they have no relation to any such case as is framed by the evidence now before the court. It is most proper to state only such parts of the law concerning homicide, as, being compressed into a sufficient compass, may serve to exhibit a clear view of the distinction between murder and manslaughter as far as regards this case. The next thing to be done, is to apply such parts of the evidence as are material to the rules just laid down. The first thing that presents itself is Norris going into Ramsay's house. He does not appear to have behaved illy there; from the whole of the evidence it does not appear he went there with a design to quarrel; he had retired before Daves and Dudley stripped and went out. They hallooed for him and Young in the street, calling them cowards. Daves charged Norris, when met, with a design to raise a riot; he denied it again and again, till called a damned liar, when he retorted the lie conditionally; Daves tripped up his heels, kicked at him on the ground, struck him after he had risen, and upon Norris intimating an intention to resort to the law for redress, repeated his blows three or four times, when Norris ran off. Now, the question arises, was this a great provocation? Would such treatment excite the passions of man in general to a degree of excess? I think it would. If Norris had killed Daves on the spot, I think it would have been but manslaughter. Norris returned in

three or four minutes, and gave the fatal stab. If he came up, and nothing more passed before the stab, as the witnesses, Campbell and Dudley, say there did not, then it is for the jury to consider whether the three or four minutes intervening between the blows near Mrs. Ramsay's and the stab opposite Thompson's, was sufficient time for the passions to cool. If it was, the killing was murder. If it was not, the case falls under the same consideration as if the fatal stroke had been given when Daves first struck him. If the jury believe what was sworn by Mrs. Thompson, and which the other witnesses do not mention, that Daves, when he advanced towards Norris after his return, struck him two or three blows before the stab, they have a right to consider whether that was not a fresh provocation, sufficient to extenuate the homicide into manslaughter. If, however, the jury believe there was not a sufficient time for the passions to subside, and that the blows mentioned by Mrs. Thompson did not pass, yet the circumstances related by two witnesses of Norris' having twice denied his having a weapon or club as it tends to evince deliberation and reflection, must be taken into their consideration; and, if they believe from the circumstance that he at that time had a reflecting capacity, and meant to conceal the weapon from Daves in order to draw him on, that he might kill him, then he is guilty of murder. It is proper, however, to observe that such a conclusion is in some sort negatived by Mrs. Thompson, who declares Norris told him to stand off, or the worst would be his. The jury will now take the law, the facts and the circumstances of the case, and by a careful comparison of the one with the other, they will draw a conclusion and say whether the prisoner is guilty of murder or manslaughter. I trust I have stated the law correctly."

§ 709. —— **Provocation — Husband and Wife.** — The killing of an adulterer in the act by the husband is considered in the law as done under legal provocation.[1]

§ 710. —— **Provocation — Parent and Child.** — If a father see a person in the act of committing an unnatural offense with his son and instantly kill him he is guilty only of manslaughter. In *R.* v. *Fisher*.[2] the father, learning of such a case, went in search of him, and killed him. PARK, J., in charging the jury said: "There is no doubt upon the evidence that the deceased came by his death in the manner stated in the indictment. There would be exceedingly wild work taking place in the world if every man were to be allowed to judge in his own case. The law of England has laid it down positively and clearly, that every killing of another is itself murder, unless the party killing can show by evidence that it is a less offense; or unless circumstances arise in the case which will either reduce the killing to manslaughter or reduce it to no crime at all. There must be an instant provocation to justify a verdict of manslaughter. The case put by the counsel for the prosecution is well known. The case put in our law books is applicable to a case of adultery, and I believe such a case as the present in its circumstances never occurred before. 'When a man finds another in the act of adultery with his wife, and kills him in the first transport of passion, he is only guilty of manslaughter and that in the lowest degree; for the provocation is grievous, such as the law

1 Price *v.* State, 18 Tex. (App.) 474 (1885); State *v.* Harmon, 78 N. C. 518; and see note in 51 Am. Rep. at p. 328.

2 8 C. & P. 183 (1837).

reasonably concludes can not be borne in the first transport of passion.' If this man had seen the thing happen, and had at that moment inflicted the injury, I should rather be inclined to think that it would have been within the rule in that case, — at least I should reserve it for the opinion of the judges. The counsel for the prisoner admits, that if the blood had time to cool, it will be murder. But I say, in the hearing of two very learned persons, that it is not exactly a question for you. Whether the blood had time to cool or not, is rather a question of law. But the jury may find the length of time which elapsed. In all cases the party must see the act done. What a state should we be in if a man on hearing that something had been done to his child, should be at liberty to take the law into his own hands, and inflict vengeance on the offender. In this case, the father only heard of what had been done from others. I say, therefore, and I do it with the assent of those who are with me, that there is not enough to reduce the offense from murder to manslaughter. We think there is not sufficient provocation to reduce this offense even to manslaughter. It is clearly no case of acquittal. It would be a gross dereliction of duty in a judge to put it as a case of acquittal. I think that, from the prisoner's carrying the instrument about him, it is clear that he meditated an attack on the deceased."[1]

§711. —— **Killing Without Design to Effect Death — Provocation.** — In *People* v. *Austin*,[2] the prisoner, along with one Nesbitt, was indicted for the murder of Timothy Shea, on September 28, 1848, by firing a pistol at him. The evidence went to show that on the evening in question the prisoner, with three of his companions, sallied out into the streets on a frolic, and after visiting five or six drinking houses entered one in Leonard Street, next door to the residence of the deceased, and in coming out passed the door of the basement occupied by the deceased's mother as a porter house, and in which the deceased, two of his brothers, and a sailor were there engaged singing and carousing. As Austin was passing the door one of the inmates came out and invited him to go in and hear the singing, which he refused to do. After refusing repeated invitations, he was taken by the collar and dragged into the basement. The door was then shut upon him, and he was repeatedly urged to sing or to drink, but refused. One of his companions, the other defendant, Nesbitt, followed him into the basement, and attempted to fasten the door open. A row then began, in the course of which Nesbitt fled from the room, and the brother of the deceased threw a tumbler and a pitcher at Austin, and struck him a severe blow on the forehead with a decanter. Austin retreated from the basement; he was followed by the sailor and struck a blow with a chair. At about this time, but whether before or after the blow with the chair was not ascertained, some one fired twice into the basement from a six-barreled revolving pistol. One of the balls took effect upon the deceased, who was then advancing with a chair uplifted towards the door through which Austin had retreated, and who died almost immediately, exclaiming as he fell and expired: "Father, I am shot!" At about the same moment, but whether before or after the firing, the light in the basement was extinguished. It was from a lamp hanging over the bar, so low that Patrick Shea, who was standing by the bar,

[1] The jury found the prisoner guilty of manslaughter, and recommended him to mercy, on account of the greatness of the provocation and his previous good character.

[2] 1 Park. C. C. 154 (1847.)

could easily extinguish it with a breath. After the firing, the prisoner retreated towards the police station house, distant about one hundred feet from the scene of the affray. On the way which he had passed, a pistol was afterwards found. Austin repaired directly to the station house, where he was met by the captain of the police, who, observing him to be very bloody, ordered him to be taken care of and a physician to be sent for. On examining him, it was found that he had received a very severe wound on the forehead with some sharp instrument, which had cut through the rim of his hat, and which stupefied him; a hole was cut through one cheek, as if a stab from an oyster knife, and various bruises on his head and body, showing that he had received at least nine blows. He was too ill from these wounds to be removed from the station house for several days, and several weeks elapsed before he arose from his bed.

There was much contradictory evidence in the case. The father of the deceased swore positively to his having seen the prisoner firing the pistol from the sidewalk, after the affray was over, while the witnesses testified that he was an habitual drunkard; that he had gone to bed very drunk that afternoon, and was asleep in another room when the affray began, and was just rising from his bed as his son expired. It was also proved that the family of the Sheas was very debased, the daughter being a strumpet, the mother sharing with her the wages of her prostitution; the deceased had been a convict in the State prison, and his brother, one of the witnesses, was then in confinement on a charge of stealing, and that the house they kept had frequently attracted the notice of the police for its riotous and disorderly character.

EDWARDS, J., in charging the jury said that the first question for them to determine was, whether the prisoner had fired the pistol. This was sworn to positively by two witnesses: Shea, the father, and Clara King, a girl of the town, who was passing at the moment. The testimony of the father was not to be relied upon. His character, his intoxication, his strong feelings, and the falsehoods which had been proved against him, forbid the idea of giving much credit to him. The testimony of the girl, however, had not been impeached, but had been corroborated by several independent circumstances in the case, and particularly by the facts that all the witnesses unite in saying, the firing was from the very spot, where all agree that the prisoner was at the time; that the pistol when found was bloody, and that he alone of all the party was bleeding; that he had an inducement to do it, whether from motives of revenge or in self-defence; that the direction of both shots was from where Austin was, back upon those who had beat him; that the pistol was found at a spot which he had just passed; that he who fired the pistol wore a white hat, and that the prisoner alone had such a hat that evening. From these considerations, the jury must determine whether it was not the prisoner who fired the pistol, and in determining it, they must bear in mind that the evidence to satisfy them must exclude, to a moral certainty, every hypothesis but that of guilt, that the conviction of guilt must flow naturally from the facts proved, and not by a forced or strained construction, and be consistent with all the facts, for if any one is utterly inconsistent with that conclusion it can not follow; and that in case of doubt, it is safest to acquit, for the protection of innocence has an equal claim upon the administration of justice with the punishment of guilt.

If upon this question the conclusion of the jury should be adverse to the prisoner, the next inquiry would be into the nature and quality of the act which should be thus established against him, and whether the homicide was justifiable or excusable, or was murder or manslaughter.

The homicide would be justifiable under our law, only in case it was committed by the prisoner when there was reasonable grounds to apprehend a design to do him some great personal injury, and there was imminent danger of such design being accomplished. But of this the jury were to be judges, not the prisoner, and it was for them to say from all the circumstances proved before them, whether there was a reasonable ground for such apprehension, and whether there was, at the moment the fatal shot was fired, imminent danger that some great personal injury would have been done to the prisoner.

This would depend mainly upon the facts when and from what position the pistol was fired? If fired after the prisoner had escaped from the party in the house and after he had reached the sidewalk, it may have flowed from a spirit of revenge for the injuries under which he was smarting.

But if he fired before he had extricated himself from the party, who had thus forcibly drawn him into the building, and had then displayed towards him such unjustifiable violence, he might at the moment have very reasonably apprehended further personal injury and might be justifiable in using the means at hand to protect himself from it.

There was, however, another view of the case in which the prisoner might be justified even if he had fired the pistol after he had left the pavement. One of the witnesses had testified that the prisoner had been followed from the basement by one of the party inside, and had been struck with a chain while ascending the steps on his retreat. If this were so, then the apprehension of personal injury would not cease with the prisoner's leaving the basement, and the imminent danger in which he had been placed might have continued up to the moment of firing the pistol, and thus he be justified in firing it.

If the jury were not satisfied that it was justifiable, they were next to inquire whether it was excusable. It is so under our law when committed by accident or misfortune, in the heat of a passion upon a sudden and sufficient provocation or upon a sudden combat without any dangerous weapon being used. The nature of the weapon used, and the manner in which it was used, must be mainly instrumental in determining this question. Thus if, in the heat of passion, upon sufficient provocation or upon a sudden combat, a man had used his walking stick, or a butcher in his stall had used his knife that lay near him, or a cooper used the adze with which he was then at work, and had given a blow which was fatal, but without any intention to take life, the homicide might be excusable. But that could hardly be where the weapon used was of a dangerous character, constructed solely for the purpose of taking life, and which could scarcely be fired off without hazarding it. If in the melee the prisoner had used the pistol as he might any other hard substance found at the instant in his pocket, by striking a blow with it calculated rather to wound than to kill, but had killed, it might be attributed to accident or misfortune. But that could not with propriety be predicated of the act of intentionally firing the pistol, and unless such firing was justifiable, it was either murder or manslaughter.

Whether the act was murder or manslaughter under our statute, depended entirely upon the existence of an intention to kill either some particular person, or generally some one of a number of persons, against whom in a mass the fatal act is perpetrated by one then engaged in committing a felony. Except in that one case, no homicide is murder without an intention to kill, and with such an intention, every homicide, with the single exception already mentioned, unless it be justifiable, is murder, whether the intention is formed in the instant or has

long been entertained. Such intention may be inferred from the act itself, for it may be one which of itself plainly indicates a heart regardless of social duty and fatally benton mischief, and never are to be presumed to intend the natural and inevitable consequences of the acts which they will fully perform, but unless there be such an intention, the act can not be more than manslaughter. It would readily be perceived that this view of the statute had entirely superseded many of the rules of the law of homicide as it existed in England, and which had been quoted on this occasion, and among them the whole doctrine of implied malice and the power of recent provocation to reduce the act from murder to manslaughter.

The English law provided very slight punishment for manslaughter, sometimes as low as the fine of a shilling, and never beyond a year's imprisonment. To remove from the operation of so inadequate a penalty acts of peculiar barbarity, such as that of a schoolmaster who whipped a scholar until it died, and that of the master chimney sweeper whose boy stuck fast in the chimney, and was killed by the violent manner in which he was pulled from the place, the English courts adopted the principle of implying malice, when there was in fact no premeditated design to take life. On the other hand, lest such a principle should extend too far, they adopted another principle which gave to recent provocation, and the fact that the passions had not time to cool, the power of modifylng the acts from murder to manslaughter.

All this had been done away by our statute. If the homicide had been perpetrated without an intention to kill, it would be manslaughter and no more, except in the single case of its perpetration by one engaged in committing a felony. But if perpetrated with an intention to kill, no matter how recent the provocation or how high the passions, it was murder. An act of homicide perpetrated with a premeditated design to effect death, though in the very highest flight of passion, and springing from even an existing provocatlon, can find no resting place in our statute except under the definition of murder or justifiable homicide, and the intention to kill being established, there is no degree or description of manslaughter in this statute which can embrace it.

That this is the intention of the statute is manifest not only from a careful perusal of all its enactments relative to homicide, but also from the recommendations of the revisers. They proposed that murder should include a homicide when perpetrated from a premeditated design to do some great bodily injury, although without a design to effect death, thus recognizing and adopting the principle of implied malice and defending it on the ground that the transaction would be such as would ordinarily lead to the result of taking life. But the Legislature refused to adopt the suggestion, and enacted a section which, in the language of the revisers, was "founded on the great principle that to constitute murder there should be an express design to take life, or such circumstances as to induce a very strong presumption of such a design."

This view of the law will commend itself to our favorable regard, not merely because it confines the crime of murder within its legitimate bounds of a premeditated design to take life, but it effectually destroys the doctrine of allowing sudden provocation and heat of passion to mitigate the offense, a doctrine most dangerous in its operation, because it tolerates the practice of carrying arms, and takes from the sudden use of them the consequences that ought justly to follow. No man can, under our laws, go habitually armed and in an affray use these arms with an intent to kill, without incurring the hazard of a conviction for murder, and no violence of provocation, no height of passion, can

mitigate or extenuate the offense. It will be murder if there is an intention to kill, unless self-defence demands the sacrifice. The practice out of which this case has sprung is too pernicious to be tolerated. No life would have been taken if the person who fired the pistol, whoever he might have been, had not gone into the affray with so deadly a weapon. The same remark is applicable to the last case tried in this court, and the sooner this law becomes well known and understood, and rigidly enforced, the better; for far better the land though stricken with poverty, when the unseen majesty of the law affords its sure protection to all, and when the atmosphere of its supremacy pervades every tenement, however humble, than that where gold may be gathered at every footstep, but where every man is armed to the death against his fellow; where every breath is drawn amid the rattling of armor, and every pulsation beats with the apprehension of instant conflict.

The inquiry, therefore, would be, was there a design to effect death? For if there was, however recent in birth, the offense was murder; but if there was an intention to wound only — a design to do some great bodily harm and not to kill, it was manslaughter and no more.

§ 712. —— "Adequate Cause." — Under the Texas statute 'any condition or circumstance which is capable of creating sudden passion, such as anger, rage, sudden resentment or terror, rendering the mind incapable of cool reflection, whether accomplished by bodily pain or not, is "adequate cause."[1] The use of insulting language towards a female relative need not be in her presence to constitute "adequate cause" within the statute.[2]

§ 713. "Adequate Cause" — Causes not Mentioned in Statute. — In *Guffee v. State*[3] it was held that to excite the sudden passion which mitigates culpable homicide from murder to manslaughter, there may be other "adequate causes" besides those instanced in the Texas Penal Code. If in one's presence his brother be killed, this may constitute such adequate cause, provided they were not jointly engaged in some unlawful act. The court said: "It is true our statute in furnishing illustrations of causes deemed adequate in law to produce sudden passion sufficient to reduce a homicide to this grade (manslaughter) fails to prescribe that the slaying of one's brother in his immediate presence is an adequate cause. But it has long since been determined that the statutory illustrations are not restrictive and exclusive, but are merely inserted as instances or examples by which those charged with the administration of the laws may be governed. Certainly, to one at all familiar with the promptings of the human heart and the motives by which men are governed in their resentments and affections, it cannot be a matter of serious question that the death of a brother by the violence of another, in the immediate presence of one, is better calculated to produce, in a person of ordinary temper, a greater degree of anger, rage, or resentment, than any of the causes particularly designated in the statute and that such an occurrence is amply sufficient to render the mind incapable of cool reflection. Down deep in the human heart there is an abiding love for our kith and kin, which intensifies as we approach a common parentage. A brother's virtues are magnified and his faults overlooked, and upon summons we fly to his relief without pausing to contemplate the consequences to our selves, or taking much time to consider whether, in the particular instance, he

[1] Williams *v.* State, 15 Tex. (App.) 622 (1884).

[2] Hudson *v.* State, 6 Tex. (App.) 565 (1879).

[3] 8 Tex. (App.) 187 (1880).

is in the right or the wrong. It suffices usually for us to know that he is in danger and needs our assistance, and we blindly follow that impulse born in us, and which impels us to rush to the rescue and save us from harm, and leaves us to contemplate our actions after the danger has passed and reason has resumed its sway. This infirmity (or virtue) in human nature can not be ignored in the practical administration of justice, and is well established in the law as pertaining to the relations even of master and servant, not to mention the other more important civil relations.[1] Of course the principle can not be taken into consideration, and can have no effect, when a brother, or parent, or master, etc., rushes to the aid of another engaged in the perpetration of an unlawful act, and knowingly joins in the execution of the original unlawful purpose; for then he becames a principal in law, and shares the culpability of the entire transaction from its inception to its determination. A master, maliciously intending to kill another, takes his servants with him, and engages his adversary on meeting him. His servants, seeing their master engaged, rush to the rescue and kill his antagonist. At common law this may be murder in the master, but only manslaughter in the servants.[2] The same principle applies to various other relations, including sometimes strangers;[3] but in law hot blood is more naturally expected in a case of interference by a near relation or friend than in others more distantly removed.[4] If, therefore, the defendant in this case, not intending to unite with his brother in making an unlawful attack upon the deceased, and not knowing the unlawful purpose of his brother, but awaiting an anticipated necessity for his interference in order to protect his brother from serious bodily harm or death, threw up his gun and fired simultaneously with the discharge of the pistol by deceased at his brother, or, seeing the intention of the deceased to fire upon his brother, and endeavoring to anticipate him, but failing, the deceased being too quick for him and discharging his pistol first, the defendant is not guilty of any higher grade of felonious homicide than manslaughter, notwithstanding the defendant's brother may have brought on the conflict with malicious intent. Or if the defendant, with no purpose of injuring the deceased, but desiring and attempting to stop the progress of the difficulty between his brother and the deceased, and with no purpose or intention to aid his brother in an unlawful and violent attack upon the deceased, saw his brother shot down in his presence, and in a fit of sudden passion, engendered by this adequate cause, he voluntarily slew the deceased upon the instant, then he is guilty of manslaughter and he should not be punished for any higher offense."

§ 714. —— **Resisting Arrest — Provocation.** — And thus the provocation of being illegally arrested is a sufficient legal provocation to reduce the killing from murder to manslaughter.[5]

§ 715. —— **Inciting to Commit Suicide.** — Inciting another to commit suicide is not an offense at common law.[6]

§ 716. —— **Sparring Match — Death Resulting from, not Manslaughter.** — In *R.* v. *Young*,[7] John Young, William Shaw, Daniel Morris, Edward Donnelly,

[1] Hor. & Thomp. on Self-Def. 750, and authorities cited. Defences to Crime, Vol. I. of this series.

[2] 1 Hawk. P. C., ch. 31, sec. 55.

[3] *Id.*, sec. 519.

[4] *Id.*, sec. 446.

[5] Com. *v.* Carey, 12 Cush. 246 (1853); U. S. *v.* Rice, 1 Hughes, 560 (1875); Rafferty *v.* People, 69 Ill. 111. See *ante*, Defenses to Crime, Vol. I. of this series.

[6] R. *v.* Leddington, 9 C. & P. 79 (1839).

[7] 10 Cox, 371 (1866).

George Flynn, Thomas Daw, and James Good, were indicted for feloniously killing and slaying Edward Wilmot.

On the 9th of October, a witness, named Evans, met the deceased, who asked him to go with him to the prisoner Shaw's, in Windmill Street, Haymarket, and look after him. When they arrived there they went upstairs into a room where sparring often takes place. Shaw was not there. In the room there is a ring, one side of which is formed by one side of the room and the other by ropes. Evans took Wilmot into the ring, and together with Donnelly acted as his second. Young was Wilmot's opponent, and his seconds were Morris and Daw. Flynn and Good were also there. Wilmot and Young put new gloves on. They were naked to the waist. They then fought a succession of rounds, sparring, hitting each other as hard as they liked with the gloves for upwards of an hour. At the last round Wilmot fell, either from a blow or a shove from Young, on his posterior, and struck his head against a post which runs up in the center of the ring. When picked up he felt rather queer and giddy. His second gave in for him, dressed him and sent him off to the hospital.

Evans further said that what was going on was simply sparring, fairly conducted; that all the parties to the sparring were good friends; that he was a teacher of sparring himself, and had constantly sparred with his pupils. He had known accidents happen occasionally, but never a death. If a man's nose gets knocked with the gloves, they will make it bleed, but it requires a very hard pair to give a black eye. According to another witness both men were getting rather tired; that after having a glass of water, they came up to the last round "all in a stumble together," and had a hugging match. They were then too exhausted to strike each other forcible blows, but were trying to throw each other, and while so engaged the deceased slipped away, or was thrown away from the prisoner Young, and so met with the accident.

The evidence of George Alry, the house surgeon at Charlng-Cross Hospital, showed that the deceased had died five hours after his admission from a rupture of an artery on the brain caused by a bruise over the right ear, which might have been caused either by a blow or a fall. In answer to questions from the court, this witness expressed his opinion that sparring with gloves in the manner described by the other witnesses might be dangerous to human life; but that death would not be a likely — in fact, it would be a very unlikely — result from such blows as had been given. A man might die from the blow of a cricket ball much sooner than from the blow of a glove. The danger would be where a person was able to strike a straight blow, but that the danger would be lessened as the combatants got weakened, as they then would not be likely to strike so straight.

*Montagu Williams*, on behalf of Shaw, submitted that there was no case against him, contending that the witnesses being spectators at an unlawful contest, must be regarded as accomplices, and as such each would require corroboration.

*Poland*, for the prosecution, referred to *Regina* v. *Hargrave*,[1] where the point had been decided the other way.

Bramwell, B., said that it had certainly occurred to him whether the witnesses might not have objected to give evidence, on the ground, that in so doing, they might criminate themselves, but in such a case as the present he thought it could not be carried to that extent.

[1] 5 C. & P. 178.

*M. Williams* then further submitted that there was no evidence to support a charge of manslaughter against any of the prisoners, as the death happened in the exercise of a mere lawful sport, citing East's Pleas of the Crown: [1] "If death ensue from such sports as are innocent and allowable, the case will fall within the rule of excusable homicide; but if the sport be unlawful in itself, or productive of danger, riot, or disorder from the occasion, so as to endanger the peace, and death ensue, the party killing is guilty of manslaughter. Manly sports and exercises which tend to give strength, activity, and skill in the use of arms, and are entered into merely as private recreations among friends, are not unlawful; and, therefore, persons playing by consent at cudgels, or foils, or wrestling, are excusable if death ensue. For though doubtless it can not be said that such exercises are altogether free from danger, yet they are very rarely attended with fatal consequences, and each party has friendly warning to be on his guard. And if the possibility of danger were the criterion by which the lawfulness of sports and recreations was to be decided, many exercises must be proscribed which are in common use, and were never heretofore deemed unlawful."

*Poland*, in reply, referred to section 42 of the same chapter, where it is said: "The latitude given to manly exercises of the nature above described, when conducted merely as diversions among friends, must not be extended to legalize prize fighting, public boxing matches, and the like, which are exhibited for the sake of lucre, and are calculated to draw together a number of idle, disorderly people, for in such cases the intention of the parties is not innocent in itself, each being careless of what hurt may be given, provided the promised reward or applause be obtained. And again, such meetings have a strong tendency in their nature to a breach of the peace."

Bramwell, B., said the difficulty was to see what was unlawful in this matter. It took place in a private room; there was no breach of the peace. No doubt, if death ensued from a fight, independently of its taking place for money, it would be manslaughter, because a fight was a dangerous thing and likely to kill; but the medical witness here stated that this sparring with the gloves was not dangerous, and not a thing likely to kill.

After consulting Byles, J., Bramwell, B., said that he retained the opinion he had previously expressed. It had, however, occurred to him that supposing there was no danger in the original encounter, the men fought on until they were in such a state of exhaustion that it was probable they would fall and fall dangerously, and if death ensued from that, it might amount to manslaughter, and he proposed, therefore, so to leave the case to the jury and reserve the point if necessary.

*Not guilty.*

§ 717. **Railroad — Killing of Passenger — Deceased Must be a "Passenger" at the time.** — Under the Massachusetts statute of 1874,[2] the deceased must be a "passenger." Thus an indictment will not lie for killing one who at the time has ceased to be a passenger, as by leaving the train when in motion.[3]

[1] ch. V., p. 41.

[2] ch. 372, sec. 163.

[3] Com. *v.* Boston & Maine R. Co., 129 Mass. 500 (1880).

# INDEX.

ABDUCTION.

*See, also,* SEDUCTION.

Abduction for the purpose of sexual intercourse is not abduction for the "purpose of prostitution." *State* v. *Stoyell*, p. 723.

The defendant, by false representations, persuaded a girl to go with him to a neighboring town, where he took her to a hotel and made her partly drunk, when he had intercourse with her several days. *Held*, that he was not guilty of abducting her "for the purpose of prostitution" within the statute, p. 723.

Prostitution means common, indiscriminate, illicit intercourse, and not illicit intercourse with one man only. Therefore under a statute against abduction for the purpose of prostitution one can not be convicted of abduction for the purpose of sexual intercourse only. *Osborn* v. *State*, p. 726.

A statute against the abduction of females of "previous chaste character" means, of actual personal virtue in distinction from a good reputation. On the trial of an indictment founded on that statute, it is admissible to prove previous particular acts of illicit intercourse on the part of the female abducted. *Lyons* v. *State*, p. 729.

An indictment for enticing an unmarried female to a house of ill-fame for purpose of prostitution must allege and the prosecution must prove, on the trial, that such female was of previous chaste character. *People* v. *Roderigas*, p. 729.

"Previous chaste character" in the statute against abduction means actual personal virtue and the female, to sustain an indictment for seducing her, must have been chaste and pure in conduct and principle, up to the time of the commission of the offense. *Carpenter* v. *People*, p. 735.

"For the purpose of prostitution" means for the purpose of her indiscriminate meretricious commerce with men; and, therefore, where the female left her home voluntarily and went to cohabit with the defendant alone, the case is not within the statute. *Id.*

Abduction not a crime at common law, p. 769.

Girl must be in charge of parents, p. 769.

Person not bound to return girl, who comes to him, 769.

Taking out of possession of father, pp. 770, 771.

Intent to marry, p. 771.

Taking for "purpose of prostitution," pp. 771, 772.

"Previous chaste character," p. 775.

"ABUSE."

Construed, p. 885.

"ACCOUNTABLE RECEIPT."

Construed, pp. 25, 95.

"ACQUITTANCE."

Construed, p. 96.

"ADEQUATE CAUSE."

Construed, p. 1196.

"ADULT."

Construed, p. 877.

AMBASSADOR.

*See* LAW OF NATIONS.

ANIMALS.

Dogs not the subject of larceny at common law, pp. 454, 456, 572.

Nor are they "chattels" within statute, p. 454.

Rabbits were netted and 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 game-keepers who had previously found the rabbits and lay in wait for the poachers. *Held*, that this did not amount to larceny. *R.* v. *Townley*, p. 458.

The prisoner was employed to trap wild rabbits and it was his duty to take them, when trapped, to the head keeper. Contrary to his duty he trapped from time to time rabbits and took them to another part of the land, and placed them in a bag with the intention of appropriating them to his own use, which another keeper observing, went and took some of the rabbits out of the bag during the prisoner's absence and nicked them and put them into the bag. His reason for nicking them was that he might know them again. The prisoner afterwards took away the bag and the rabbits: *Held*, that the act of the keeper in nicking the rabbits was no reduction of them into the possession of the master, so as to make the prisoner guilty of stealing them. *R.* v. *Petch*, p. 463.

Animal not subjects of larceny, p. 571.

As doves, p. 571.

Or oysters, p. 572.

Or other fish, p. 572.

ARTIST.

Falsely putting artist's name on picture not perjury, p. 12.

ASSAULT AND BATTERY.

*See* ASSAULT WITH INTENT TO COMMIT MANSLAUGHTER; LAW OF NATIONS; OFFICERS; ASSAULT WITH INTENT TO MURDER; SPRING GUNS; RAPE.

ASSAULT AND BATTERY — *Continued.*

An assault is an inchoate violence to the person of another, with the present means of carrying the intent into effect. Threats are not sufficient; there must be proof of violence actually offered, and this within such a distance as that harm might ensue if the party was not prevented. *People* v. *Lilley*, p. 783.

An assault is an offer or an attempt to do a corporal injury to another, as by striking him with the hand or with a stick, or shaking the fist at him or presenting a weapon within such distance as that a hit might be given or brandishing it in a menacing manner, with intent to do some corporal hurt to another. *U. S.* v. *Hand*, p. 788.

Firing a pistol at a person's window not an assault on him, p. 789.

In a prosecution for assault and battery, the court instructed the jury that if under circumstances mentioned in the charge, "the defendant struck or beat the prosecuting witness while he was gathering corn in the field; or, while he was driving his team in the field, in the act of gathering corn, the defendant struck and beat the horses of the prosecuting witness in a rude and angry manner with a stick, the defendant is guilty of an assault and battery." *Held*, that as there was evidence tending to prove that the defendant did strike the horses when being driven, the instruction was calculated to mislead the jury to the conviction that such striking the horses was an assault and battery upon the driver, which it was not in any legal or logical sense, the driver himself not having been touched directly or indirectly, and hence such instruction was erroneous. *Kirland* v. *State*, p. 792.

If a man raise his hand against another, within striking distance, and at the same time say, "If it were not for your gray hairs," etc., it is no assault; because the words explain the action, and take away the idea of an intention to strike. *Com.* v. *Eyre*, p. 800.

The taking hold of a person's arm in the confidence of existing friendship, trusting to a license acquired by a supposed mutual kind feeling, doing no injury, and with no wrongful intent is not a criminal act. *People* v. *Hale*, p. 804.

One who negligently drives over another is not guilty of a criminal assault and battery, although he does it while violating a city ordinance against fast driving. *Com.* v. *Adams*, p. 808.

A conductor on a railroad is justified in ejecting a passenger from a car who uses grossly profane and indecent language on the car. *People* v. *Caryl*, p. 813.

So also the refusal of the passenger to obey the reasonable regulations of the company. *Id.*

The superintendent of a County Poor-House has a right to use gentle and moderate physical coercion towards the inmates so far as may be necessary for the purpose of preserving quiet and subordination among the inmates, and is not guilty of assault and battery in so doing. *State* v. *Neff*, p. 816.

The court charged the jury as follows: 1. When an injury is caused by violence to the person, the intent to injure is presumed, and it rests upon the person inflicting the injury to show accident or innocent intention.

ASSAULT AND BATTERY — *Continued.*

The injury intended be either bodily pain, constraint, a sense of shame or other disagreeable emotion of the mind. 2. When violence is permitted to effect a lawful purpose, only that degree of force must be used which is necessary to effect such purpose. *Held,* erroneous applied to the present case. *Dowlen* v. *State,* p. 822.

See this case for special instructions requested which, embodying correctly the law applicable to the facts, were improperly refused in the trial of a teacher for chastising his pupil. *Id.*

Persons engaged in assisting another in a lawful act, can not be held guilty of an assault committed by him, unless there is evidence tending to show a previous conspiracy or present participation in that act, or some other evidence tending to show that they were present to aid and assist in any unlawful act he might do, p. 829.

Under the Texas statute making an assault on a "child" an aggravated assault the word "child" is not synonymous with minor. *McGregor* v. *State,* p. 844.

An information charged an adult with aggravated assault on a child, and alleged no other circumstance of aggravation. *Held,* error to instruct the jury to convict in case they found that the assault was made under other circumstances of aggravation than the one alleged. *Id.*

A decrepit person within the Texas statute is one who is disabled, incapable or incompetent from physical or mental defects produced by age or otherwise, to such an extent as to render him helpless against one of ordinary health. *Hall* v. *State,* p. 846.

H. was indicted for an assault on another person in his house. The evidence disclosed that the assault occurred in the house of the defendant's father, of whose family the defendant was a member, and of which house he was an occupant. *Held,* that the evidence was insufficient. *Id.*

In every assault there must be an intent to injure coupled with an act which must at least be the beginning of the attempt to injure at once, and not a mere act of preparation for some contemplated injury that may afterwards be inflicted. Evidence *held* to be insufficient in this case to support a conviction for aggravated assault, because insufficient to prove an assault. *Fondren* v. *State,* p. 852.

A woman was indicted under a statute for causing a "bodily injury dangerous to life" with intent to murder. It appeared she had abandoned her child in a field whereby a temporary congestion of the lungs had taken place. *Held,* that this was not within the statute. *R.* v. *Gray,* p. 858.

Present intention to strike necessary, p. 865.

Intent to injure essential, p. 866.

Threatening gesture not, p. 866.

Words not an assault, p. 867.

Words explaining hostile action, p. 867.

Assault must be on person, p. 868.

Beating horse, p. 868.

ASSAULT AND BATTERY — *Continued.*

Opening railroad switch, p. 868.

Stopping carriage, p. 868.

Shooting at house window, p. 870.

Force must be external, p. 869.

And must do injury, p. 869.

Accident or play, p. 869.

Use of lawful force, p. 869.

Negligent driving, p. 871.

Recaption, p. 871.

Aggravated assault, intent and act essential, p. 877.

"What is beating," p. 877.

"Bodily injury dangerous to life," p 877.

"Grievous bodily harm," p. 877.

"Wounding," p. 877.

"Dangerous weapon," p. 877.

"Deadly weapon," p. 877.

"Offensive weapon," p. 878.

"Sharp dangerous weapon," p. 878.

Snatching bill from hand not assault with violence, p. 878.

Deterring person from giving evidence, p. 878.

Beating person to force confession, p. 878.

ASSAULT WITH INTENT TO COMMIT MANSLAUGHTER.

There is no such offense as an assault with intent to commit manslaughter. Such an offense requires a specific intent; a specific intent requires deliberation, and in manslaughter there can be no deliberation. *People* v. *Lilley*, p. 783.

ASSAULT WITH INTENT TO KILL.

Elements of the crime, p. 871.

ASSAULT WITH INTENT TO MURDER.

*See* SPRING GUNS.

One who points a pistol at another, who is attempting unlawfully to stop his team, and threatens to shoot him unless he desists from his attempt, may properly be convicted of an assault, but such evidence will not sustain a conviction for assault with intent to commit murder. To constitute the latter offense there must exist an actual and absolute intent to kill, which the conditional threat does not tend to prove, but which, on the contrary, it negatives. *Hairston* v. *State*, p. 828.

K. was indicted for an assault with intent to murder E. The court charged the jury that if "a loaded gun was presented within shooting range at W. or E. or at the dog, under circumstances not justified by law, and under circumstances showing an abandoned and malignant heart, and the gun was fired off and inflicted a dangerous wound upon E., then the crime of an assault with a deadly weapon with intent to inflict a bodily injury upon E. has been proved; and it would only remain for them to

ASSAULT WITH INTENT TO MURDER — *Continued.*

inquire whether defendant was guilty of the crime." There was evidence tending to show that K. fired a gun in the direction of W. and E., and of a dog near them, there being some dispute as to whether the intent was to kill or wound the dog or these men, or one of them: *Held*, that the charge was wrong. *People* v. *Keefer*, p. 831.

Elements of the crime, p. 873.

Assault with intent to kill not, p. 874.

Intent must be to kill person assaulted, p. 875.

ASSAULT WITH INTENT TO RAPE.

*See* RAPE.

ASSAULT WITH INTENT TO ROB.

Assault must be connected with robbery, p. 876.

ATTEMPT.

To commit statutory fraud not indictable, p. 129.

BAILEE.

*See* LARCENY.

BANK BILLS.

Construed, p. 96.

BANK-NOTES.

Not subjects of larceny, p. 565.

"BEATING."

Construed, p. 877.

"BEING THE ACT OF ANOTHER."

Construed, p. 50.

BILLS OF EXCHANGE.

*See, also,* FORGERY.

Not subjects of larceny, p. 567.

Construed, pp. 96, 565.

"BODILY INJURY DANGEROUS TO LIFE."

Construed, pp. 877, 858.

CERTIFICATE OF CHARACTER.

Not subject of forgery, p. 78.

"CERTIFICATE FOR THE PAYMENT OF MONEY."

Construed, p. 568.

CHARITABLE DONATION.

Fraudulently obtaining, not false pretenses, p. 276.

CHASTE CHARACTER.

Construed, pp. 775, 776.

"CHATTELS."

Construed, p. 454.

"CHILD."

Construed, p. 844.

COFFIN.

Larceny to steal, 474.

COMMON CARRIER.

*See* ASSAULT AND BATTERY.

CORPSE.

*See* DEAD BODY.

COUNTERFEIT MONEY.

Passing counterfeit money not forgery, p. 92.

"COW, SHEEP, HOG OR OTHER ANIMAL."

Construed, p. 571.

"CREDITORS."

Construed, p. 358.

"DANGEROUS WEAPON."

Construed, p. 877.

DATES.

Dates should not be specified by figures in an indictment, p. 118.

DEAD BODY.

Not larceny at common law to steal, p. 474.

"DEADLY WEAPON."

Construed, p. 877.

"DECREPIT."

Construed, p. 846.

"DEED."

Construed, p. 96.

DEGREES OF MURDER.

*See, also,* POISONING.

A statute declares that "all murder which shall be perpetrated by means of poison, lying in wait or any other kind of willful, deliberate, malicious and premeditated killing, or which shall be committed in the perpetration of or attempt to perpetrate any rape, arson, burglary, or larceny, shall be deemed murder in the first degree," *held,* that to constitute murder in the first degree, there must exist, in the mind of the person who slays another, a specific intention to take the life of the person slain, and that if he, with premeditated intent to slay one person, against his intention slay another, it will not be murder in the first degree. *Bratton* v. *State,* p. 1012

DEGREES OF MURDER — *Continued.*

A premeditated intention to destroy life is indepensable in order to constitute murder in the first degree. *Johnson* v. *Commonwealth*, p. 1022.

Murder by drowning is not, under the Act of 1794, necessarily murder in the first degree; it is not one of the modes of destroying life enumerated in the statute. *Id.*

The Act of 1794, provides that "all murder which shall be perpetrated by means of poison, or by lying in wait, or by any other kind of willful, deliberate, and premeditated killing, or which shall be committed in the perpetration or attempt to perpetrate any arson, rape, robbery, or burglary, shall be deemed murder in the first degree, and all other kinds of murder shall be deemed murder of the second degree," the jury, in case of conviction, to ascertain the degree. Under an indictment charging that the defendant feloniously, willfully and of his malice aforethought, cast a certain E. T. into a dam of water and held her in and under the water till drowned, he was found "guilty in manner and form as he stands indicted." *Held*, that the defendant was not convicted of murder in the first degree, but of murder in the second degree. *Id.*

Where the only evidence against the prisoner is that he was known to have habitually treated the deceased, an infant step-child, with shocking brutality, and that the child was found dead on his hearth; *held*, that he was either guilty of murder in the first degree, or not guilty; that it was error to charge the jury that they might find him guilty of murder in the second degree. *State* v. *Mahly*, p. 1025.

Under the statute which provides that "every murder * * * which shall be committed in the perpetration or attempt to perpetrate any arson, rape, robbery, burglary or other felony, shall be deemed murder in the first degree," it is error to charge that, "if the jury believes, from the evidence, that it was not the intention of the defendant to kill the child Scott, by whipping him, but that he did intend to do him great bodily harm, and in so whipping him death ensued, he is guilty of murder in the first degree." "The words 'other felony' used in the first section, refer to some collateral felony, and not to those acts of personal violence to the deceased which are necessary and constituent parts of the homicide itself. *State* v. *Shock*, p. 1028.

On a trial for murder the evidence tended to show that a mother and her three children were killed at night, while being in separate beds, by having their skulls crushed with some blunt weapon, and that their house was then burnt. The evidence was circumstantial. The verdict was guilty of murder in the third degree, on the theory that the crime was committed in endeavoring to commit rape upon, or adultery with, the mother. The Wisconsin statute makes "the killing of a human being, without a design to effect death, by a person engaged in the commission of any felony" murder in the third degree. *Held*, that there is no such connection between rape or adultery and homicide as to make one the natural consequence of either of the others; and that as there was no evidence to show that the killing was without design to effect death, the verdict was wrong. *Pliemling* v. *State*, p. 1037.

DEGREES OF MURDER — *Continued.*

In order to constitute murder in the first degree there must be something more than malicious or intentional killing. There must be killing by means of poison, lying in wait, or torture, or some other kind of killing different from that of poison, lying in wait, or torture, which is willful, deliberate, or premeditated, or a killing which is committed in the perpetration or the attempt to perpetrate any arson, rape, robbery, or burglary. Every other kind of murder, which is murder at common law, is murder in the second degree. *People* v. *Sanchez*, p. 1043.

Murder in the first degree, unless committed in perpetrating or attempting to perpetrate arson, rape, robbery or burglary, is the unlawful killing, with malice, and with a deliberate, premeditated, preconceived design to take life, though such design may have been formed in the mind immediately before the mortal wound was given. *People* v. *Long*, p. 1046.

Murder in the second degree is the unlawful killing with malice, but without a deliberate, premeditated or preconceived design to kill. *Id.*

The facts in this case reviewed by the court, and held insufficient to establish premeditation. *People* v. *Morgan*, p. 1049.

Upon the trial of an indictment framed under the first subdivision of section 183, of the Penal Code, where the evidence shows a killing with a design to effect death, but not deliberation and premeditation, the verdict can not be anything more than murder in the second degree. *People* v. *Conroy*, p. 1052.

The crime of murder in the first degree under such an indictment can only be shown by proof of some amount or kind of deliberation and premeditation antecedent to the act which intentionally effects the death, and of which the intent alone is not sufficient evidence. *Id.*

Voluntary intoxication may be considered upon the question of premeditation. *Id.*

To constitute the offense of murder in the first degree, the killing must be premeditated, and not under momentary impulse of passion; though the determination need not have existed any particular length of time. *Prima facie,* all homicide is murder in the second degree. *Onus* is on prosecution to raise the offense to the first degree. *McDaniel* v. *Com.*, p. 1065.

To sustain a verdict of murder in the first degree, the record must show proof, direct or inferential, sufficient to justify the jury in coming to the conclusion that the death of the deceased was the untimate result which the concurring will, deliberation and premeditation of the prisoner sought. *Id.*

A quarrel had taken place between the prisoner and the deceased, in which both used violent language, and the former had given the latter the lie; they then separated, and fifteen or twenty minutes later, the deceased carrying a light cane approached the prisoner, declaring that he would not stand what the prisoner had said; the prisoner picked up a large stick, and upon being asked by the deceesed why he stood holding that stick, said, "If you come here I will show you;" the deceased then raised his cane to parry a blow from the prisoner, and struck at or

DEGREES OF MURDER — *Continued.*

struck the prisoner, who then struck the deceased two blows with his stick, from which he died about two hours afterwards. *Held*, not guilty of murder in the first degree. *Id.*

There can be no murder in the second degree without premeditation. *State* v. *Robinson*, p. 1070.

Where there is testimony from which the jury might infer that the killing took place under such circumstances as to make it either murder in the first or second degree or manslaughter in the fourth degree, it is error in the trial court to refuse or fail to give appropriate instructions on these offenses. *Id.*

Willful murder with malice and premeditation, in a cool state of the blood, is murder in the first degree. Murder in the second degree is a willful killing committed with premeditation and malice, but without deliberation. *State* v. *Curtis*, p. 1072.

The words "malice aforethought" are equivalent to "malice" and "premeditation." "Deliberation means a cool state of the blood;" premeditation, in a cool state of the blood, is murder in the first degree. Willful killing, without deliberation and without malice aforethought, constitutes manslaughter. *Id.*

To constitute murder in the first degree, the killing must have been done willfully, deliberately, premeditatedly and with malice aforethought, and these different words must be defined by the instructions of the court. *State* v. *Sharp*, p. 1077.

An instruction which defines the word "deliberately" to mean intentionally, purposely, considerately, is insufficient. "Deliberately" means in a cool state of the blood, and a willful, premeditated killing is murder in the second degree. *Id.*

Upon a Sunday evening the defendant and four persons, all more or less under the influenee of liquor, assaulted one Daly, threw him down, struck him with a stone and cut him with knives. Daly had been drinking with them, and the cause of the disagreement was not shown, nor was there any evidence to show that they intended to kill him. The wounds and cuts inflicted were not considered by the physician who attended him to be of a dangerous character. He died the next night, and a *post mortem* examination showed that his death resulted from meningitis, and that his disease had probably been produced by an injury to his head resulting from the blows or a fall. *Held*, that there was no evidence to sustain a conviction of murder in the second degree. *Daly* v. *People*, p. 1038.

To murder in first degree, intent to take life essential, p. 1155.

And deliberation and premeditation, p. 1156.

Murder in first degree not presumed from act of killing, 1156.

Implied malice, erroneous charges, pp. 1156–1166.

Evidence insufficient to convict of murder in the first degree, pp. 1166-1180.

Evidence insufficient to convict of murder in second degree, pp. 1180-1189.

DEMURRER.

A demurrer to an indictment may be withdrawn by the defendant, by permission of the court, after the court has intimated an opinion that it ought to be overruled, but before judgment, p. 169.

DIPLOMA.

College diploma not a "document" and not subject of forgery, p. 7.

"DIRECTIONS IN WRITING."

Construed, p. 568.

DIVORCE.

Making fictitious decree of divorce not forgery, p. 31.

"DOCUMENT."

Construed, p. 17.

DOGS.

*See* ANIMALS.

DOVES.

*See* ANIMALS.

DWELLING HOUSE.

Construed, p. 580.

ERROR AND APPEAL.

For errors on mere questions of fact, the remedy of the injured party is by a motion for a new trial. No writ of error lies to an inferior court to review its decision upon matters of fact, p. 258.

"FALSE."

Construed, p. 52.

FALSE IMPRISONMENT.

False imprisonment is the illegal restraint of one person against his will. *State* v. *Lunsford*, p. 861, 879.

When on trial of an indictment for such an offense it appeared that the defendants went to the prosecutor's house at night, called him up out of bed, represented to him in changed voices that they were in search of a stolen horse, and offered to pay him to accompany them; and thereupon he mounted behind one of the defendants on his horse, and went voluntarily, without threat or violence from defendants, and after riding a quarter of a mile in a gallop he complained of the uncomfortable mode of transportation, dismounted and discovered he was the victim of a hoax and was left in the road by defendants: *Held*, that the fraud practiced did not impress the transaction with the character of a criminal act. *Id.*

The ordinance of a city authorized the arrest by an officer of a drunken man without warrant. A. being arrested by B. for drunkenness immediately offered to give bond, which B. refused and he was confined in the

FALSE IMPRISONMENT — *Continued.*

calaboose about an hour. *Held*, that B. was not liable to conviction for false imprisonment. *Beville* v. *State*, p. 863.

Upon the question of the right of the deputy marshal to arrest a party detected in the violation of the ordinance, the trial court charged that, in order to make a valid arrest, such officer must have "express" authority. *Held*, error. *Id.*

"FALSE OR BOGUS CHECKS."

Construed, p. 318.

FALSE PRETENSES.

Statements as to the value of lots, or that they are "nicely located," are matters of opinion, and not facts, and therefore not within the statute as to false pretenses. *People* v. *Jacobs*, p. 115.

It is not a false pretense to obtain money for a thing by falsely puffing and exaggerating its quality. *R.* v. *Bryan*, p. 134.

B. falsely represented to a pawnbroker that certain spoons were of the very best quality and were equal to Elkington's A. brand, and the pawnbroker advanced money on them on this representation. *Held*, that B. was not guilty of a false pretense. *Id.*

A pretense which is false when made, but true by the act of the person making the same, when the prosecutor relies thereon and parts with his property, is not a false pretense within the statute. *Re Snyder*, p. 149.

It must appear that the pretenses relied upon relate to a past event or to some present existing fact, and not to something to happen in the future. A mere promise is not sufficient. *Id.*

In a criminal prosecution for obtaining money under false pretenses where the alleged false pretense consists in representing as genuine a note which had been forged by the defendant, evidence that the defendant signed the names of the parties to the note with their consent is admissible. If the note was so signed it was not forgery. *State* v. *Lurch*, p. 159.

An indictment for false pretenses in selling a mortgage, which alleges that the prisoner pretended that he had recently sold the real estate covered by the mortgage, and that said real estate was situated in I., but which does not give the name of the purchaser or describe the property without alleging that such name and description are unknown, is bad on a motion to quash as being too uncertain and indefinite. *Keller* v. *State*, p. 162.

In an indictment for false pretenses in the sale of a $500 mortgage, where the pretense was that the real estate covered by the mortgage was worth $3,500, an allegation that the real estate was not worth $3,500, is insufficient. The indictment should show that the property was not of sufficient value amply to secure the sum of $500. It seems that, in a prosecution for false pretenses in the sale of a mortgage, if the real estate covered by the mortgage is sufficiently valuable amply to secure the sum due on the mortgage, it is immaterial that the respondent rep-

FALSE PRETENSES — *Continued.*

resented the real estate to be very much more valuable than it actually was. *Id.*

In an indictment for false pretenses in the sale of a mortgage, where the pretense is that the property covered by the mortgage is not subject to any prior liens, an allegation that the property was subject to prior liens, but which does not set them out or describe them, is insufficient. *Id.*

Representations of future events are not false pretenses, which must be as to existing facts. *Id.*

An indictment for obtaining money by false pretenses must show what the pretense was, that it was false, and in what particular it was false. *United States* v. *Watkins*, p. 168.

An indictment for obtaining the signature of a purchaser to promissory note given for the purchase price of property sold to him by the false pretenses and representations as to the price asked for the property by a third person, who was the owner, cannot be sustained, where the proof shows that no representations were made by the defendant in regard to the price, except that he told the purchaser, in the course of the negotiations, that he did not think that the seller would take less than a sum named; and that the only representation as to price, at the time of the sale and purchase, were made by the seller. *Scott* v. *People*, p. 241.

Although the price asked, and finally agreed to be paid by the purchaser, be fixed by collusion between the owner of the property and the defendant, for the purpose of defrauding the purchaser, such collusion, though it may be an indictable offense, is not the offense charged. *Id.*

If, in fact, the price agreed to be paid by the purchaser was the price demanded by the seller, at the time of the sale, the motive in asking that price is of no consequence, so far as the offense charged is concerned. *Id.*

On an indictment for fraudulently obtaining goods in a market by falsely pretending that a room had been taken at which to pay the market people for their goods, the jury found that the well-known practice was for buyers to engage a room at a public-house, and that the prisoner pretending to be a buyer, conveyed to the minds of the market people that she had engaged such a room, and that they parted with their goods on such belief. *Held*, there being no evidence that the prisoner knew of such a practice, and the case being consistent with a promise only on her part to engage such a room and pay for the goods there, a conviction could not be sustained. *R.* v. *Burrows*, p. 245.

F. expecting to buy a certain lot, sold it to R. telling him that he owned it, and received the money for it. After selling to R., F. made a written contract for the lot and paid a portion of the price, but he never paid the full price for the lot nor ever acquired title to it. F. was prosecuted for obtaining R.'s money by false pretenses, the false pretense being the statement that he owned the lot. *Held*, that if F. at the time he made the sale to R. and obtained his money, honestly intended and expected to make title to the lot to R. he did not have the intent to

FALSE PRETENSES — *Continued.*

defraud required by the statute and should not be convicted. *Fay* v. *Com.*, p. 248.

The party alleged to have been defrauded must be induced to part with his money by means of the false pretense *i.e.*, he would not have parted with it if the pretense had not been made. *Held*, that the evidence in this case does not establish this fact. *Id.*

Where by the agreement between the prosecutor and the defendant, the defendant gets no title to the property which is delivered to him on the faith of the alleged false pretenses, the crime of obtaining property by false pretenses is not committed. *State* v. *Anderson*, p. 254.

An indictment under a statute which provides that "whoever designedly, by a false pretense, or by a privy or false token, and with intent to defraud, obtains from another person any property * * * shall be punished," etc., will not lie against one who by false pretenses obtains the consent of a city to the entry of judgment against it in an action then pending in his favor, and receives a sum of money in satisfaction of such judgment. *Com.* v. *Harkins*, p. 257.

H. bought certain merchandise of A. which was put in a box marked with H.'s name and address, and delivered on board a boat named by him to be carried to his home. After this, but before A. who had received the shipper's receipt and invoice had given them to H., A. hearing that H. was in embarrassed circumstances inquired of him. In answer thereto, H. made false representations as to his solvency. *Held*, that the goods having been obtained by H. and in his possession before these representations were made he was not guilty of false pretenses. *People* v. *Haynes*, p. 258.

Whether on an indictment for obtaining goods by false pretenses, an indictment setting forth several pretenses inducing the sale of the goods will be sustained by proof of some of the false pretenses, *quære*. *Id.*

An untrue answer to an inquiry as to one's financial ability is not a false pretense. *Id.*

Obtaining a charitable donation by false representations is not indictable as a false pretense; *e.g.*, one who falsely represents himself to be deaf and dumb and obtains money thereby. *People* v. *Clough*, p. 276.

In an indictment for false pretenses it must clearly appear that there was a false pretense of an existing fact. *R.* v. *Henshaw*, p. 279.

An indictment alleged that C. pretended to A.'s agent that she (A.'s agent) was to give him 20s for B. and that A. was going to allow him 10s a week. *Held*, that it did not sufficiently appear that there was any false pretense of an existing fact. *Id.*

A. procured B. to indorse his note under the pretense that he would use the note to take up another on which B. was indorser; instead of which A. had it discounted and used the proceeds. *Held*, that A. was not guilty of false pretenses. *Com.* v. *Moore*, p. 283.

A false pretense must be the assertion of an existing fact, not a promise to perform in future. *Id.*

FALSE PRETENSES — *Continued.*

A conviction for constructive larceny can not be had on an indictment for false pretenses. *Id.*

To constitute the offense of swindling some false representation as to existing facts or past events must be made by the accused. Mere false promises, or false professions of intention, though acted upon, are not sufficient. The information in this case charged substantially, that defendant promised to pay one B. fifty cents for four certain fish, if said B. would deliver the same at his, defendant's, house; that B. did so deliver the fish, and that the said representations of the defendant were then and there false, etc. *Held*, that the information was insufficient to charge swindling or any other offense. *Allen* v. *State*, p. 285.

The prisoner by falsely pretending that he was a naval officer, induced the prosecutrix to enter into a contract with him to lodge and board him at a guinea a week, and under this contract he was lodged and supplied with various articles of food. *Held*, that a conviction for obtaining the articles of food by false pretenses could not be sustained, as the obtaining the food was too remotely the result of the false pretense. *R.* v. *Gardner*, p. 287.

The object of a felonious false pretense must be to obtain property, and the property must be given in consequence of the false pretense. *Morgan* v. *State*, p. 291.

The prosecutor went to Hot Springs, Ark., for the purpose of boarding at the same house with Dr. W., an acquaintance of his who was visiting there. He went to defendant's hotel and defendant told him he knew Dr. W., and that he had been boarding at his hotel for some time, but had left town, all of which was willfully false. By means of said representations the prosecutor was induced to take board with the defendant for a month and pay him in advance. *Held*, not a case of false pretenses. *Id.*

A person who by false and fraudulent representations obtains from another a sum of money which is no more than is rightfully due him from the latter, can not be convicted of obtaining money by false pretenses, under the General Statutes, and, at the trial of an indictment against him on that statute, evidence of the amount of the debt to him is admissible. *Com.* v. *McDuffy*, p. 296.

A false statement that a house and lot whre unincumbered, when, in fact, they were subject to a recorded mortgage, is not a false pretense within the statute, because the party defrauded had the means of detecting it at hand, and might have protected himself by the exercise of common prudence. *Com.* v. *Grady*, p. 300.

To constitute a crime of false pretenses the money of the injured party must be parted with. *R.* v. *Watson*, p. 302.

W. by false and fraudulent representations made to B. as to his business, customers and profits induced B. to enter into a partnership with him and to advance $500 as part of the capital of the concern, and B. afterwards recognized and acted upon such partnership. *Held*, that this was not obtaining money by false pretenses, as the money was still under the control of B. *Id.*

FALSE PRETENSES — *Continued.*

A cheat or fraud to be an indictable offense at common law must be such as would affect the public; such a deception that common prudence can not guard against, as by using false weights and measures or false tokens, or where there is a conspiracy to cheat. *People* v. *Babcock*, p. 304.

No indictment will lie where one obtained a release of a judgment, falsely pretending he had ability to discharge it. *Id.*

Under the act or 1853, no other frauds are punishable than such as are indictable at common law, with the single exception of mock auctions. *Ranney* v. *People*, 306.

The obtaining of money by false representation, essentially promissory in its nature, though with no intention of performance, is not indictable under the statute of false pretenses. *Id.*

A person obtaining goods of another by false and fraudulent declarations respecting his estate and circumstances, is not indictable. *State* v. *Sumner*, p. 309.

To convict of obtaining money or a signature to an obligation by false pretenses, it must be shown by the prosecution that the parting with the property or the signing of the instrument was by reason of the false pretenses charged or that they materially influenced the action of the party complaining. *Therasson* v. *People*, p. 311.

On the trial of an indictment for obtaining the signature of Z. to the discharge of a mortgage by false pretenses, Z. was examined as a witness for the prosecution, but was not asked whether she was induced to sign by the representations proved. The prisoner's counsel asked the court to charge that although the jury might find the false pretenses and the fraudulent intent as charged, yet they had no right to consider these on the question of influence, which the court refused. *Held*, error. *Id.*

While the falsity of the pretense and the fraudulent intent are necessary elements of the crime, the question whether the prosecutrix was influenced by them can not be answered by them. *Id.*

A. having invented an improved lamp, entered into a partnership deed with B. and C. for carrying out and vending the subject of the invention. By a subsequent verbal agreement with his copartners he was to travel about to obtain orders for the lamps upon a commission. On all orders received by him such commission (besides his traveling and personal expenses) was to be paid to him as soon as he received the orders, and to be payable out of the capital funds of the partnership before dividing any profits. By falsely representing to his copartners that he had obtained orders upon which his commission would be £12 10s, he obtained from them that amount. *Held*, that as the subject-matter of the misrepresentation would come under consideration in the partnership accounts, such misrepresentation was not sufficient to sustain an indictment for false pretenses against A. *R.* v. *Evans*, p. 314.

A note or order given by a defendant which is signed by himself does not come within the meaning of the words "false or bogus check," as used in the criminal code, defining the confidence game, as it

FALSE PRETENSES — *Continued.*

is genuine. Any one taking either, does so upon the faith of the defendant's signature alone. If they contain forged or fictitious signatures or indorsements, a different question would be presented. *Pierce* v. *People*, p. 318.

Where a party after having obtained money and credit gives his note for the sum due, and afterwards an order for the sum he owed, it can not be said he obtained money or property by the use of the note or order. *Id.*

The exhibition of letter heads of a firm with which defendant is connected, business cards, a draft, or copy of one, and the making of a note, payable at a particular bank, and the drawing of an order for money, are means to inspire confidence in the party's ability to pay, precisely as declarations of his credit and standing, and are, at most, but false representations of his solvency, but do not make out a case of confidence game. *Id.*

The language of the statute does not expressly extend to cases of property or money obtained on the belief of the ability and disposition of the defendant to pay, but it contemplates a transaction in which the "means or device," instead of being the cause of the cause, is the direct and proximate cause of obtaining the money or property. *Id.*

To bring a case within the statute punishing the obtaining of the signature of a person to a written instrument by false pretenses, the instrument must be of such a character as that it may work a prejudice to the property of the person affixing the signature, or of some other person. *People* v. *Galloway*, p. 322.

A deed of lands by a wife, conveying real estate belonging to her in her own right, executed by her with her husband, at the solicitation of the husband, under the pretense that it was a deed of lands belonging to him, but not acknowledged by the wife in the mode prescribed by law for passing the estate of a *feme covert*, is not such an instrument as is contemplated in the statute. *Id.*

An indictment alleged that the defendant to induce M. to sign a lease to C., falsely represented that C. was a liquor-dealer doing business as such in B.; that C. was a man worth ten thousand dollars; and that a certain person whom the defendant pointed out to M. was C. *Held*, that the first allegation was of a representation of a material fact; that the second was not; and *semble* that the third was not. *Com.* v. *Stevenson*, p. 324.

An indictment charging that the defendant falsely represented to A. that he had then and there in his possession a check for the payment of money drawn by him in favor of A. from the proceeds of which he intended to pay certain bills due from A. to other persons does not set out a false pretense within the statute. *Id.*

The prisoner was convicted upon an indictment founded upon section 53 of 7 and 8 George IV. for obtaining a valuable security by false pretenses. The facts were, that the prisoner falsely represented to the prosecutor that a third person was baling up for him a quantity of leather which was to come to his warehouse that afternoon, and the prose-

FALSE PRETENSES — *Continued.*

cutor, relying on such false statement, at the request of the prisoner, agreed to purchase the leather, and to accept a bill for the amount of the purchase-money. The prisoner shortly afterwards produced and handed to the prosecutor a bill duly stamped, signed by himself as drawer, addressed to the prosecutor, and made payable to the prisoner's own order; and the prosecutor accepted the bill and returned it to the prisoner, who subsequently indorsed and negotiated it, and appropriated the proceeds to his own use. *Held*, that the conviction could not be supported, as the bill, whilst in the hands of the prosecutor, was of no value to him nor to any one else unless to the prisoner; and as the prosecutor had no property in the bill as a security, or even in the paper on which it was written. *R.* v. *Danger*, p. 328.

Upon the trial of an indictment for obtaining goods by means of false representation, it is not necessary that the prosecution should prove all the false representations alleged in the indictment. *People* v. *Blanchard*, p. 339.

Where the representations set forth in the indictment are proved, the sense in which they were used and what was designed to be and was understood from them are questions for the jury. *Id.*

An indictment for false pretenses may not be founded upon an assertion of an existing intention although it did not in fact exist; there must be a false representation as to an existing fact. *Id.*

On the trial of an indictment for obtaining a number of cattle by false pretenses, it appeared that the vendor sold the cattle to the prisoner at Buffalo and received his check post-dated for the purchase price, upon his representation that he was buying and wanted the cattle for G., who lived at Utica; that they were for G., who would remit the price in time to meet the check; the prisoner had been in the habit of purchasing cattle to supply G. as a customer and of selling them to him and had general authority so to buy whenever cattle were low; two days before the purchase G. had written to the prisoner, stating that he wanted a choice lot of cattle and requesting him to send on a car load. The prisoner, however, instead of sending the cattle to G. shipped them to Albany, sold them at a reduced price and did not pay the check. *Held*, that a conviction was error; that while there might have been a fraud there were no false pretenses as the vendor was cheated not by any false statement of facts on the part of the vendee, but by reliance upon a promise not meant to be fulfilled, and a false statement as to intention. *Id.*

The defendant was indicted in England for a misdemeanor in attempting to obtain moneys from L. & Co., by false pretenses. The defendant had a circular letter of credit marked No. 41, from D. S. & Co., of New York, for £210, with authority to draw on L. & Co. in London, in favor of any of the lists of correspondents of the bank in different parts of the world, for all or such sums as he might require of the £210. The circular letters of credit of D. S. & Co. were each numbered with distinctive numbers, and it was the practice of the correspondent on whom the draft was drawn, after giving cash on such draft, to indorse the amount on the circular letter; and when the whole sum was advanced, the last

FALSE PRETENSES — *Continued.*

person making such advance retained the circular letter of credit. The defendant having procured from D. S. & Co., of New York, a circular letter of credit for £210, No. 41, came to England, and drew drafts in favor of the named correspondents there in different sums, in the whole less than £210, retaining the circular letter, the sums so advanced being indorsed on the letter. He then went to St. Petersburg, and there exhibited the letter of credit to W. & Co. of that place, a firm mentioned in the list of correspondents, the letter having first been altered by him, by the addition of the figure 5 to 210, so converting it into a letter of credit for £5,210. He obtained from that house several sums, and finally a sum of £1,200, and another of £2,500, on drafts for those amounts on L. & Co. W. & Co. forwarded these drafts to their house in London, who presented the draft for £1,200 on L. & Co., and required payment of it. L. & Co. having been advised of the draft, No. 41, by D. S. & Co., as a draft for £210 only, discovered the fraud and refused to pay it. The defendant being afterwards found in England was taken into custody and indicted, as before stated. The jury found the prisoner guilty, and in reply to a question put by the learned baron as to whether, although the defendant's immediate object was to cheat W. &. Co. at St. Petersburg, by means of the forged letter of credit, he did not also mean that they or their correspondents, or the indorsees from them should present the draft and obtain payment of it from L. & Co., and the jury further found that he did. *Held*, that if L. & Co. had paid one of the drafts the defendant could not in law have been found guilty of the statutory misdemeanor; and, consequently, that he could not be found guilty of attempting to commit the common-law misdemeanor. *R.* v. *Garrett*, p. 347.

Breach of contract not indictable, p. 359.

Puffing goods; opinions, p. 359.

Value of business, p. 363.

False warranty, not indictable, p. 364.

Pretense must be false p. 365.

False pretense turning out true, p. 365.

Prisoner must know that pretense false, p. 366.

False representation must be relied on, pp. 366–371.

Intent must be to deprive owner of property, p. 371.

Money or property must be obtained, p. 373.

Obtaining satisfaction of debt, p. 373.

Representation made subsequently, p. 374.

Property must be obtained by means of the pretense, p. 374.

Must be made with design of obtaining property, p. 374.

Owner must intend to part with property, p. 375.

Prisoner must have received property, p. 375.

Object of pretense must be as charged, p. 375.

Pretense must be of existing fact, not future event, p. 375.

Assertion of existing intention insufficient, p. 377.

FALSE PRETENSES — *Continued.*

Pretense must not be remote, p. 378.

Direct promise must be proved, p. 380.

Inference of pretense from conduct, p. 381.

Protection afforded only to honesty, p. 382.

Property given to induce compromise of crime, p. 382.

Obtaining one's own by fraud not false pretenses, p. 383.

Person deceived must have used ordinary prudence, p 385.

Passing counterfeit money not, p. 386.

Passing bank-note of bankrupt bank, p. 386.

What not false pretenses; other illustrations, p. 386.

Statute not applicable to partnership affairs, p. 387.

"False token or writing," p. 387.

"False writing," p. 387.

"Fraudulent, swindling or deceitful practice," p. 387.

"Money," p. 388.

"Money, goods or other property," p. 388.

"Valuable security," p. 388.

"Written instrument," p. 388.

Swindling and theft under Texas code, pp. 388, 389.

"FALSE TOKEN OR WRITING."

Construed, p. 387.

"FALSE WRITING."

Construed, p. 387.

FINDER.

If a man finds goods that have been actually lost or are reasonably supposed by him to have been lost, and appropriates them to his own use, believing at the time that the owner can not be found, he is not guilty of larceny. *R.* v. *Thurborn*, 424.

T. found a bank-note on the highway and took it intending to appropriate it to his own use. The note had no mark on it to identify the owner, nor did he then know him. T. afterwards, and when he had discovered who the owner was, changed the note, and appropriated the money. *Held*, that T. was not guilty of larceny. *Id.*

To establish a charge of larceny against the finder of a lost article two things must be shown: (1) that at the time of the finding, the finder had the felonious intent to appropriate the thing to his own use, (2) that at the time of finding he had reasonable grounds for believing that the owner might be discovered. *R.* v. *Christopher*, p. 432.

Where a bank-note is lost, and is found by a person who appropriates it to his own use, *held*, that the jury are not to be directed to consider at what time the prisoner, after taking it into his possession, resolved to appropriate it to his own use, but whether at the time he took possession of it he knew, or had the means of knowing, who the owner was,

FINDER — *Continued.*

and took possession of it with intent to steal it; for if his original possession of it was an innocent one, no subsequent change of his mind, or resolution to appropriate it to his own use, would amount to larceny. *R.* v. *Preston*, p. 436.

Prisoner received from his wife a £10 Bank of England note, which she had found, and passed it away. The note was indorsed "E. May" only, and the prisoner, when asked to put his name and address on it, by the person to whom he passed it, wrote on it a false name and address. When charged at the police station, the prisoner said he knew nothing about the note. The jury were directed that, if they were satisfied that the prisoner could, within a reasonable time, have found the owner, and if, instead of waiting, the prisoner immediately converted the note to his own use, intending to deprive the owner of it, it would be larceny. The prisoner was convicted. *Held*, that the jury ought to have been asked whether the prisoner, at the time he received the note, believed the owner could be found; and that the conviction was wrong. *R.* v. *Knight*, p. 441.

The *bona fide* finder of a lost article, as a trunk lost from a stage coach and found on the highway, is not guilty of larceny by any subsequent act in secreting or appropriating to his own use the article found. *People* v. *Anderson*, p. 446.

One who finds lost goods which have no marks or indications of ownership, and who does not know the owner, is not bound to exercise diligence to ascertain the owner and is not guilty of larceny in retaining the goods. *State* v. *Dean*, p. 448.

Finder of lost goods not guilty of larceny, pp. 559, 565.

FISH.

*See* Animals.

"FORGED."

Construed, p. 52.

FORGERY.

H. forged his father's indorsement to a promissory note and negotiated it to R. Before the note came due the father learned of the forgery. R., when the note came due, knowing of the forgery, and knowing that H.'s father knew of the forgery, left the note at the bank where it was payable, with instructions to make demand and protest it if not paid. *Held*, that R. was not guilty of uttering forged paper with intent to defraud. *State* v. *Redstrake*, p. 1.

An intent to defraud some person is essential to the crime of forgery. *R.* v. *Hodgson*, p. 7.

A. forged a diploma of the College of Surgeons with the general intent to make the public believe that he was a member of the college, and he showed it to a number of persons to induce such belief, but he had no intent to defraud any particular individual. *Held*, that A. was not guilty of forgery. *Id.*

A diploma is not a public document, *semble*. *Id.*

FORGERY — *Continued.*

A forgery must be of some document or writing. *R.* v. *Closs*, p. 12, and see p. 67.

The painting an artist's name in the corner of a picture in order to pass it off as an original picture by that artist is not a forgery. *Id.*

Forgery is the making of a false document to resemble a genuine one. *R.* v. *Smith*, p. 17.

Therefore to imitate the wrappers of a baking powder of celebrity for the purpose of palming off a spurious article is not forgery. *Id.*

The prisoner was indicted on the first count for forging and uttering an indorsement on a bill of exchange, in the second count on a paper writing in the form of and purporting to be a bill of exchange, and in the third count on a certain paper writing. The facts were these: The prosecutor wrote the body of the bill of exchange, but without signing the drawer's name, and sent it to the prisoner, who was to accept it and procure an indorsement by a solvent person, and return it to the prosecutor. The prisoner accepted it, and forged the indorsement of another person's name, and returned it. *Held*, that the prisoner could not be convicted upon this indictment, as the document was only an inchoate instrument of no value when the prisoner forged the instrument. *R.* v. *Harper*, p. 23.

An instrument to be the subject of forgery, must be a valid instrument on its face or be proved so. *State* v *Wheeler*, p. 25.

An indictment for the forgery of an "accountable receipt for personal property," viz.: an elevator ticket for wheat, alleged that the defendant "did falsely make, forge, alter, and counterfeit a certain false, forged, altered, and counterfeited accountable receipt for personal property, viz.: an elevator ticket for wheat, which false, forged, altered, and counterfeited accountable receipt for personal property, viz.: an elevator ticket for wheat, is of the tenor following, that is to say: 'St. Paul and Sioux City Elevator Co., St. Peter, * * * Received of J. S., load No. 20, ticket No. 2402, account of W. B. N. or bearer, No. 1 Wheat, 84 5-60 bushels. M. Good, Inspector,' with intent thereby then and there to injure and defraud contrary to the form of the statute," etc., etc. *Held*, that inasmuch as no connection between the subscriber of the instrument and said elevator company appeared on the face thereof; as it cannot be intended in support of the indictment, that "M. Good Inspector," was an agent of the company, the indictment presents the case of an accountable receipt, not purporting to be signed by any authorized agent of the company and not on its face of any apparent legal effect; and there being no averment in the indictment of any connection between said subscriber and said company, which would give it such effect, the indictment was insufficient. *Id.*

An alteration of the date of an order for the delivery of goods, made by the drawer with fraudulent intent, after the order had been satisfied and returned to him, is not forgery. *People* v. *Fitch*, p. 29.

A fictitious decree of a court of another State, got up with the intent to deceive, is not the subject of forgery. *Brown* v. *People*, p. 31.

Forging any instrument or writing which, as appears on its face, would

FORGERY – *Continued.*

have been void, if genuine, is not an indictable offense. *Fadner* v. *People*, p. 34.

The plaintiff in error on a trial for bigamy, put in evidence an alleged copy of a decree granting him a divorce from his first wife, and he was thereby acquitted. On the back of the paper was an impression purporting to be the seal of New York County, and also the following writing: "Filed August 14, 1879. A Copy. Hubert O. Thompson, clerk." He was indicted for forgery in having uttered a false and forged impression of the seal of the Supreme Court with intent to defraud, and it appeared on the trial that no such judgment had ever been granted, and that the alleged copy was a forgery. *Held*, that assuming the act of the prisoner in uttering the false impression of the seal falls within the condemnation of 2 Revised Statutes, and constitutes forgery, if the same is published in connection with, and as any part of a certificate which the county clerk, as keeper of the seal, is authorized to make, in his official capacity, yet, as the pretended certificate was not in the form prescribed by the Code of Civil Procedure, it was void on its face, and the alleged decree was inadmissible in evidence, and the acts specified did not furnish the basis for an indictment for forgery. *Id.*

Signing a promissory note in the name of a fictitious firm, with intent to defraud, and falsely representing that the firm consists of the writer and another person, is not forgery. *Com.* v. *Baldwin*, p. 40.

It is not forgery at common law or under the New Hampshire statute for one to make a false charge in his own book accounts. Ordinarily, the writing or instrument which may be the subject of forgery, must be, or purport to be, the act of another, or it must be at the time the property of another, or it must be some writing or instrument under which others have acquired some rights, or have in some way become liable, and where these rights or liabilities are sought to be affected are changed by the alteration without their consent. *State* v. *Young*, p. 43.

A forged writing or instrument must, in itself, be false, that is fictitious, not genuine, a counterfeit, and not the true instrument which it purports to be, without regard to the truth or falsehood of the statement which the writing contains. *Id.*

A county treasurer without authority issued and negotiated instruments for the payment of money, purporting in the body to be the obligations of the county, but signed only by him in his own name with the addition "treasurer." *Held*, not to be forgery, the same "not being or purporting to be the act of another," within the statute. *People* v. *Mann*, p. 50.

The terms "false" and "forged" and "altered" as used in General Statute, 1878, are used in the same sense in which these terms are used in section 1 of that chapter, and refer to the same kind, or classes, of instruments. Therefore, the instrument, the uttering and publishing of which would be an offense under section 2, must be one, the making of which would be an offense under section 1. The statute enumerates the instruments which may be the subjects of forgery, but does not

FORGERY — *Continued.*

assume to change the existing rules of law as to what constitutes a false or forged instrument. *State* v. *Willson*, p. 52.

Where one executes an instrument purporting on its face to be executed by him as the agent of a principal therein named, when he has in fact no authority from such principal to execute the same, he is not guilty of forgery; the instrument is not a false or forged deed within the meaning of the statute. There is no false making of the instrument, but a mere false assumption of authority. Therefore, when such instrument is uttered by the party, who thus signs it under the false assumption of authority, he is not guilty of uttering a false deed within the meaning of the statute. *Id.*

Writing a note for a person, and inserting a larger sum than the real amount due, and falsely and fraudulently reading it over to him as for the latter amount, with a view to defraud and injure him, is not forgery. *Hill* v. *State*, p. 56.

The fabrication of a certificate of a notary public, purporting to authenticate the acknowledgment of a conveyance or transfer, is not an offense against the laws of this State. *Rogers* v. *State*, p. 58.

The uttering and publishing of a forged instrument by the prisoner raises no presumption of law that he committed the forgery. *Miller* v. *State*, p. 62.

On a charge of forgery the uttering and publishing of the forged instrument are circumstances to be weighed by the jury in connection with other evidence in the case. *Id.*

Intent to defraud essential in forgery, p. 64.

Forgery of incomplete instrument not a crime, p. 67.

As bank-note without name of cashier, p. 67.

Or a paper without signature, p. 68.

Or a check payable to order of ——, p. 68.

Instrument must be valid on its face, p. 68.

Defective certificate, p. 68.

Bond given by husband to wife, p. 68.

Void bill of exchange, p. 68.

Guarantee not binding, p. 68.

Satisfied order of delivery, p. 68.

Public warrants without seals, p. 68.

Deed of married woman without acknowledgment, p. 69.

Promise to pay but no consideration, p. 71.

Rights of some one must be injured, p. 75.

Altering deed to make it express intention of parties not forgery, p. 75.

Alteration not affecting legal obligation, p. 75.

Adding witness' name when witness not required, p. 75.

Other cases, p. 75.

FORGERY — *Continued.*
Letter of iutroduction, p. 78.
False certificate of character, p. 78.
False "making" necessary, p. 80.
False assumption of authority not forgery, p. 81.
"Uttering" necessary, p. 85.
Fictitious name, p. 85.
Inducing one to sign note for larger sum, p. 90.
Inducing signer to assent to alteration, p. 91.
Drawing check in one's own name, p. 92.
Passing counterfeit money, p. 92.
Falsely attesting voting papers, p. 92.
Cutting pieces out of bank-note, p. 93.
What not forgery; other illustrations, p. 93.
Partners not indictable for attempt to defraud firm, p. 95.
Injury must not be too remote, 95.
"Accountable receipt," p. 95.
"Acquittance," p. 96.
"Bank-bill," p. 96.
"Bill of exchange," p. 96.
"Deed," p. 96.
"Order for the delivery of goods," p. 96.
"Order for the payment of money," p. 96.
The order must appear to be valid, p. 96.
"Promissory note," p. 98.
"Receipt for money," p. 98.
"Receipt," p. 98.
"Record," p. 98.
"Shares," p. 98.
"Undertaking," p. 99.
"Warrant," p. 99.
Evidence held insufficient to convict of forgery, p. 99.
An indictment charged that the defendant ostensibly for the public service, but falsely and without authority caused and procured to be issued from the navy-yard of the United States, a certain requistion. *Held*, that this did not sustain a charge of forgery. *U. S.* v. *Watkins*, p. 168.
An indictment which charges the obtaining money by false pretenses by erasure of certain public securities does not support a charge of forgery. *Id.*
An indictment for forgery is not good at common law, unless it use the terms "forge or counterfeit." *Id.*

FRAUD.
An offense to be indictable, must be one that tends to injure the public. Defrauding one person only, without the use of false weights, measures,

FRAUD — *Continued.*

or tokens, and without any conspiracy, is, at common law, only a civil injury, and not indictable. *R.* v. *Wheatley*, p. 100.

To constitute the offense denounced by article 797 of the Penal Code, the property upon which the lien was given must have been "personal or movable property" at the time the lien was executed. The sale or other disposition of real property on which the owner had executed a written lien is no offense against the laws of this State. *Hardman* v. *State*, p. 104.

Movable property is such as attends the person of the owner wherever he goes, in contradistinction to things immovable. Under this rule it is *held* that a growing crop is immovable property. *Id.*

An ungathered crop still appendant to the ground can, under no circumstances, be held movable property, and can not partake of the character of personal property until ready for harvest. *Id.*

The indictment charged in substance that, having executed a valid mortgage lien in writing upon "eighteen acres of cotton, then and there being movable property," the defendant subsequently sold the same with intent to defraud his mortgagee. *Held*, insufficient to charge any offense against the laws of this State. *Id.*

The statute making it a penal offense (1) to remove out of the State any personal property on which the accused has given any written lien; (2) to sell such property; or (3) to "otherwise dispose of" such property — requires an intent to defraud the holder of the lien as an essential ingredient of each offense. *Robertson* v. *State*, p. 109.

A removal of such property, with such intent, from one county in the State to another is not an offense under said article. The expression "otherwise dispose of" does not include a removal or sale, but does include any other mode of placing the property beyond the reach of the holder of the lien, with such intent. *Id.*

A bankrupt was indicted under the bankrupt act for making a false entry in a book of account with intent to defraud creditors. The jury found that the entry was made by him to deceive his creditors as to the state of his accounts and to prevent investigation, but not to defraud any of them or to conceal any of his property. *Held*, that he could not be convicted, the intent to defraud being the gist of the offense. *R.* v. *Ingham*, p. 111.

In an indictment under section 44 of the Bankrupt Act, for obtaining goods on credit, with intent to defraud, the prooceedings in the bankrupt court must be pleaded and proved with such particularity as to show affirmatively that an adjudication of bankruptcy was made upon a case in which the court had jurisdiction. *U. S.* v. *Prescott*, p. 118.

The indictment, therefore, should set out the filing of the petition, the name of the petitioning creditor, the amount of his debt, the alleged act of bankruptcy, and the adjudication of the bankrupt court. *Id.*

The description of the goods obtained, as a "large quantity of boots and shoes," is too uncertain. It should be as definite as would be required in a declaration in trover. *Id.*

FRAUD — *Continued.*

Offenses under section 44 are misdemeanors, and the word "feloniously" should not be used. *Id.*

An indictment charging fraud of any sort ought to aver wherein the fraud consisted and by what means it was effected. *U. S.* v. *Goggin*, p. 120.

The general rule that an indictment for an offense created by statute is sufficient if it follows the language of the statute is subject to the qualification that the accused must be apprised by the indictment with reasonable certainty of the nature of the accusation against him, to the end that he may prepare his defence and plead the judgment as a bar in a subsequent prosecution for the same offense. *Id.*

An indictment under the act of March 3, 1862, charging the commission of the offense "by fraudulent means," and not specifying the means, is bad for want of certainty. *U. S.* v. *Bettillini*, p. 124.

An attempt to commit a statutory fraud is not indictable. *U. S.* v. *Henning*, p. 129.

Private frauds are not indictable at common law; but frauds affecting the public at large or the public revenue are. *U. S.* v. *Watkins*, p. 168.

In the case of private frauds, the act to be indictable must be committed by false tokens or forgery or conspiracy. This rule, however, does not apply to direct frauds upon the public. *Id.*

An indictment must be certain to a certain intent in general, p. 168.

An indictment charging fraud must aver the means by which the fraud was effected, p. 168.

An indictment charging fraud must aver the facts that constitute the fraud, p. 168.

Deceit is an essential element of fraud; and the deceitful practices charged must in an indictment for fraud be set out, p. 168.

Fraud to be indictable at common law must injure public, p. 355.

Refusal to surrender goods not a "removal" with intent to defraud, p. 358.

Intent must be fraudulent, p. 358.

Persons with debts not due not "creditors," p. 358.

Removing property with intent to defeat levy, p. 358.

Removing nuisance, p. 359.

GOLD.

Nuggets of, not subject of larceny, p. 569.

"GOODS AND CHATTELS."

Construed, pp. 568, 677.

"GRANARY."

Construed, p. 580.

"GRIEVOUS BODILY HARM."

Construed, p. 877.

"GROUND ADJOINING A DWELLING-HOUSE."

Construed, p. 580.

"GUARDIAN."

Construed, p. 780.

HIRER.

*See* LARCENY.

HOMICIDE.

*See* MURDER; MANSLAUGHTER; DEGREES OF MURDER; POISONING.

INSTRUCTIONS.

Where the court in its charge to the jury states the same proposition of law twice, the first time correctly, the second time incorrectly, it will be inferred that the latter statement is likely to have made a lodgment with the jury and, in some instances, the judgment will be reversed on this ground. *Rice* v. *Com.*, p. 759.

INTENT.

*See* LARCENY.

LARCENY.

*See, also,* ANIMALS; FINDER; POSSESSION OF STOLEN PROPERTY; LARCENY FROM HOUSE; VALUE.

To constitute larceny, there must be an intention on the part of the prisoner to appropriate the property to his own use. *R.* v. *Poole*, p. 393.

Two glove finishers took a quantity of finished gloves out of a store room, and laid them on their tables, with intent fraudulently to obtain payment for them as for so many gloves finished by them. *Held,* that they were not guilty of the larceny of the gloves. *Id.*

Larceny is the fraudulent taking of the personal goods of another with the felonious intent to convert them to his own use, without the consent of the owner — "felonious" meaning without color of right for the act and "intent" to deprive the owner not temporarily but permanently of the property. *R.* v. *Halloway*, p. 395.

A., who was in the employ of B., a tanner, took skins from the warehouse of B. to C. the foreman of B. at another part of the premises pretending that he had done work on them for which he was to be paid. A. intended to return the skins to his master when he had been paid for his pretended work on them. *Held,* not larceny. *Id.*

To constitute larceny the possession of the thing must pass from the owner. Therefore, where E. with corn coaxed a hog twenty yards, and then struck it with an ax, when the hog squealed and E. ran away and left it. *Held,* that E. was not guilty of larceny. *Edmonds* v. *State*, p. 398.

A. found a check, and being unable to read, showed it to G. who told him it was only an old check; that he wished to show it to a friend. G. kept the check on different excuses, in the hopes of getting the reward which

LARCENY — *Continued.*

might be offered for it. *Held*, that this constituted no "taking" from A. such as would amount to larceny. *R.* v. *Gardiner*, p. 401.

A necessary element of theft is the fraudulent taking of property from the possession of the owner, or some one holding possession for him. A taking by the party accused is essential to his guilt of theft, and no other subsequent connection with the stolen property, whether in good or in bad faith, will of itself constitute theft; wherefore it was error to charge, in substance, that the jury was authorized to convict if they believe that when he purchased the alleged stolen property from another, the defendant knew that the person from whom he purchased had no title to the property, and no right to sell it. *McAfee* v. *State*, p. 403.

W. was indicted for the larceny of six pounds of brass from a foundry. The only evidence was that W., who was employed on the premises, had been seen to come into the place where the brass was kept. *Held*, that there was no evidence on which to convict. *R.* v. *Walker*, p. 409.

Where the owner intends to part with his property there is no larceny. Thus where a contract for the loan of money is induced by fraud and false pretenses of the borrower, and the lender, in performance of the contract, delivers certain bank-bills without any expectation that the same bills will be returned in payment, the borrower is not guilty of larceny. *Kellogg* v. *State*, p. 411.

Money was given to the prisoner for the purpose of paying turnpike toll at two gates on his journey. Twelve days afterwards, on being asked if he had paid the toll at one of the gates, the prisoner said he had not — that he gone by a parish road which only crossed the road at that gate, and so no toll was payable there, and that he had spent the money on beer for himself and his mates. The prisoner having been convicted of larceny of the money, but it not appearing on a case reserved that the question of felonious intention had been distinctly left to the jury, this court quashed the conviction. *R.* v. *Deering*, p. 415.

One is not guilty of stealing goods from an attaching officer, if he, being owner, intended at the time to leave and did leave with the officer goods enough to satisfy the claim of the attaching creditor. *Com.* v. *Greene*, p. 418.

To constitute larceny, there must be a felonious intent to deprive the owner permanently of his property. *Johnson* v. *State*, p. 419.

It is error in the judge to instruct the jury that certain facts constitute larceny, unless the *animus furandi* be expressly stated as one of those facts and unless the fact be also stated that the goods were taken without the consent of the owner. *Weston* v. *U. S.*, p. 421.

A person hired a horse intending at the time to return it according to his agreement. Subsequently he changed his mind and converted it to his own use. *Held*, that he was not guilty of larceny. *Hill* v. *State*, p. 450.

Dogs are not the subject of larceny nor are they chattels within statute. *R.* v. *Robinson*, p. 454; *State* v. *Lymus*, p. 456.

The prisoner took out of his pocket a piece of blank paper properly stamped with a sixpenny stamp, having led the prosecutor to believe

LARCENY — *Continued.*

that he was about to pay him the sum of £4 11s 1 ½d due to him from one P. The prosecutor wrote upon the paper a receipt, for the money; whereupon the prisoner took up the receipt, and left the prosecutor without paying him; and the jury found that he took it with intent to defraud. *Held,* that the prisoner could not be convicted of larceny, the prosecutor never having had such a possession of the paper as would have enabled him to maintain trespass. *R.* v. *Smith,* p. 466.

On a trial for theft the court charged as follows: "Possession of the person unlawfully deprived of property is constituted in all cases where the person so deprived of possession is, at the time of taking, lawfully entitled to the possession thereof as against the true owner. *Held,* error. *McNair* v. *State,* p. 469.

Upon the question of intent, the court charged in a theft case as follows: "The intent in all criminal cases is judged of from the act." *Held,* error, inasmuch as it confines the question of intent to the act, whereas intent is to be deduced from all the circumstances remotely or immediately attending the taking. *Id.*

Upon the question of ownership the court charged: "If you believe from the evidence that the property as charged was not the property of the person as charged, beyond a reasonable doubt, you will acquit the defendant." *Held,* error. *Id.*

It is not larceny, at common law, to steal a dead body; *aliter* as to a coffin in which a body is interred. *State* v. *Doepke,* 474.

To constitute a larceny, an intention of benefit or gain by the taking is essential. *People* v. *Woodward,* p. 478.

A. and B. being on bad terms on account of lawsuits between them, A. took B.'s horse from the stable, killed and buried it. The act injured B. but was not intended to and could not benefit A. *Held,* that A. was not guilty of the larceny of the horse. *Id.*

The Code provides that, "if the person accused of theft be part owner of the property, the taking does not come within the definition of theft, unless the person from whom it was taken be wholly entitled to the possession at the time." *Held,* applicable to a renter or cropper on shares, whose contract with his landlord did not entitle the latter to the exclusive possession of the crop, and who, without the landlord's consent, took part of the crop before it was divided. *Bell* v. *State,* p. 480.

By contract between appellant and one T., the former became a cropper on the latter's land, and each was to be entitled to one-half of the crop when gathered. The crop was bound to T. for any advances made by him to appellant. Before the crop was gathered or divided, the appellant, in the absence of T., pulled and sold a bushel of the corn. *Held,* that the taking was not theft. *Id.*

One in lawful possession of goods can not be convicted of their larceny. The prisoner assigned his goods by deed to trustees for the benefit of his creditors. No manual possession was taken under the assignment, but the prisoner remained in possession of the goods himself, and while in such possession he removed the goods, intending to deprive the cred-

LARCENY — *Continued.*

itors of them. The jury found the prisoner guilty of larceny, and found that the goods were not in the custody of the prisoner as the agent of the trustees. *Held*, that the conviction was wrong. *R.* v. *Pratt*, p. 482.

A constable having an execution placed in his hands, levied upon and took possession of certain goods belonging to the judgment debtor, and put them in possession of the judgment creditor. A short time after, the constable took the goods away, with the consent of the judgment creditor, and sold them at private sale, receiving therefor the sum of $55, which he converted to his own use. In a prosecution against the constable, under an indictment charging him with having stolen divers United States notes and current bank-bills, for the payment of $55, and of that value, of divers issues and denominations to the grand jury unknown, the personal goods and property of the judgment creditor, it was *held*, that the prosecution could not be maintained under section 71 of the Criminal Code, declaring the felonious conversion of money, goods, etc., by a bailee, to be larceny. *Zschocke* v. *People*, p. 486.

The owner of horses delivered them to defendant under an agreement that the defendant was to buy them, the horses to remain the property of the owner till paid for and be returnable at a specified period if not paid for. The defendant refused to pay for them, or return them. *Held*, not larceny, nor larceny by a bailee. *Krause* v. *Com.*, p. 488.

It was the custom of the employer's cashier to enclose in paper, in lump sum, the wages of all the men working together in one room, inside which was written the names of the men to whom the money was to be paid, and the sum due to each. By arrangement among the men in each room, one of them went to the cashier on the pay-day for the wages of all the men in the room, and paid over the amount due to each. The prisoner, one of the workmen who had been sent in the usual way by his fellow-workmen, and received in a wrapper the wages of the men working in his room, instead of paying over the wages to each absconded and appropriated the money to his own use. *Held*, that he could not be convicted on an indictment charging him with stealing the moneys of his employers, for the prisoner was the agent of his fellow-workmen, and the handing of the money over to him by the cashier was a payment by the employers. *R.* v. *Barnes*, p. 492.

It was the duty of G. as C.'s servant to receive and pay moneys for him and enter them in a book which was examined by C. from time to time. On one examination G. showed a balance in his favor of £2 by making entries of false payments, and thereupon C. paid him this £2. *Held*, that G. was not guilty of the larceny of the £2. *R.* v. *Green*, p. 494.

It was the duty of T., who was E.'s clerk, to ascertain daily the amount of dues payable by E. on the exportation of E.'s goods, and having obtained the money from the cashier to pay it over. T. falsely represented that a larger sum was due on a certain day, and appropriated the difference. *Held*, that he was not guilty of larceny. *R.* v. *Thompson*, p. 497.

Larceny is the felonious stealing, taking and carrying away of the personal goods of another. When property, lawfully in the custody of an em-

LARCENY — *Continued.*

ployee or baile, is criminally appropriated to the use of such employe or bailee, the offense is not larceny. *State* v. *Wingo*, p. 499.

A., a farmer sent B., his farm hand, to haul a load of corn to market, with orders to sell it, B. using two mules and a wagon for that purpose. B. sold the mules to C., who supposed he had a right to dispose of them. *Held*, that B. was not guilty of larceny. *Id.*

The bringing into this Commonwealth by the thief, of goods stolen in one of the British Provinces, is not larceny in this Commonwealth. *Com.* v. *Uprichard*, p. 501.

One can not be convicted of larceny in Ohio, for bringing into Ohio property stolen by him in Canada. *Stanley* v. *State*, p. 508.

A conviction for grand larceny can not be sustained upon the mere proof that the defendant had access to the house and rooms in which the missing property was kept, although the evidence shows that he made a false statement in regard to a matter in no way connected with the crime for which he was accused. *People* v. *Wong Ah You*, p. 522.

The return of stolen property may be "voluntary" within the meaning of article 738 of the Penal Code, notwithstanding it was superinduced by the fear of detection and punishment as well as the spirit of repentance and restitution. *Allen* v. *State*, p. 534.

Voluntary return of stolen property, such as under the provision of article 378 of the Penal Code will operate to reduce a theft from the grade of felony to misdemeanor, must be made under the following circumstances: 1. The return must be voluntary, that is, willingly made; not made under the influence of compulsion, fear of punishment or threats. If, however, it be made under the influence of repentance for the crime and with the desire to make reparation to the injured owner, it will be voluntary, although it may also be influenced by fear of punishment. 2. It must be made within a reasonable time after the theft, and before prosecution for the theft has been commenced. 3. It must be an actual, not merely a constructive return of the property into the possession of the owner. 4. The property returned must be the identical property, unchanged and all of it, that was stolen. *Bird* v. *State*, p. 536.

In this case the defendant drove the stolen animal about ten miles from its range, and attempted to sell it. Pending negotiations of sale, it was discovered by parties acquainted with it, when the party with whom the sale was being negotiated told the defendant to turn it loose, and that they would get it another time. In a few days the owner told the defendant that all he wanted was the animal, and that if he would drive it back home, he, the owner, would not prosecute him, the defendant. Soon after this the owner found the animal on its accustomed range. *Held*, that under such circumstances the court should have given in charge the issue as to the voluntary return of the animal by the defendant; that, while not strictly a return of actual possession, it was such as was demanded by the owner, and therefore sufficient. *Id.*

The want of owners' consent to the taking of the property must, in a trial for theft, be proved like any other element of the offense, and can not

LARCENY — *Continued.*

be presumed or inferred. It may, however, be proved by circumstantial evidence. *Wilson* v. *State*, p. 639.

Where one owns the property and another has the possession, management, control or care of it, the want of the consent of both to the taking must be proved. And this proof should be made by the persons themselves if attainable, and if they are not, their absence should be accounted for before the State can be allowed to resort to circumstantial evidence. *Id.*

Taking necessary in larceny; property must be removed, pp. 541, 542.

Goods must be taken from owner, p. 544.

Purchasing property from thief with notice not larceny, p. 545.

Property must be converted by prisoner, p. 545.

Must be taken against owner's will, pp. 545, 547.

Property parted with through fraud, p. 547.

Intent to steal essential, p. 548.

Goods must be taken with fraudulent intent, p. 549.

Open taking, p. 550.

Intent to use and return property, p. 550.

Other motives, p. 553.

Aiding to escape, p. 553.

Taking in joke, p. 553.

Intent to induce criminal connection, p. 554.

Taking part of seized goods, p. 554.

Servant giving away goods in charity, p. 554.

Intent must be to deprive owner of property permanently, p. 555.

Intent must exist at time of taking, p. 556.

Choses in action not subjects of larceny, p. 565.

Nor bank-notes, p. 565.

Nor railroad tickets, p. 565.

Nor bills of exchange, p. 565.

Things attached to realty not subject of larceny, p. 569.

As nuggets of gold, p. 569.

Or sea weed, p. 570.

Severance and asportation must be different acts, p. 570.

Animals not subjects of larceny, p. 571.

As doves, p. 571.

Or dogs, p. 572.

Or oysters, p. 572.

Or other fish, p. 572.

Prosecutor must have property in things stolen, p. 572.

*Lucri causa* essential, p. 574.

LARCENY— *Continued.*

No larceny of one's own property, p. 574.

Tenant in common or joint owner, p. 574.

Person having lawful possession of property, p. 575.

Larceny by bailee, pp. 575–578.

By common carrier, p. 578.

By servant, p. 578.

Stealing "in a building," p. 579.

Evidence held insufficient to convict of larceny in *Casas* v. *State*, p. 583; *Cook* v. *State*, p. 586; *Crockett* v. *State*, p. 589; *Deering* v. *State*, p. 590; *Dresch* v. *State*, p. 594; *Green* v. *State*, p. 597; *Hammell* v. *State*, p. 600; *Hardeman* v. *State*, p. 602; *Harrison* v. *State*, p. 604; *Johnson* v. *State*, p. 606; *Johnson* v. *State*, p. 608; *Knutson* v. *State*, p. 612; *Madison* v. *State*, p. 616; *Martinez* v. *State*, p. 621; *Pettigrew* v. *State*, p. 625; *Saltillo* v. *State*, p. 625; *Seymore* v. *State*, p. 627; *Shelton* v. *State*, p. 628; *Taylor* v. *State*, p. 632; *Wolf* v. *State*, p. 632; *Womack* v. *State*, p. 633.

LARCENY FROM HOUSE.

Stealing property hanging at and outside of a store door is simple larceny, and not larceny from a house. *Martinez* v. *State*, p. 577.

A bale of cotton was stolen from an alleyway outside of a warehouse and not in a warehouse; *held*, that the defendant was guilty only of simple larceny. *Middleton* v. *State*, p. 579.

The court charged that "if the bale of cotton was in front of the warehouse, and under its control and protection, stealing it is the same offense as if the bale of cotton were actually within the walls of the warehouse;" *held*, error. *Id.*

Stealing "in a building," p. 579.

"From a dwelling-house," p. 580.

"In a dwelling-house," p. 580.

LARCENY FROM PERSON.

One can not be convicted of larceny on evidence which establishes a larceny from the person. *King* v *State*, p. 520.

Stealing from the person, p. 580.

"Privately from the person," p. 581.

"LAWFUL MONEY OF THE UNITED STATES."

Construed, p. 568.

LAW OF NATIONS.

By the law of nations an attack on the property of a foreign minister is an assault on him. But the person must know the property to be his. *U. S.* v. *Hand*, p. 789.

LETTER OF INTRODUCTION.

Not subject of forgery, p. 78.

LIMITATIONS.

The defendant has the right upon demurrer to avail himself of the statute of limitations, p. 168.

MANSLAUGHTER.

In case of mutual combat where a homicide is committed, in order to reduce the offense from murder to manslaughter, it must appear that the contest was waged on equal terms, and no undue advantage was sought or taken by the defendant, for if such was the case, malice may be inferred, and the killing amount to murder. *People* v. *Sanchez*, p. 1042.

When two persons have a sudden quarrel, and after a sufficient time has elapsed for the blood to cool and passion to subside, go out to fight, and one of them kills the other, the killing will be murder and not manslaughter. *Id.*

Whether a homicide amounts to murder or to manslaughter merely, does not depend upon the presence or absence of the intent to kill. *People* v. *Freel*, p. 1082.

In either murder or manslaughter, there may be a present intention to kill at the moment of the commission of the act. *Id.*

An instruction that if one slay another in the heat of passion and without malice, the crime can not be manslaughter, if a dangerous weapon is used, is error. *People* v. *Crowey*, p. 1110.

An indictment for manslaughter in the first degree, brought under the Revised Statutes of Missouri, which does not charge that the killing was done without a design to effect death, nor while the doer of the act was engaged in the perpetration or attempt to perpetrate any crime or misdemeanor not amounting to a felony, is insufficient. *State* v. *Emmerich*, p. 1113.

An indictment brought under section 1241, for the crime of manslaughter in the first degree, perpetrated in the attempt to commit an abortion, is bad, where the descriptive words "pregnant with a quick child" are not employed; nor is it good under section 1268, which defines the crime of abortion; since that section, at the time of the criminal act, did not apply to a case where death ensued in consequence of a criminal act. *Id.*

The degree of negligence on the part of the servants of a railroad corporation required to be proved on an indictment under the General Statutes, is not changed by the statute of 1871, and, on an indictment under the latter statute, if negligence of the servants of the corporation is relied on, gross negligence must be averred and proved. *Com.* v. *Fitchberg, etc., R. Co.*, p. 1117.

If an indictment against a railroad corporation under the General Statutes, and the statute of 1871, does not allege that the neglect on the part of the corporation to give the signals required by law contributed to the death of the person killed, evidence of such neglect is inadmissible. *Id.*

Under an indictment against a railroad corporation under the Massachusetts statutes which alleges as the only act of negligence that the servants of the corporation ran a locomotive engine "rashly and without watch,

MANSLAUGHTER — *Continued.*

care or foresight, and with great, unusual, unreasonable and improper speed, evidence is inadmissible to show that the servants neglected to ring the bell on the engine or to sound the whistle. *Com.* v. *Fitchburg, etc., R. Co.*, p. 1126.

An indictment against a railroad corporation, on the General Statutes, charging the killing of a person by reason of the gross negligence and carelessness of its servants while engaged in its business, by running a locomotive engine with great, unusual, unreasonable and improper speed, is not sustained by proof, that at the time of the killing, the engine was run at a high rate of speed, in the absence of evidence that the servants in so doing were acting in violation of their duty. *Id.*

An indictment against a railroad corporation under the Massachusetts statute of 1874, for killing a passenger which alleges that the death was caused by the failure of the corporation to reduce the rate of speed of one of its engines and to give certain signals, is not supported by proof that the servants of the corporation neglected to do so. *Com.* v. *Boston, etc., R. Co.*, p. 1129.

The prisoner, a conductor of a freight train, was indicted for manslaughter. The indictment charged that the prisoner negligently omitted while crossing with his train from the outward track of the road across the inward track to a side track, and again across the inward to the outward track, to send forward any signal to warn the driver of a passenger train which the prisoner well knew was due and about to arrive at that part of said railroad, whereby said passenger train collided with the prisoner's train, causing the death of a passenger. There was no proof given on the trial that the prisoner knew of the approach of the passenger train. *Held*, that the conviction could not be sustained. *Com.* v. *Hartwell*, p. 1133.

Provocation reduces crime to manslaughter, pp. 1189, 1192.

Heat of passion, p. 1189.

Husband and wife, p. 1191.

Parent and child, p. 1191.

"Adequate cause," p. 1196.

Resisting arrest, p. 1196.

Death resulting from sparring match, not, p. 1197.

MAYHEM.

Where defendant had destroyed the eye of a person by throwing a stone at him, the information for mayhem charged the malicious intent in the words of the statute. Verdict that defendant was "guilty as charged in the information, with the malicious intent as applied by law." *Held*, that this does not find the malicious intent as a fact with sufficient certainty to sustain a judgment for mayhem. *State* v. *Bloedow*, p. 827.

A premeditated design to do the act is essential to mayhem, and therefore where the act is done in the heatof a sudden affray, without any evidence of premeditation, the crime is not committed. *Godfrey* v. *People*, p. 856.

Essentials of the crime, p. 871.

"MENACES."

Construed, p. 703.

"MONEY."

Construed, pp. 388, 568.

"MONEY, GOODS, OR OTHER PROPERTY."

Construed, p. 388.

"MONEY, GOODS, WARES OR MERCHANDISE."

Construed, p. 568

"MONEY OR PROPERTY."

Construed, p. 373.

"MOVABLE PROPERTY."

Construed, p. 105.

MURDER.

An infant, though fully delivered, can not be considered in law a human being and the subject of homicide until life, independent of the mother, exists; and the life of the infant is not independent, in the eye of the law, until an independent circulation has become established. *State* v. *Winthrop*, 911.

If a woman with a sedate and deliberate mind, before or after the birth of her child, formed the design to take its life, and after the parturition was complete and the child born alive and in existence, she executed her design and took its life, it was murder with express malice and in the first degree. But if the design to take the life of her child was formed and executed when her mind, by physical or mental anguish, was incapable of cool reflection, and when she had not the ability to consider and contemplate the consequences of the fatal deed, and she conceived and perpetrated it under a sudden, rash impulse after the child had been wholly produced from her body and while it had existence, the crime was murder in the second degree. *Wallace* v. *State*, 914.

If in a case of this character the jury might have concluded from the evidence that the defendant took her infant's life before its birth was complete, or that she caused its death by means which she used merely to assist her delivery, it was incumbent on the court to instruct for acquittal in the event the jury should so find. *Id.*

To constitute murder, the death must be the result of the prisoner's act, and must take place within the time provided by law. *People* v. *Aro*, 917, 1139.

An indictment for murder, charging that the accused, on or about a certain day, did willfully, feloniously and with malice aforethought, kill, murder and put to death a certain person, with a pistol and knife, without specifying further the facts and the manner is bad. *Id.*

The crime of murder is committed not on the day when the victim dies, but on the day on which his injury was received. *People* v. *Gill*, p. 920.

Where an act is passed between the time of the commission of the act and the death of the victim, defining the offense, and providing for its

MURDER — *Continued.*

punishment, and providing that upon trials for crimes committed previous to its enactment, the party shall be tried by the laws in force at the time of the commission of the crime, the prisoner must be tried under the law in force when the violation of the law was committed. *Id.*

If a wound is inflicted not dangerous in itself, and the death which ensues was evidently occasioned by the grossly erroneous treatment of it, the original author will not be accountable. But if the wound was mortal or dangerous, the person who inflicted it can not shelter himself under the plea of erroneous treatment. *Parsons* v. *State*, p. 922.

The evidence was conflicting, as to whether the deceased came to his death from the effects of a wound inflicted by the prisoner, or from the improper treatment of it by the attending physician in sewing it up. The prisoner's counsel requested the court to charge that if the wound was not mortal, and it clearly appeared that the deceased came to his death from the erroneous treatment, and not from the wound, they must acquit the prisoner. This charge the court gave, with this qualification, "that if the ill treatment relied on, was the sewing up of the wound, the defendant would not be excused if otherwise guilty." *Held*, the qualification was erroneous. *Id.*

Where a judge charged the jury that if one person inflicts a mortal wound and before the assailed person dies, another person kills him by an independent act, the former is guilty of murder, it was *held* to be error. *State* v. *Scates*, p. 924.

At common law, the neglect or improper treatment must produce the death in order to exonerate the person who inflicted the original injury. Under the statute it is not necessary that the neglect or improper treatment shall contribute in any degree to the death, but if there be gross neglect or manifestly improper treatment, either in preventing or in aiding the fatal effects of the injury, the death of the injured person is not homicide by the party who inflicted the original injury. *Morgan* v. *State*, p. 926.

"Gross neglect and improper treatment," to mean, not only such as produce the destruction of human life, but as well such as allow, suffer or permit the destruction of human life. *Id.*

On a trial for murder, the jury were instructed as follows: "Implied malice is an inference or conclusion of law upon certain facts found by the jury. Thus the law implied malice from the unlawful killing of a human being, unless the circumstances make it evident that the killing was either justifiable, or if not justifiable, was so mitigated, as to reduce the offense below murder in the second degree." *Held*, error. *Id.*

To warrant a conviction of murder there must be direct proof either of the death, as by the finding and identification of the corpse, or of criminal violence adequate to produce death and exerted in such a manner as to account for the disapearance of the body. *Ruloff* v. *People*, p. 939.

The *corpus delicti*, in murder, has two components, death as the result and criminal agency of another as the means. It is only where there is

MURDER — *Continued.*

direct proof of one, that the other can be established by circumstantial evidence. *Id.*

The rule of Lord Hale forbidding a conviction of murder or manslaughter, unless the fact proved to be done, or at least the body found dead, commented upon and affirmed. *Id.*

A conviction of murder is not warranted when there is no proof of the *corpus delicti*, but the uncorroborated extra-judicial confession of the accused. *State* v. *German*, p. 954.

In a prosecution for homicide, where it appears that no weapon was used, but that death resulted from a blow or a kick not likely to cause death the offense is manslaughter and not murder, although the assault be unlawful and malicious, unless the respondent did the act with intent to cause death or grievous bodily harm, or to perpetrate a felony, or some act involving all the wickedness of a felony. *Wellar* v. *People*, p. 958.

Where an act is done with intent to commit a misdemeanor and death ensues it is not murder. *Smith* v. *State*, p. 981.

An indictment alleged that the prisoner caused the death of a pregnant woman by an operation performed by him with intent to procure a miscarriage. The prisoner was convicted of murder. *Held*, error as the intent was not to commit a felony. *Id.*

Where there are sufficient facts before the jury to enable them to infer malice, or the want of it, as a fact, directly from the evidence, recourse should not be had to any legal presumption of malice which may arise in the absence of direct proof, from the fact of homicide. *State* v. *Coleman*, p. 987.

Where there is full evidence as to the surrounding circumstances, this presumption can not be allowed to deprive the prisoner of the benefit of any reasonable doubt, but the jury should find the malice as an inference from the facts, if at all. It was erroneous, therefore, to charge "that all homicide is presumed to be malicious, and amounting to murder until the contrary appears from circumstances of alleviation, excuse or justification, and that it is incumbent upon the prisoner to make out such circumstances to the satisfaction of the court and jury, unless they arise out of the evidence produced against him." *Id.*

Under a statute defining the crime of murder and enacting (among others) that killing should be murder "when perpetrated by any act imminently dangerous to others and evincing a depraved mind, regardless to human life, although without any premeditated design to effect the death of any particular individual," a killing without premeditated design to take life, though perpetrated by such acts as are eminently dangerous to the person killed, and evince a depraved mind, regardless of the life of the deceased, is not murder. *Darry* v. *People*, p. 990.

There are many other adequate causes, which will reduce a homicide from murder to manslaughter, besides the four provoking causes enumerated in article 2254, Paschal's Digest. *Brown* v. *State*, p. 1086.

On a trial for murder, where there is evidence of malpractice on the part of the surgeon who attended the deceased, the jury should be instructed

MURDER — *Continued.*

that they can not convict of murder, unless satisfied that the death resulted from the wound, and not from the malpractice of the surgeon. *Id.*

The prisoner was convicted of murder. The evidence showed the homicide was committed by stabbing the deceased with a knife, in immediate retaliation for insulting words and a violent blow struck the prisoner by the deceased. *Held,* that, in the absence of premeditated design, which was clearly wanting, the conviction was unauthorized. *McCann* v. *People,* 1089.

Under the law making homicide by a husband justifiable when committed on one taken in an act of adultery with his wife, before the parties have separated, it is sufficient if such parties are taken in such circumstances as reasonably indicate that they have just committed or are about to commit the adulterous act. Adultery here means violation of the marriage bed, and not habitual carnal intercourse. *Price* v. *State,* p. 1095.

The charge of the court upon the law of manslaughter, in defining "adequate cause" as arising from the use of insulting language towards a female relative by the deceased told the jury that such language, unless it was used in the presence of the female, did not constitute "adequate cause" within the meaning of the statute. *Held,* error. *Hudson* v. *State,* p. 1100.

Cooling time is a question of law for the court and not a question for the jury. *State* v. *Moore,* p. 1107.

The separation of two persons engaged in a fist fight, which eventually terminates in a homicide, to justify a verdict of murder must be for a time sufficient for the passions excited by the fight to have subsided and reason have resumed its sway. Hence, where one witness testified that the prisoner was "absent no time," and another, that after the first fight he started to go home, and looking back the parties were again fighting. *Held,* that there was not such sufficient cooling time to justify a verdict of murder. *Id.*

Violence essential in murder, p. 1138.

False swearing away life of another, p. 1138.

Death must take place in a year and a day, p. 1139.

Must be in consequence of prisoner's act, p. 1139.

Death partly by predisposing cause, p. 1139.

Death occasioned by one of two causes, p. 1140.

Death from subsequent medical operation, p. 1140.

*Corpus delicti* must be proved, p. 1141.

OFFICERS.

Where an officer is empowered by law to arrest without warrant, he is not in every case bound before making the arrest to give the party to be arrested clear and distinct notice of his purpose to make the arrest, and also of the fact that he is legally qualified to make it. *Shovlin* v. *Com.,* p. 810.

OFFICERS — *Continued.*

Where the offender in question is openly and notoriously engaged in breaking the law, as for example, where he is maintaining a gambling table in a public place, it is sufficient for the officer to announce his official position and demand a surrender. If this is refused the officer is not liable to indictment for assault by reason of the fact that he used force to secure his prisoner, p. 810.

A policeman may arrest without a warrant one whom he has reasonable cause to suspect of a felony, and may justify an assault on one endeavoring to assist such person to escape. *State* v. *Doering*, p. 818.

OPINION.

*See* FALSE PRETENSES.

"ORDER FOR DELIVERY OF GOODS."

Construed, p. 96.

"ORDER FOR PAYMENT OF MONEY."

Construed, pp. 96, 566, 568.

"OTHERWISE DISPOSED OF."

Construed, p. 109.

OYSTERS.

*See* ANIMALS.

PARTNERSHIP.

Partner not guilty of forgery of firm obligation, p. 95.

"PERSONAL GOODS."

Construed, p. 568.

"PERSONAL PROPERTY."

Construed, p. 570.

PICTURE.

Falsely putting artist's name on picture, not forgery, p. 12.

POISONING.

To convict of murder by poisoning, there must be shown knowledge by defendant of the poisonous character which produced the death. Knowledge of defendant that the article was not entirely harmless, is not sufficient. *People* v. *Stokes*, p. 962.

To justify a conviction upon circumstantial evidence, not only must the facts proved be consistent with and point to the defendant's guilt beyond a reasonable doubt, but they must be inconsistent with his innocence. *Id.*

Where a case depends on circumstantial evidence, which points to a particular person as the criminal, a motive on the part of that person to commit the crime, much fortifies the probabilities created by the other evidence. *Id.*

POISONING — *Continued.*

On an indictment for the murder of an infant by the administration of laudanum, the judge charged the jury, that "if Ann, a slave, without authority administered laudanum to the infant, with intent to produce unnecessary sleep, and contrary to her expectations it caused death, she would be guilty of murder." *Held,* erroneous. If an act unlawful in itself be done with a deliberate intent to effect mischief, and death ensues, though against the intention of the party, it will be murder; if the act be done heedlessly and incautiously without such intent, it will be manslaughter only. *Ann* v. *State,* p. 968.

The administration of laudanum was not *per se* unlawful, and the charge excluded from the jury the consideration of the facts, whether the defendant intended serious mischief to the infant or not, and whether the offense amounted to murder or manslaughter. *Id.*

Symptoms of themselves are insufficient to sustain a conviction for administering poison. The indirect proof considered satisfactory in such cases is that of chemical analysis and tests of the contents of the stomach and bowels. *Joe* v. *State,* p. 974.

In a trial for murder by poison, the court below charged, "the life or death of this man is in your hands; there is no middle course, he must be convicted of murder in the first degree or acquitted of everything. If your verdict is guilty of murder, you must state of the first degree. If not guilty you say so and no more." *Held,* to be error. *Lane* v. *Com.,* p. 1017.

POSSESSION OF STOLEN PROPERTY.

Possession of property recently stolen may be relied upon by the State to connect the defendant with the taking, but this possession may be accounted for by purchase whether in good or in bad faith. And a purchase in bad faith, though it would subject the accused to prosecution for knowingly receiving stolen property, is matter defensive to a prosecution for theft of the property thus purchased with knowledge that the seller had stolen it. *McAfee* v. *State,* p. 403.

Possession of recently stolen property is not of itself sufficient to sustain a conviction for theft. The court charged as follows: "If the jury find that the property alleged to have been stolen was the property of the defendant, and that he had exercised actual control, care and management over the same, prior to the alleged taking, you will find the defendant not guilty." *Held,* error, inasmuch as when the evidence tended to show that defendant was the legal owner of the property, the effect of the charge was to destroy such defence, unless the defendant could show that he exercised actual control, care and management of the property prior to the taking. *McNair* v. *State,* pp. 469, 583.

Recent possession of stolen property insufficient alone to justify conviction. *See State* v. *Graves,* p. 523; *State* v. *Walker,* p. 526; *Yates* v. *State,* p. 527; *People* v. *Noregea,* p. 529; *Galloway* v. *State,* p. 530; *Gablich* v. *People,* p. 531; *State* v. *Hale,* p. 531, *and see* pp. 581, 582.

PRESUMPTION.

*See, also,* Possession of Stolen Property.

Uttering forged instrument does not raise presumption of forgery, p. 62.

"PROMISSORY NOTES."

*See, also,* Forgery.

Construed, pp. 98, 568.

PROSTITUTION.

Construed, pp. 726, 771, 772.

"PUBLIC HIGHWAY."

Construed, p. 722.

"PUBLIC SECURITY."

Construed, p. 568.

PUFFING.

*See* False Pretenses.

"PURPORTING TO BE ACT OF ANOTHER."

Construed, p. 50.

RABBITS.

*See* Animals.

RAILROAD COMPANY.

*See* Manslaughter.

RAILROAD TICKETS.

Not subject of larceny, p. 565.

RAPE.

Force is an essential ingredient in the crime of rape, and if a charge that if the defendant intended "to gratify his passion upon the person of the female, either by force or by surprise, and against her consent, then he is guilty as charged," is erroneous. *McNair* v. *State*, pp. 880, 897.

Force is essential to the crime of rape, and acts and devices without violence by which the moral nature of the woman is corrupted, and she can not resist, will not take its place. *People* v. *Royal*, pp. 882, 897.

In a statute punishing carnal knowledge or "abuse" in an attempt to have carnal knowledge, of a female child under ten years of age, the word "abuse" applies only to injuries to the genital organs in an unsuccessful attempt at rape, and does not include mere forcible or wrongful ill-usage. *Dawkins* v. *State*. p. 885.

On the trial of an indictment charging the defendant with an assault on his daughter with intent to commit a rape, it appeared that he uncovered her person as she was lying asleep in bed, and took indecent liberties with her person, and after she awoke endeavored to persuade her to let him have connection with her, and offered her money to induce

RAPE — *Continued.*

her to do so, and lay upon her, but she wholly refused his request, and he did not effect his purpose, and, when she finally refused, desisted from his attempt, and left her. *Held*, that there was no evidence of the felonious intent alleged. *Com.* v. *Merrill*, p. 887.

In order to sustain a conviction for assault with intent to commit rape, the proof must show that the assault was committed with the specific intent to commit rape. No other intent will suffice. A conviction for such offense is not supported by proof that the accused assaulted a woman with the intent of having improper connection with her, without the use of force, nor without her consent. *Thomas* v. *State*, p. 890.

On an indictment for assault with intent to commit rape it appeared that the prosecutrix with a boy six years old was trundling a carriage with a baby in it. The defendant seventy-five yards distant shouted, "Halt, I intend to ride in the carriage; if you don't halt, I'll kill you when I get hold of you." The prosecutrix ran, trundling the carriage, and the defendant pursued, telling her to stop, until she came up with another woman. *Held*, insufficient to convict of assault with intent to commit rape. *State* v. *Massey*, p. 895.

Penetration must be proved, p. 897.

And emission, p. 898.

Not rape if woman consent, p. 899.

Intent must be to succeed at all hazards, p. 899.

Convictions reversed for insufficient evidence. *People* v. *Ardega*, p. 899; *Christian* v. *Com.*, p. 900; *People* v. *Hamilton*, p. 901; *Boxley* v. *Com.*, p. 902.

Assault with intent to commit rape; intent to rape must be proved, p. 904.

Evidence held insufficient, pp. 905–910.
Penetration proved, p. 910.
Intoxication of prisoner, p. 910.

REASONABLE DOUBT.

*See* LARCENY.

"RECEIPT."

Construed, p. 98.

"RECEIPT FOR MONEY."

Construed, p. 98.

RECEIVING STOLEN PROPERTY.

Before a defendant can be convicted of receiving stolen property, it must satisfactorily appear beyond a doubt: (1) That the property was acquired by theft, and (2) that, knowing it to have been so acquired, he concealed the same. *Wilson* v *State*, p. 639.

A. and B. two thieves, were seen to come at midnight out of a house belonging to C.'s father, under the following circumstances: A. carried a

RECEIVING STOLEN PROPERTY — *Continued.*

sack containing the stolen goods; B. accompanied him; C. preceded them, carrying a lighted candle. All three go into an adjoining stable belonging to C., and then shut the door. Policemen enter the stable and find the sack lying on the floor tied at the mouth, and the three men standing round it as if they were bargaining; but no particular words were heard. *Held*, by eight judges to four, that on this evidence C. could not be convicted of receiving stolen goods; inasmuch as although there was evidence of a criminal intent to receive and of a knowledge that the goods were stolen, yet the exclusive possession of them still remained in the thieves, and therefore C. had no possession, either actual or constructive. *R.* v. *Wiley*, p. 643.

A passenger's baggage in charge of a railway company was stolen from the railway station. Afterwards the thieves sent a portion of it in a bundle, and delivered it to the same railway company to be forwarded by them to B., at Brighton. When it arrived at Brighton, the police officer attached to the railway company examined the bundle, and finding it to contain part of the stolen property, directed a porter not to part with it until further orders. The thieves were then arrested and on the following day the bundle was sent by the railway company to B., who having received it, was charged with feloniously receiving it. *Held*, that the charge could not be sustained, the property having been obtained by the owners from whom it had been stolen before the receiving by prisoner. *R.* v. *Schmidt*, p. 653.

If stolen goods are restored to the possession of the owner, and he returns them to the thief for the purpose of enabling him to sell them to a third person, they are no longer stolen goods, and that third person can not be convicted of feloniously receiving stolen goods, although he received them, believing them to be stolen. Where, therefore, stolen goods were found in the pocket of the thief by the owner, who sent for a policeman; and it was proved that after the policeman had taken the goods, the three went together towards the prisoner's shop where the thief had previously sold other stolen goods; that when near that shop, the policeman gave the goods to the thief who was sent by the owner into the shop to sell them, and that the thief accordingly sold them to the prisoner, and then returned with the proceeds to the owner. *Held*, that the prisoner was not guilty of feloniously receiving stolen goods; inasmuch as they were delivered to him under the authority of the owner by a person to whom the owner had bailed them for that purpose. *R.* v. *Dolan*, p. 658.

One can not be convicted of receiving stolen property from a thief on proof that he received it from another person. *U. S.* v. *De Barr*, p. 662.

On an indictment for receiving stolen property, when it is shown that before the defendant received the property it had been recovered, and had lost its character as stolen property, by passing into the hands of the owner or his agents, the charge fails *Id.*

In order to convict under section 239, of the criminal code, for receiving and aiding in concealing stolen goods for gain, or to prevent the owner from receiving the same, etc., it is essential, first to show that the

RECEIVING STOLEN PROPERTY — *Continued.*

property alleged to have been received or concealed, was in fact stolen; secondly, that the accused received the goods, knowing them to have been stolen, guilty knowledge being an essential ingredient of the crime; and lastly, that the accused, for his own gain, or to prevent the owner from recovering the same, bought, received or aided in concealing the stolen goods. *Aldrich* v. *People*, p. 665.

Where a defendant, on behalf of the owner, receives stolen goods from the thief, for the honest purpose of restoring them to the owner, without fee or reward, or the expectation of any pecuniary compensation, and in fact, immediately after obtaining their possession restores all he receives to the owner, and is not acting in concert or connection with the party stealing, to make a profit out of the transaction, he will not be guilty, under the statute. *Id.*

Receiving embezzled property not criminal. *Leal* v. *State*, p. 671.

Bank-notes are not "goods and chattels," and the receiver of stolen bank-notes can not be indicted under the statute making it a misdemeanor to receive stolen "goods or chattels. *State* v. *Calvin*, pp. 674, 678.

Goods must be stolen, p. 677.

Must be actually in prisoner's possession, p. 677.

Stoppage in *transitu* before receipt, p. 677.

Knowledge that goods were stolen essential, p. 677.

Stealer not receiver, p. 678.

Principal and accessory, p. 678.

Receiving property stolen from mail, p. 678.

Is not larceny, p. 581.

"RECORD."

Construction, p. 98.

RES GESTÆ.

Deceased, who was in company with the prisoner C. and S. was stabbed at night in the dark and after walking one hundred yards fell, and soon after became insensible and remained so until the next morning. C. offered to prove that four hours after the return of consciousness, S. was taken by the sheriff to the deceased, who recognized S. as the man who stabbed him. *Held*, inadmissible. *State* v. *Curtis*, p. 1072.

ROBBERY.

The mere snatching a thing from the hand or person of another without any struggle or resistance by the owner, or any force or violence on the part of the thief, will not constitute robbery. Where the court instructed the jury that feloniously taking another's property with violence sufficient to constitute an assault and battery would make out the crime of robbery, it was held to be erroneous, and the prisoner having been convicted under such a charge, the judgment was reversed. *Mc-Closkey* v. *People*, p. 684.

When the property is not obtained by putting the person in fear of immediate injury to the person, the violence necessary to make the offense

ROBBERY — *Continued.*

amount to robbery must be sufficient to force the person to part with his property, not only against his own will, but in spite of his resistance. *Id.*

Robbery is committed by force, larceny by stealth, and where there is no violence or circumstance of terror resorted to for the purpose of inducing the owner to part with his property, for the sake of his person, the crime committed is not robbery, but larceny. *State* v. *John*, p. 687.

To constitute robbery, the force used must be either before or at the time of the taking, and of such nature as to show that it was intended to overpower the party robbed, or to prevent resistance on his part, and not merely to get possession of the property. *Id.*

Money was snatched from A.'s hand by B. but without violence to his person, the only violence used being in preventing its recovery and struggling to retain it after it was taken. *Held*, that such snatching or taking was not such violence as to constitute robbery, and that subsequent violence, or putting in fear, will not make a previous clandestine taking robbery. *Shinn* v. *State*, p. 693.

An indictment, which alleges that the defendant assaulted and robbed A., and being armed with a dangerous weapon, did strike and wound him, is not proved, as to the wounding, by evidence that the defendant made a slight scratch on A.'s face, by rupturing the cuticle only, without separating the whole skin; nor as to the striking, by evidence that the defendant put his arms about A.'s neck, and threw him on the ground, and held him jammed down to the ground. *Com.* v. *Gallagher*, p. 696.

To constitute the offense made punishable by the Revised Statutes, the articles stolen must be carried away by the robber, and must be the property of the person robbed, or of some third person; and these facts must be alleged in an indictment on that section, in the same manner, as an indictment for robbery at common law. *Com.* v. *Clifford*, p. 698.

Robbery is defined by the penal code, and to constitute the offense the property must be taken either by assault, or by violence, and putting in fear of life or bodily injury. If it be by assault, violence and putting in fear may be omitted in the indictment, and if by violence and putting in fear, assault may be omitted. *Kimble* v. *State*, p. 701.

But where the indictment charges by "assault and putting in fear of bodily injury" though the indictment would be good on the ground of assault (treating "putting in fear" as surplusage), still if, as in this case, the ground of assault be abandoned, the conviction can not be sustained on the other ground, because of the omission of the necessary descriptive term "violence" in the indictment. *Id.*

Evidence held insufficient to sustain a conviction for robbery by means of an assault. *Id.*

In order to constitute the statutory offense of demanding property with menaces, the "menaces" must cause such alarm as to unsettle the mind of the person on whom it operates, and take away from his acts that element of free voluntary action which alone constitutes consent. *R.* v. *Walton*, 703.

ROBBERY — *Continued.*

Where the menaces are not necessarily of such character, the question is for the jury whether they were made under such circumstances of intimidation. *Id.*

W. had obtained money by threatening to execute a distress warrant, which he had no authority to do. The judge directed the jury, that as a matter of law, this constituted a "menace" within the statute: *held*, error. *Id.*

To constitute robbery as distinguished from larceny from the person, there must be force or intimidation in the act; therefore, where a thief slipped his hand into the pocket of a lady and got his finger caught therein, and she felt the hand, and, turning, saw him unconcernedly looking at the houses, and caught him by the coat, which was left with her in making his escape, *held*, that the crime is larceny from the person, and not robbery, though the lady's pocket was torn in extracting his hand. *Fanning* v. *State*, p. 709.

Force must be used, p. 710.

Or putting in fear, p. 710.

Force must be used to overcome resistance, p. 710.

Fear must be of personal violence, p. 712.

Threat to prosecute on false charge, p. 712.

Threat of legal imprisonment, p. 713

Demand necessary, p. 714.

Putting in fear; bodily injury, p. 714.

Intent to steal at time necessary, p. 717.

Subsequent use of violence, p. 717.

Taking must be in prosecutor's presence, p. 717.

Property must be in possession of party robbed, p. 717.

Receiver not guilty of robbery, p. 718.

Article must be property of another, p. 718.

*Lucri causa* essential, p. 719.

Getting one's own by violence, p. 722.

"Public highway," p. 722.

Time of war, p. 722.

SEA WEED.

Not subject of larceny, p. 569.

SEDUCTION.

*See, also,* ABDUCTION.

To seduce a female is not an offense within the meaning of the two hundred and sixty-sixth section of the Penal Code, which makes it a crime to procure any female to have illicit carnal connection with any man. The act refers to one who procures the gratification of the passion of lewdness in another. *People* v *Roderigas*, p. 729.

SEDUCTION — *Continued.*

In an indictment under the statute for seducing a female of good repute under twenty-one years of age, under promise of marriage, the Commonwealth must prove affirmatively the good repute of the female. The proper practice in such case is for the Commonwealth to call witnesses to prove that the general reputation of the prosecutrix for chastity in the neighborhood in which she has lived is good. *Oliver* v. *Com.*, p. 732.

It is error for the court to charge the jury that they may infer good repute from the general evidence offered by the prosecution, not adduced for that purpose and having scarcely the slightest tendency in that direction. *Id.*

"Character" in seduction statute prescribing that woman be "of previously chaste character" signifies that which the person really is, in distinction from that which she may be reputed to be. To establish unchaste character of unmarried female on trial of indictment for seduction, it is not necessary to prove that she has been guilty of previous sexual intercourse, it is sufficient to show that she has been guilty of obscenity of language, indecency of conduct, and undue familiarity with men and the like. *Andre* v. *State*, p. 743.

"Previous chastity" in the seduction statute would signify mere actual chastity or freedom from sexual intercourse, but "previously chaste character" does not signify merely this, but also purity of mind and innocence of heart. *Id.*

The defendant at the time the alleged seduction was about sixteen years of age, and the prosecutrix was about six years older, and a woman of very considerable experience with men of her own age, and had known defendant from his boyhood. It appeared that the illicit intercourse was not confined to one occasion, but was deliberately permitted from time to time till within two months of the birth of the child. It also appeared that prosecutrix had had confidential relations with many men to whom she had permitted unbecoming familiarities, and had conducted herself in a manner indicative of great laxity of moral obligation. *Held*, on the whole case, that as the evidence was strongly against the probability of the alleged promise to marry, and against the purity of character of the prosecutrix, a new trial must be granted. *People* v. *Eckert*, p. 748,

Upon the trial of an indictment for seduction under promise of marriage, the defendant, who has testified in his own behalf, may be asked on cross-examination, for the purpose of affecting his credibility, if he has had sexual intercourse with a person other than the prosecutrix, and in no way connected with the action. *Id.*

In order to warrant a conviction for seduction under a promise of marriage in accordnnce with the provisions of the act of March 31, 1860, there must be evidence to corroborate the prosecutrix, in regard to the promise of marriage. *Rice* v. *Com.*, p. 759.

The fact that a defendant charged with seduction is now allowed to testify in his own behalf, does not alter the law, in regard to the necessity of

SEDUCTION — *Continued.*

evidence corroborative of that of the prosecutrix, as to the promise of marriage. *Id.*

What circumstances do and what do not constitute sufficient corroborative evidence to warrant a conviction in such case considered. *Id.*

Where in such case there is some proof that the defendant admitted the promise to marry, it is not error for the court to refuse to withdraw the question of seduction from the jury. *Id.*

On a trial for seduction under promise of marriage mere social attentions on the part of the defendant to the prosecutrix are not sufficient to corroborate her testimony of a promise of marriage. *Rice* v. *Com.*, p. 764.

Evidence that the defendant confessed to the seduction and declared an intention to make amends by marrying the prosecutrix does not raise an inference of a previous promise of marriage; nor does proof that he wished to settle the case by payment of money. *Id.*

Where the woman does not consent to the intercourse the crime is not seduction. *Croghan* v. *State*, pp. 767, 780.

The court charged the jury that "if the woman ultimately consented to the illicit intercourse the crime was seduction, though she consented partly through fear, and partly because the defendant hurt her." *Held*, error. *Id.*

"Previous chaste character," pp. 775, 776.

"Purpose of prostitution," p. 776.

Promise of marriage necessary, p. 776.

Married man not guilty of, p. 777.

Marriage of parties, 780.

Seduction of ward by guardian, p. 780.

Evidence held insufficient to convict, p. 781

"SHARES."

Construed, p. 98.

"SHARP DANGEROUS WEAPON."

Construed, p. 878.

"SHOP."

Construed, p. 580.

SPRING GUNS.

It is unlawful for the occupant of lands to set spring-guns or other mischievous weapons on his premises and if the same cause death to any trespasser it is a criminal homicide. But to authorize a conviction of assault with intent to commit a murder, a specific felonious intent must be proved; and so when one plants such weapons with the general intent to commit murder. The intent to kill that particular person alone must be shown and can not be implied from the general conduct. *Simpson* v. *State*, p. 833.

SWINDLING.

*See* False Pretenses.

"UNDERTAKING."

Construed, p. 99.

"UTTERING."

Construed, p. 85.

"VALUABLE SECURITY."

Construed, pp. 328, 388.

VALUE.

Where the value of the article stolen is material in a prosecution for larceny, its value is to be fixed by its market price, and not by what it is worth to its owner, or for the particular purpose for which it is used. It is to be regarded as worth just what it would fetch in the open market. *State* v. *Doepke*, p. 474.

To be larceny property stolen must have some value, p. 572.

Opening letter addressed to another, p. 572.

Value of list of subscribers, p. 573.

"VOLUNTARY."

Coustrued, pp. 534, 536.

"WAREHOUSE."

Construed, p. 580.

"WARRANT."

Construed, p. 99.

WORDS AND PHRASES.

(*See* the different titles.)

"WOUNDING."

Construed, p. 877.

WRAPPERS.

Of baking powders not subject of forgery, p. 17.

"WRITING CONTAINING EVIDENCE OF ANY EXISTING DEBT."

Construed, p. 573.

"WRITTEN INSTRUMENT."

Construed, p. 388.