FALSE STATEMENT BY PUBLIC OFFICER. (*New*).

367. Every one is guilty of an indictable offence and liable to five years' imprisonment, and to a fine not exceeding five hundred dollars, who, being an officer, collector or receiver, intrusted with the receipt, custody or management of any part of the public revenues, knowingly furnishes any false statement or return of any sum of money collected by him or intrusted to his care, or of any balance of money in his hands or under his control.

This section is a re-enactment of 50 Geo. III. c. 59, s, 2, with an increased punishment. It ought to form part of the preceding section.

ASSIGNING WITH INTENT TO DEFRAUD.

368. Every one is guilty of an indictable offence and liable to a fine of eight hundred dollars and to one year's imprisonment who—

(*a*) with intent to defraud his creditors, or any of them,

(i) makes, or causes to be made, any gift, conveyance, assignment, sale, transfer or delivery of his property;

(ii) removes, conceals or disposes of any of his property; or

(*b*) with the intent that any one shall so defraud his creditors, or any one of them, receives any such property. R. S. C. c. 173, s. 28.

This is a re-enactment of c. 26, s. 20, C. S. U. C. *See* R. v. Henry, 21 O. R. 113.

DESTROYING BOOKS WITH INTENT TO DEFRAUD.

369. Every one is guilty of an indictable offence and liable to *ten years'* imprisonment who, with intent to defraud his creditors, or any of them, destroys, alters, mutilates or falsifies any of his books, papers, writings or securities, or makes, or is privy to the making of, any false or fraudulent entry in any book of account or other document. R. S. C. c. 173, s. 27.

This is also taken from c. 26, C. S. U. C. Under the repealed clause the punishment was *six months'* imprisonment.

CONCEALING DEEDS OR INCUMBRANCES.

370. Every one is guilty of an indictable offence and liable to a fine, or to two years' imprisonment, or to both, who being a seller or mortgagor of land, or of any chattel, real or personal, or chose in action, or the solicitor or agent of any such seller or mortgagor (and having been served with a written demand of an abstract of title by or on behalf of the purchaser or mortgagee before the completion of the purchase or mortgage) conceals any settlement, deed, will or other instrument material to the title, or any encumbrance, from such purchaser or mortgagee, or falsifies any pedigree upon which the title depends, with intent to defraud and in order to induce such purchaser or mortgagee to accept the title offered or produced to him. R. S. C. c. 164, s. 91.

No prosecution without leave of Attorney-General of the Province; s. 548.

FRAUD IN REGISTRATION.

371. Every one is guilty of an indictable offence and liable to three years' imprisonment who, acting either as principal or agent, in any proceeding to obtain the registration of any title to land or otherwise, or in any transaction relating to land which is, or is proposed to be, put on the register, knowingly and with intent to deceive makes or assists or joins in, or is privy to the making of, any material false statement or representation, or suppresses, conceals, assists or joins in, or is privy to the suppression, withholding or concealing from, any judge or registrar, or any person employed by or assisting the registrar, any material document, fact or matter of information. R. S. C. c. 164, ss. 96 & 97.

This section, by the repealed Act, applied only to British Columbia.

Fine, s. 958.

FRAUDULENT SALES, HYPOTHECATIONS, SEIZURES, ETC.

372. Every one is guilty of an indictable offence and liable to one year's imprisonment, and to a fine not exceeding two thousand dollars, who, knowing the existence of any unregistered prior sale, grant, mortgage, hypothec, privilege or encumbrance of or upon any real property, fraudulently makes any subsequent sale of the same, or of any part thereof. R. S. C. c. 164, ss. 92 & 93.

See R. v. Palliser, 4 L. C. J. 276.

373. Every one who pretends to hypothecate, mortgage, or otherwise charge any real property to which he knows he has no legal or equitable title is guilty of an indictable offence and liable to one year's imprisonment, and to a fine not exceeding one hundred dollars.

2. The proof of the ownership of the real estate rests with the person so pretending to deal with the same. R. S. C. c. 164, ss. 92 & 94.

374. Every one is guilty of an indictable offence and liable to one year's imprisonment who, *in the province of Quebec*, wilfully causes or procures to be seized and taken in execution any lands and tenements, or other real property, not being, at the time of such seizure, to the knowledge of the person causing the same to be taken in execution, the *bona fide* property of the person or persons against whom, or whose estate, the execution is issued. R. S. C. c. 164, ss. 92 & 95.

Fine, s. 958. These three sections, by the repealed statute, applied only to the Province of Quebec. Why s. 374 has also not been either extended to the other Provinces or repealed, has not been explained.

UNLAWFUL DEALINGS WITH GOLD.

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

(*a*) being the holder of any lease or license issued under the provisions of any Act relating to gold or silver mining, or by any persons owning land supposed to contain any gold or silver, by fraudulent device or contrivance defrauds or attempts to defraud Her Majesty, or any person, of any gold, silver or money payable or reserved by such lease, or, with such intent as aforesaid, conceals or makes a false statement as to the amount of gold or silver procured by him; or

(*b*) not being the owner or agent of the owners of mining claims then being worked, and not being thereunto authorized in writing by the proper officer on that behalf named in any Act relating to mines in force in any province of Canada, sells or purchases (except to or from such owner or authorized person) any quartz containing gold, or any smelted gold or silver, at or within three miles of any gold district or mining district, or gold mining division; or

(*c*) purchases any gold in quartz, or any unsmelted or smelted gold or silver, or otherwise unmanufactured gold or silver, of the value of one dollar or upwards (except from such owner or authorized person), and does not, at the same time, execute in triplicate an instrument in writing, stating the place and time of purchase, and the quantity, quality and value of gold or silver so purchased, and the name or names of the person or persons from whom the same was purchased, and file the same with such proper officer within twenty days next after the date of such purchase. R. S. C. c. 164, ss. 27, 28 & 29.

Fine, s. 958; s. 569 for search warrant, and s. 621 for indictment.

WAREHOUSEMEN GIVING FALSE RECEIPTS.

376. Every one is guilty of an indictable offence and liable to three years' imprisonment, who—

(*a*) being the keeper of any warehouse, or a forwarder, miller, master of a vessel, wharfinger, keeper of a cove, yard, harbour or other place for storing timber, deals, staves, boards, or lumber, curer or packer of pork, or dealer in wool, carrier, factor, agent or other person, or a clerk or other person in his employ, knowingly and wilfully gives to any person a writing purporting to be a receipt for, or an acknowledgment of, any goods or other property as having been received into his warehouse, vessel, cove, wharf, or other place, or in any such place about which he is employed, or in any other manner received by him, or by the person in or about whose business he is employed, before the goods or other property named in such receipt, acknowledgment or writing have been actually delivered to or received by him as aforesaid, with intent to mislead, deceive, injure or defraud any person, although such person is then unknown to him; or

(*b*) knowingly and wilfully accepts, transmits or uses any such false receipt or acknowledgment or writing. R. S. C. c. 164, s. 73.

Fine, s. 958; *see* s. 379. This is not in the Imperial Act.

FRAUDS IN TRADE, ETC.

377. Every one is guilty of an indictable offence and liable to three years' imprisonment, who—

(*a*) having, in his name, shipped or delivered to the keeper of any warehouse, or to any other factor, agent or carrier, to be shipped or carried, any merchandise upon which the consignee has advanced any money or given any valuable security afterwards, with intent to deceive, defraud or injure such consignee, in violation of good faith, and without the consent of such consignee, makes any disposition of such merchandise different from and inconsistent with the agreement made in that behalf between him and such consignee at the time of or before such money was so advanced or such negotiable security so given; or

(*b*) knowingly and wilfully aids and assists in making such disposition for the purpose of deceiving, defrauding or injuring such consignee.

2. No person commits an offence under this section who, before making such disposition of such merchandise, pays or tenders to the consignee the full amount of any advance made thereon. R. S. C. c. 164, s. 74.

Fine, s. 958; *see* s. 379. This is not in the Imperial Act.

OTHER FRAUDS.

378. Every person is guilty of an indictable offence and liable to three years' imprisonment who—

(*a*) wilfully makes any false statement in any receipt, certificate or acknowledgment for grain, timber or other goods or property which can be used for any of the purposes mentioned in *The Bank Act*; or

(*b*) having given, or after any clerk or person in his employ has, to his knowledge, given, as having been received by him in any mill, warehouse, vessel, cove or other place, any such receipt, certificate or acknowledgment for any such grain, timber or other goods or property,—or having obtained any such receipt, certificate or acknowledgment, and after having endorsed or assigned it to any bank or person, afterwards, and without the consent of the holder or endorsee in writing, or the production and delivery of the receipt, certificate or acknowledgment, wilfully alienates or parts with, or does not deliver to such holder or owner of such receipt, certificate or acknowledgment, the grain, timber, goods or other property therein mentioned. R. S. C. c. 164, s. 75.

Fine, s. 958; *see* next section. This is not in the Imperial Act.

379. If any offence mentioned in any of the three sections next preceding is committed by the doing of anything in the name of any firm, company or co-partnership of persons, the person by whom such thing is actually done, or who connives at the doing thereof, is guilty of the offence, and not any other person. R. S. C. c. 164, s. 76.

Section 197 of c. 174, R. S. C., which applied to the three preceding sections, has not been re-enacted.

SELLING WRECKS, ETC.

380. Every one is guilty of an indictable offence and liable to seven years' imprisonment who, not having lawful title thereto, sells any vessel or wreck found within the limits of Canada. R. S. C. c. 81, s. 36 (*d*).

"Wreck" defined, s. 3.

OTHER OFFENCES RESPECTING WRECK.

381. Every one is guilty of an indictable offence and liable, on conviction on indictment to two years' imprisonment, and on summary conviction before two justices of the peace to a penalty of four hundred dollars or six months' imprisonment, with or without hard labour, who—

(*a*) secretes any wreck, or defaces or obliterates the marks thereon, or uses means to disguise the fact that it is wreck, or in any manner conceals the character thereof, or the fact that the same is such wreck, from any person entitled to inquire into the same; or

(*b*) receives any wreck, knowing the same to be wreck, from any person, other than the owner thereof or the receiver of wrecks, and does not within forty-eight hours inform the receiver thereof;

(*c*) offers for sale or otherwise deals with any wreck, knowing it to be wreck, not having a lawful title to sell or deal with the same; or

(*d*) keeps in his possession any wreck, knowing it to be wreck, without a lawful title so to keep the same, for any time longer than the time reasonably necessary for the delivery of the same to the receiver; or

(*e*) boards any vessel which is wrecked, stranded or in distress against the will of the master, unless the person so boarding is, or acts by command of, the receiver. R. S. C. c. 81, s. 37.

OFFENCES—MARINE STORES—PUBLIC STORES, ETC.

382. Every person who deals in the purchase of old marine stores of any description, including anchors, cables, sales, junk, iron, copper, brass, lead and other marine stores, and who, by himself or his agent, purchases any old marine stores from any person under the age of sixteen years, is guilty of an offence and liable, on summary conviction, to a penalty of four dollars for the first offence and of six dollars for every subsequent offence.

2. Every such person who, by himself or his agent, purchases or receives any old marine stores into his shop, premises or places of deposit, except in the day-time between sunrise and sunset, is guilty of an offence and liable, on summary conviction, to a penalty of five dollars for the first offence and of seven dollars for every subsequent offence.

3. Every person, purporting to be a dealer in old marine stores, on whose premises any such stores which were stolen are found secreted is guilty of an indictable offence and liable to five years' imprisonment. R. S. C. c. 81, s. 35.

383. In the next six sections, the following expressions have the meaning assigned to them herein:

(*a*) The expression "public department" includes the Admiralty and the War Department, and also any public department or office of the Government

of Canada, or of the public or civil service thereof, or any branch of such department or office;

(*b*) The expression "public stores" includes all stores under the care, superintendence or control of any public department as herein defined, or of any person in the service of such department;

(*c*) The expression "stores" includes all goods and chattels, and any single store or article. 50-51 V. c. 45 s. 2.

Section 570, as to search-warrant.

The Imperial statute on public stores is 38 & 39 V. c. 25.

384. The following marks may be applied in or on any public stores to denote Her Majesty's property in such stores, and it shall be lawful for any public department, and the contractors, officers and workmen of such department, to apply such marks, or any of them, in or on any such stores:—

Marks appropriated for Her Majesty's use in or on Naval, Military, Ordnance, Barrack, Hospital and Victualling Stores.

STORES.	MARKS.
Hempen cordage and wire rope.	White, black or coloured threads laid up with the yarns and the wire, respectively.
Canvas, fearnought, hammocks and seamen's bags.	A blue line in a serpentine form.
Bunting.	A double tape in the warp.
Candles.	Blue or red cotton threads in each wick or wicks of red cotton.
Timber, metal and other stores not before enumerated	The broad arrow, with or without the letters W. D.

Marks appropriated for use on Stores, the property of Her Majesty in the right of Her Government of Canada.

STORES.	MARKS.
Public stores.	The name of any public department, or the word "Canada," either alone or in combination with a Crown or the Royal Arms.

50-51 V. c. 45, s. 3. 53 V. c. 38.

385. Every one is guilty of an indictable offence and liable to *two* years' imprisonment who, without lawful authority the proof of which shall lie on him, applies any of the said marks in or on any public stores. 50-51 V. c. 45. s. 4.

Fine, s. 958; *see* s. 709 as to offences under this and the four next following sections.

Indictment.— that A. B., on the day of , unlawfully and without lawful authority applied a certain mark, to wit, a double tape in the warp, in and on certain stores, to wit, five hundred yards of bunting.

386. Every one is guilty of an indictable offence and liable to *two* years' imprisonment who, with intent to conceal Her Majesty's property in any public stores, takes out, destroys or obliterates, wholly or in part, any of the said marks. 50-51 V. c. 45, s. 5.

Fine, s. 958.

Indictment.— The jurors for our lady the Queen present that J. S., on the first day of June, in the year of our Lord , unlawfully, with intent to conceal Her Majesty's property in the stores hereinafter mentioned, took out ("*takes out, destroys, or obliterates, wholly or in part*") from 100 yards of canvas, which said canvas was then stores of and belonging to Her Majesty, and under the care, superintendence and control of the (*as the case may be*), a certain mark, to wit, a blue line in a serpentine form, which said mark was then applied on the said canvas in order to denote Her said Majesty's property therein.

387. Every one who, without lawful authority the proof of which lies on him, receives, possesses, keeps, sells or delivers any public stores bearing any such mark, is guilty of an indictable offence and liable on conviction on indictment to one year's imprisonment and, if the value thereof does not exceed twenty-five dollars, on summary conviction, before two justices of the peace, to a fine of one hundred dollars or to six months' imprisonment, with or without hard labour. 50-51 V. c. 45, ss. 6 & 8.

Fine, s. 958.

Indictment.— that T. V., on the day of , without lawful authority, unlawfully possessed ("*receives, possesses, keeps, sells, or delivers*") five hundred yards of canvas, which said canvas was then naval stores of and belonging to Her Majesty, and then bore a certain mark ("*any such mark as aforesaid,*"), to wit, a blue line in a serpentine form, then applied thereon, in order to denote Her Majesty's property in naval stores so marked, the said T. V., then well knowing the said canvas to bear the said mark.

388. Every one, not being in Her Majesty's service, or a dealer in marine stores or a dealer in old metals, in whose possession any public stores bearing any such mark are found who, when taken or summoned before two justices of the peace, does not satisfy such justices that he came lawfully by such stores so found, is guilty of an offence and liable, on summary conviction, to a fine of twenty-five dollars; and

2. If any such person satisfies such justices that he came lawfully by the stores so found, the justices, in their discretion, as the evidence given or the circumstances of the case require, may summon before them every person through whose hands such stores appear to have passed; and

3. Every one who has had possession thereof, who does not satisfy such justices that he came lawfully by the same, is liable, on summary conviction of having had possession thereof, to a fine of twenty-five dollars, and in default of payment to three months' imprisonment with or without hard labour. 50-51 V. c. 45, s. 9.

Having in possession, defined, s. 3.

389. Every one who, without permission in writing from the Admiralty, or from some person authorized by the Admiralty in that behalf, creeps, sweeps, dredges, or otherwise searches for stores in the sea, or any tidal or inland water, within one hundred yards from any vessel belonging to Her Majesty, or in Her Majesty's service, or from any mooring place or anchoring place appropriated to such vessels, or from any mooring belonging to Her Majesty, or from any of Her Majesty's wharfs or docks, victualling or steam factory yards, is guilty of an offence and liable, on summary conviction before two justices of the peace, to a fine of twenty-five dollars, or to three months' imprisonment, with or without hard labour. 50-51 V. c. 45, ss. 11 & 12.

RECEIVING SOLDIERS' OR SAILORS' NECESSARIES.

390. Every one is guilty of an indictable offence and liable on conviction on indictment to five years' imprisonment, and on summary conviction before two justices of the peace to a penalty not exceeding forty dollars, and not less than twenty dollars and costs, and, in default of payment, to six months' imprisonment, with or without hard labour, who—

(*a*) buys, exchanges or detains, or otherwise receives from any soldier, militiaman or deserter any arms, clothing or furniture belonging to Her Majesty, or any such articles belonging to any soldier, militiaman or deserter as are generally deemed regimental necessaries according to the custom of the army; or

(*b*) causes the colour of such clothing or articles to be changed; or

(*c*) exchanges, buys or receives from any soldier or militiaman any provisions, without leave in writing from the officer commanding the regiment or detachment to which such soldier belongs. R. S. C. c. 169, ss. 2 & 4.

391. Every one is guilty of an indictable offence and liable, on conviction on indictment, to five years' imprisonment, and on summary conviction before two justices of the peace to a penalty not exceeding one hundred and twenty dollars, and not less than twenty dollars and costs, and in default of payment to six months' imprisonment, who buys, exchanges or detains, or otherwise receives, from any seaman or marine, upon any account whatsoever, or has in his possession, any arms or clothing, or any such articles, belonging to any seaman, marine or deserter, as are generally deemed necessaries according to the custom of the navy. R. S. C. c. 169, ss. 3 & 4.

Fine, s. 958. "Having in possession" defined, s. 3; *see* next section. These four sections, 390, 391, 392, 393, should form only one.

392. Every one is guilty of an indictable offence who detains, buys, exchanges, takes on pawn or receives, from any seaman or any person acting for a seaman, any seaman's property, or solicits or entices any seaman, or is employed by any seaman to sell, exchange or pawn any seaman's property, unless he acts in ignorance of the same being seaman's property, or of the person with whom he deals being or acting for a seaman, or unless the same was sold by the order of the Admiralty or Commander-in-Chief.

2. The offender is liable, on conviction on indictment to five years' imprisonment, and on summary conviction to a penalty not exceeding one hundred dollars; and for a second offence, to the same penalty, or, in the discretion of the justice, to six months' imprisonment, with or without hard labour.

3. The expression "seaman" means every person, not being a commissioned, warrant or subordinate officer, who is in or belongs to Her Majesty's navy, and is borne on the books of any one of Her Majesty's ships in commission, and every person, not being an officer as aforesaid, who, being borne on the books of any hired vessel in Her Majesty's service, is, by virtue of any Act of Parliament of the United Kingdom for the time being in force for the discipline of the navy, subject to the provisions of such Act.

4. The expression "seaman's property" means any clothes, slops, medals, necessaries or articles usually deemed to be necessaries for sailors on board ship, which belong to any seaman.

5. The expression "Admiralty" means the Lord High Admiral of the United Kingdom, or the Commissioners for executing the office of Lord High Admiral. R. S. C. c. 171, ss. 1 & 2.

393. Every one in whose possession any seaman's property is found who does not satisfy the justice of the peace before whom he is taken or summoned that he came by such property lawfully is liable, on summary conviction, to a fine of twenty-five dollars. R. S. C. c. 171, s. 3.

"Having in possession" defined, s. 3.

CONSPIRACY TO DEFRAUD. (*New*).

394. Every one is guilty of an indictable offence and liable to seven years' imprisonment who conspires with any other person, by deceit or falsehood or other fraudulent means, to defraud the public or any person, ascertained or unascertained, or to affect the public market price of stocks, shares, merchandise or anything else publicly sold, whether such deceit or falsehood or other fraudulent means would or would not amount to a false pretense as hereinbefore defined.

Sections 613, 616, as to indictment.

This is a common law misdemeanour;

Indictment.— that A. B. and C. D., on unlawfully, fraudulently and deceitfully did conspire and agree together to defraud the public by falsely : 3 Chit. 1139, 1164.

A conspiracy for concealing treasure trove might, perhaps, be indictable under this section. By s. 3, the word *person* includes Her Majesty. As to the offence of concealing treasure trove, *see* R. v. Thomas, Warb. Lead. Cas. 79.

CHEATING AT PLAY, ETC.

395. Every one is guilty of an indictable offence and liable to three years' imprisonment who, with intent to defraud any person, cheats in playing at any game, or in holding the stakes, or in betting on any event. R. S. C. c. 164, s. 80. (*Amended*). 8-9 V. c. 109, s. 17 (Imp.).

Fine, s. 958; ss. 613, 616, as to indictment.

Indictment.— that A. B., on in playing at and with cards (*any game*) unlawfully did, with intent to defraud C. D., and others, cheat, (*or unlawfully did by fraud and cheating win from the said C. D. a sum of one hundred dollars.*)

See R. v. Moss, Dears. & B. 104; R. v. Hudson, Bell, 263; R. v. Rogier, 2 D. & R. 431; R. v. Bailey, 4 Cox, 392; R. v. O'Connor, 15 Cox, 3.

The Imperial Act, 14 & 15 V. c. 100, s. 29 (*Lord Campbell's Act*,) also provides for the punishment of cheats, frauds and conspiracies, not otherwise specially provided for.

In R. v. Roy, 11 L. C. J. 89, Mr. Justice Drummond said: "The only cheats or frauds punishable at common law are the fraudulent obtaining of the property of another by any deceitful and illegal practice, or token, *which affects or may affect the public, or such frauds as are levelled against the public justice of the realm.*"

It is not every species of fraud or dishonesty in transactions between individuals which is the subject matter of a criminal charge at common law: 2 East, P. C. 816.

Fraud, to be the object of criminal prosecution, must be of that kind which in its nature is calculated to defraud numbers, as false weights or measures, false tokens, or where there is a conspiracy; *per* Lord Mansfield: R. v. Wheatly, 2 Burr. 1125.

So cheats, by means of a bare lie, or false affirmation in a private transaction, as if a man selling a sack of corn falsely affirms it to be a bushel, where it is greatly deficient, has been holden not to be indictable: R. v. Pinkney, 2 East, P. C. 818.

So, in R. v. Channell, 2 East, P. C. 818, it was held that a miller charged with illegally taking and keeping corn could not be criminally prosecuted.

And in R. v. Lara, cited in 2 East, P. C. 819, it was held that selling sixteen gallons of liquor for and as eighteen gallons, and getting paid for the eighteen gallons, was an unfair dealing and an imposition, but not an indictable offence.

The result of the cases appears to be, that if a man sell by *false weights*, though only to one person, it is an indictable offence, but if, without false weights, he sell, even to many persons, a *less quantity* than he pretends to do, it is not indictable: 2 Russ. 610; R. v. Eagleton, Dears. 376, 515.

If a man, 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 token or mark, that would be a cheat at common law, but the indictment, in such a case, must show clearly that it was by means of such false token that the defendant obtained the money: by Chief Justice Cockburn, in R. v. Closs, Dears. & B. 460.

Offences of this kind would now generally fall under the "*Trade Marks Offences*," s. 443, *post*.

Frauds and cheats by forgeries or false pretenses are also regulated by statute.

All frauds affecting the crown or the public at large are indictable, though arising out of a particular transaction or contract with a private party. So the giving to any person

unwholesome victuals, not fit for a man to eat, *lucri causa*, or from malice and deceit is an indictable misdemeanour: 2 East, P. C. 821, 822. And if a baker sell bread containing alum in a shape which renders it noxious, although he gave directions to his servants to mix it up in a manner which would have rendered it harmless, he commits an indictable offence; he who deals in a perilous article must be wary how he deals; otherwise, if he observe not proper caution, he will be responsible. The intent to injure in such cases is presumed, npon the universal principle that when a man does an act of which the probable consequence may be highly injurious, the intention is an inference of law resulting from doing the act: R. v. Dixon, 3 M. & S. 11.

If a person maim himself in order to have a more specious pretense for asking charity, or to prevent his being enlisted as a soldier, he may be indicted: 1 Hawk. 108.

In indictments for a cheat or fraud at common law it is not sufficient to allege generally that the cheat or fraud was effected by means of certain false tokens or false pretenses, but it is necessary to set forth what the false tokens or pretenses were, so that the court may see if the false tokens or pretenses are such within the law: 2 East, P. C. 837. But the indictment will be sufficient if upon the whole it appears that the money has been obtained by means of the pretense set forth, and that such pretense was false: 2 East, P. C. 838; *see* s. 616, *post*.

It would seem that s. 838, *post*, does not apply to cheats and frauds at common law, and that, therefore, the court has no power of awarding restitution of the property fraudulently obtained, upon convictions on indictments other than those brought for stealing or receiving stolen property: 2 East, P. C. 839.

Upon an indictment for any offence, if it appears to the jury upon the evidence that the defendant did not complete the offence charged, but that he was guilty only of an

attempt to commit the same, the jury may convict of the attempt: s. 711, *post.*

PRACTISING WITCHCRAFT, ETC. (*New*).

396. Every one is guilty of an indictable offence and liable to one year's imprisonment who pretends to exercise or use any kind of witchcraft, sorcery, enchantment or conjuration, or undertakes to tell fortunes, or pretends from his skill or knowledge in any occult or crafty science, to discover where or in what manner any goods or chattels supposed to have been stolen or lost may be found.

Fine, s. 958.—This section is a re-enactment of 9 Geo. II. c. 5, s. 4: *see* R. v. Milford, 20 O. R. 306; 2 Stephen's Hist. 430.

ROBBERY.

The crime of robbery is a species of theft, aggravated by the circumstances of a taking of the property *from the person or whilst it is under the protection of the person by means either of violence* "or" *putting in fear*: 4th Rep. Cr. L. Commrs. LXVII.

Robbery is larceny committed by violence from the person of one put in fear: 2 Bishop, Cr. L. 1156.

To constitute this offence there must be: 1. A larceny embracing the same elements as a simple larceny; 2. violence, but it need only be slight for anything which calls out resistance is sufficient, or, what will answer in place of actual violence, there must be such demonstrations as put the person robbed in fear. The demonstrations of fear must be of a physical nature; and 3. the taking must be from what is technically called the "person," the meaning of which expression is, not that it must necessarily be from the actual contact of the person, but it is sufficient if it is from the personal protection and presence: Bishop, Stat. Cr. 517.

1. *Larceny.*—Robbery is a compound larceny, that is, it is larceny aggravated by particular circumstances. Thus, the indictment for robbery must contain the description of the property stolen as in an indictment for larceny; the ownership must be in the same way set out, and so of the

rest. Then if the aggravating matter is not proved at the trial the defendant may be convicted of the simple larceny. If a statute makes it a larceny to steal a thing of which there could be no larceny at common law then it becomes, by construction of law, a robbery to take this thing forcibly and feloniously from the person of one put in fear: 2 Bishop, Cr. L. 1158, 1159, 1160. An actual taking either by force or upon delivery must be proved, that is, it must appear that the robber actually got *possession* of the goods. Therefore if a robber cut a man's girdle in order to get his purse, and the purse thereby fall to the ground, and the robber run off or be apprehended before he can take it up, this would not be robbery, because the purse was never in the possession of the robber: 1 Hale, P. C. 553.

But it is immaterial whether the taking were by force or upon delivery, and if by delivery it is also immaterial whether the robber have compelled the prosecutor to it by a direct demand in the ordinary way, or upon any colourable pretense.

A carrying away must also be proved as in other cases of larceny. And therefore where the defendant, upon meeting a man carrying a bed, told him to lay it down or he would shoot him, and the man accordingly laid down the bed, but the robber, before he could take it up so as to remove it from the place where it lay, was apprehended, the judges held that the robbery was not complete: R. v. Farrell, 1 Leach, 322.

But a momentary possession, though lost again in the same instant, is sufficient. James Lapier was convicted of robbing a lady, and taking from her person a diamond earring. The fact was that as the lady was coming out of the Opera house she felt the prisoner snatch at her earring and tear it from her ear. which bled, and she was much hurt, but the earring fell into her hair where it was found after she returned home. The judges were all of opinion that the earring being in the possession of the prisoner for

a moment, separate from the lady's person, was sufficient to constitute robbery, although he could not retain it but probably lost it again the same instant: 2 East, P. C. 557.

If the thief once takes possession of the thing the offence is complete, though he afterwards return it; as if a robber, finding little in a purse which he had taken from the owner, restored it to him again, or let it fall in struggling, and never take it up again, having once had possession of it: 2 East, *loc. cit.;* 1 Hale, 533; R. v. Peat, 1 Leach, 228.

The taking must have been done *animo furandi,* as in larceny, and against the will of the party robbed, that is, that they were either taken from him by force and violence, or delivered up by him to the defendant, under the impression of that degree of fear and apprehension which is necessary to constitute robbery.

Where, on an indictment for robbery, it appeared that the prosecutor owed the prisoner money, and had promised to pay him five pounds, and the prisoner violently assaulted the prosecutor and so forced him then and there to pay him his debt, Erle, C.J., said that it was no robbery, there being no felonious intent: R. v. Hemmings, 4 F. & F. 50.

2. *Violence.*—The prosecutor must either prove that he was actually in bodily fear from the defendant's actions, at the time of the robbery, or he must prove circumstances from which the court and jury may presume such a degree of apprehension of danger as would induce the prosecutor to part with his property; and in this latter case, if the circumstances thus proved be such as are calculated to create such a fear, the court will not pursue the inquiry further, and examine whether the fear actually existed. Therefore, if a man knock another down, and steal from him his property whilst he is insensible on the ground, that is robbery. Or suppose a man makes a manful resistance, but is overpowered, and his property taken

from him by the mere dint of superior strength, this is a robbery: Fost. 128; R. v. Davies, 2 East, P. C. 709.

One Mrs. Jeffries, coming out of a ball, at St. James' Palace, where she had been as one of the maids of honour, the prisoner snatched a diamond pin from her head-dress with such force as to remove it with part of the hair from the place in which it was fixed, and ran away with it: *Held*, to be a robbery: R. v. Moore, 1 Leach, 335. *See* Lapier's Case, 1 Leach, 320.

Where the defendant laid hold of the seals and chain of the prosecutor's watch, and pulled the watch out of his fob, but the watch, being secured by a steel chain which went round the prosecutor's neck, the defendant could not take it until, by pulling and two or three jerks, he broke the chain, and then ran off with the watch; this was holden to be robbery: R. v. Mason, R. & R. 419. But merely snatching property from a person unawares, and running away with it, will not be robbery: R. v. Steward, 2 East, P. C. 702; R. v. Horner, *Id.* 703; R. v. Baker, 1 Leach, 290; R. v. Robins, do. do.; R. v. Macauley, 1 Leach, 287; because fear cannot, in fact, be presumed in such a case. When the prisoner caught hold of the prosecutor's watch-chain, and jerked his watch from his pocket with considerable force, upon which a scuffle ensued and the prisoner was secured, Garrow, B., held that the force used to obtain the watch did not make the offence amount to robbery, nor did the force used afterwards in the scuffle; for the force necessary to constitute robbery must be either immediately before or at the time of the larceny, and not after it: R. v. Gnosil, 1 C. & P. 304. The rule, therefore, appears to be well established, that no sudden taking or snatching of property unawares from a person is sufficient to constitute robbery, unless some injury be done to the person, or there be a previous struggle for the possession of the property, or some force used to obtain it: 2 Russ. 104.

If a man take another's child, and threaten to destroy him unless the other give him money, this is robbery: R. v. Reane, 2 East, P. C. 734; R. v. Donally, *Id.* 713. So where the defendant, at the head of a mob, came to the prosecutor's house and demanded money, threatening to destroy the house unless the money were given, the prosecutor therefore gave him five shillings, but he insisted on more, and the prosecutor, being terrified, gave him five shillings more; the defendant and the mob then took bread, cheese and cider from the prosecutor's house, without his permission, and departed, this was holden to be a robbery as well of the money as of the bread, cheese and cider: R. v. Simons, 2 East, P. C. 731; R. v. Brown, *Id.* So where, during some riots at Birmingham, the defendant threatened the prosecutor that unless he would give a certain sum of money he should return with the mob and destroy his house, and the prosecutor, under the impression of this threat, gave him the money, this was holden by the judges to be robbery: R. v. Astley, 2 East, P. C. 729. So where, during the riots of 1780, a mob headed by the defendant came to the prosecutor's house, and demanded half a crown, which the prosecutor, from terror of the mob, gave, this was holden to be robbery, although no threats were uttered: R. v. Taplin, 2 East, P. C. 712. Upon an indictment for robbery it appeared that a mob came to the house of the prosecutor, and with the mob the prisoner, who advised the prosecutor to give them something to get rid of them, and prevent mischief, by which means they obtained money from the prosecutor; and Parke, J., after consulting Vaughan and Anderson, JJ., admitted evidence of the acts of the mob at other places before and after on the same day, to show that the advice of the prisoner was not *bona fide*, but in reality a mere mode of robbing the prosecutor: R. v. Winkworth, 4 C. & P. 444. Where the prosecutrix was threatened by some person at a mock auction to be sent to prison, unless she paid for some article they pretended was knocked down to her, although she never bid for it; and they accordingly

called in a pretended constable, who told her that unless she gave him a shilling she must go with him, and she gave him a shilling accordingly, not from any apprehension of personal danger but from a fear of being taken to prison, the judges held that the circumstances of the case were not sufficient to constitute the offence of robbery; it was nothing more than a simple duress, or a conspiracy to defraud: R. v. Knewland, 2 Leach, 721; 2 Russ. 118; *see* s. 404, *post*. In R. v. MacGrath, 11 Cox, 347, a woman went into a mock auction room, where the prisoner professed to act as auctioneer. Some cloth was put up by auction, for which a person in the room bid 25 shillings. A man standing between the woman and the door said to the prisoner that she had bid 26 shillings for it, upon which the prisoner knocked it down to the woman. She said she had not bid for it, and would not pay for it, and turned to go out. The prisoner said she must pay for it before she would be allowed to go out, and she was prevented from going out. She then paid 26 shillings to the prisoner, because she was afraid, and left with the cloth; the prisoner was indicted for larceny, and having been found guilty the conviction was affirmed; but Martin, B., was of opinion that the facts proved also a robbery. Where the defendant, with an intent to take money from a prisoner who was under his charge for an assault, handcuffed her to another prisoner, kicked and beat her whilst thus handcuffed, put her into a hackney coach for the purpose of carrying her to prison, and then took four shillings from her pocket for the purpose of paying the coach hire, the jury finding that the defendant had previously the intent of getting from the prosecutrix whatever money she had, and that he used all this violence for the purpose of carrying his intent into execution, the judges held clearly that this was robbery: R. v. Gascoigne, 2 East, P. C. 709. Even in a case where it appeared that the defendant attempted to commit a rape upon the prosecutrix, and she, without any demand from him, gave him some money to desist, which he put into his

pocket, and then continued his attempt until he was interrupted; this was holden by the judges to be robbery, for the woman from violence and terror occasioned by the prisoner's behaviour and to redeem her chastity, offered the money which it is clear she would not have given voluntarily, and the prisoner, by taking it, derived that advantage to himself from his felonious conduct, though his original intent was to commit a rape: R. v. Blackham, 2 East, P. C. 711.

And it is of no importance under what pretense the robber obtains the money if the prosecutor be forced to deliver it from actual fear, or under circumstances from which the court can presume it. As, for instance, if a man with a sword drawn ask alms of me, and I give it him through mistrust and apprehension of violence, this is felonious robbery. Thieves come to rob A., and finding little about him force him by menace of death to swear to bring them a greater sum, which he does accordingly, this is robbery; not for the reason assigned by Hawkins, because the money was delivered while the party thought himself bound in conscience to give it by virtue of the oath, which in his fear he was compelled to take; which manner of stating the case affords an inference that the fear had ceased at the time of the delivery, and that the owner then acted solely under the mistaken compulsion of his oath. But the true reason is given by Lord Hale and others; because the fear of that menace still continued upon him at the time he delivered the money: 2 East, P. C. 714. Where the defendant, at the head of a riotous mob, stopped a cart laden with cheeses, insisting upon seizing them for want of a permit; after some altercation he went with the driver, under pretense of going before a magistrate, and during their absence the mob pillaged the cart; this was holden to be a robbery: Merriman v. Hundred of Chippenham, 2 East, P. C. 709. On this case, it is well observed that the opinion that it amounted to a robbery must have been grounded upon the consideration that the

first seizure of the cart and goods by the defendant, being by violence and while the owner was present, constituted the offence of a robbery: 2 Russ. 111.

So where the defendant took goods from the prosecutrix to the value of eight shillings, and by force and threats compelled her to take one shilling under pretense of payment for them, this was holden to be a robbery: Simon's Case and Spencer's Case, 2 East, P. C. 712. The fear must precede the taking. For if a man privately steal money from the person of another, and afterwards keep it by putting him in fear, this is no robbery, for the fear is subsequent to the taking: R. v. Harman, 1 Hale, 534; and R. v. Gnosil, 1 C. & P. 304.

"It remains further to be considered of what nature this fear may be. This is an inquiry the more difficult, because, it is nowhere defined in any of the acknowledged treatises upon the subject. Lord Hale proposes to consider what shall be said a putting in fear, but he leaves this part of the question untouched. Lord Coke and Hawkins do the same. Mr. Justice Foster seems to lay the greatest stress upon the necessity of the property's being taken *against the will of* the party, and he leaves the circumstance of fear out of the question; or that at any rate, when the fact is attended with circumstances of evidence or terror, the law, *in odium spoliatoris*, will presume fear if it be necessary, where there appear to be so just a ground for it. Mr. Justice Blackstone leans to the same opinion. But neither of them afford any precise idea of the nature of the fear or apprehension supposed to exist. Staundford defines robbery to be a felonious taking of anything from the person or in the presence of another, *openly and against his will;* and Bracton also rests it upon the latter circumstance. I have the authority of the judges, as mentioned by Willes, J., in delivering their opinion in *Donally's Case*, in 1779, to justify me in not attempting to draw the exact line in this case; but thus 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 hand, 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": 2 East, P. C. 713.

It has been seen, *ante*, R. v. Astley, 2 East, P. C. 729, that a threat to destroy the prosecutor's house is deemed sufficient by law to constitute robbery, if money is obtained by the prisoner in consequence of it. This is no exception to the law which requires violence or fear of bodily injury, because one without a house is exposed to the inclement elements; so that to deprive a man of his house is equivalent to inflicting personal injury upon him. In general terms, the person robbed must be, in legal phrase, put in fear. But if force is used there need be no other fear than the law will imply from it; there need be no fear in fact. The proposition is sometimes stated to be that there must be either force or fear, while there need not be both. The true distinction is doubtless that, where there is no actual force, there must be actual fear, but where there is actual force the fear is conclusively inferred by the law. And within this distinction, assaults where there is no actual battery, are probably to be deemed actual force. Where neither this force is employed, nor any fear is excited, there is no robbery, though there be reasonable grounds for fear: 2 Bishop, Cr. L. 1174; *see* s. 404, *post*.

From the person.—The goods must be proved to have been taken *from the person* of the prosecutor. The legal meaning of the word *person*, however, is not here, that the taking must necessarily be from the actual contact of the body, but if it is from under the personal protection that

will suffice. Within this doctrine the person may be deemed to protect all things belonging to the individual within a distance, not easily defined, over which the influence of the personal presence extends. If a thief, says Lord Hale, come into the presence of A., and, with violence and putting A. in fear, drive away his horse, cattle or sheep, he commits robbery. But if the taking be not either directly from his person or in his presence it is not robbery. In robbery, says East, 2 P. C. 707, it is sufficient if the property be taken in the presence of the owner; it may not be taken immediately from his person, so that there be violence to his person, or putting him in fear. As where one, having first assaulted another, takes away his horse standing by him; or, having put him in fear, drives his cattle out of his pasture in his presence, or takes up his purse which the other in his fright had thrown into a bush. Or, adds Hawkins, rob my servant of my money before my face, *after having first assaulted me:* 1 Hawk. 214. Where, on an indictment for robbery, it appeared that the prosecutor gave his bundle to his brother to carry for him, and while they were going along the road the prisoners assaulted the prosecutor, upon which his brother laid down his bundle in the road, and ran to his assistance, and one of the prisoners then ran away with the bundle; Vaughan, B., intimated an opinion that under these circumstances the indictment was not sustainable, as the bundle was in the possession of another person at the time when the assault was committed. Highway robbery was a felonious taking of the property of another by violence against his will, either from his person or in his presence: the bundle in this case was not in the prosecutor's possession. If these prisoners intended to take the bundle, why did they assault the prosecutor, and not the person who had it: R. v. Fallows, 2 Russ. 107. The prisoners were convicted of a simple larceny. *Quære*, whether if the indictment had been for robbing the brother, who was carrying the bundle, it might not have been sustained, as

it was the violence of the prisoners that made him put it down and it was taken in his presence. In R. v. Wright, Styles, 156, it was holden that if a man's servant be robbed of his master's goods in the sight of his master, this is robbery of the master: *note* by Greaves.

Where, on an indictment for robbery and stealing from the person, it was proved that the prosecutor, who was paralyzed, received, whilst sitting on a sofa in a room, a violent blow on the head from one prisoner, whilst the other prisoner went and stole a cash-box from a cupboard in the same room; it was held that the cash-box being in the room in which the prosecutor was sitting, and he being aware of that fact, it was virtually under his protection; and it was left to the jury to say whether the cash-box was under the protection of the prosecutor at the time it was stolen: R. v. Selway, 8 Cox, 235.

The taking must be charged to be with violence from the person, and against the will of the party; but it does not appear certain that the indictment should also charge that he was put in fear, though this is usual, and, therefore, safest to be done.

But in the conference on Donally's case, where the subject was much considered, it was observed by Eyre, B., that the more ancient precedents did not state the putting in fear, and that, though others stated the putting in corporeal fear, yet the putting in fear of life was of modern introduction. Other judges considered that the gist of the offence was the taking by violence, and that the putting in fear was only a constructive violence, supplying the place of actual force. In general, however, as was before observed, no technical description of the fact is necessary, if upon the whole it plainly appears to have been committed with violence against the will of the party: 2 East, P. C. 783.

The ownership of the property must be alleged the same as in an indictment for larceny. The value of the articles stolen need not necessarily be stated. In R. v. Bingley, 5

C. & P. 602, the prisoner robbed the prosecutor of a piece of paper, containing a memorandum of money that a person owed him, and it was held sufficient to constitute a robbery.

PART XXIX.

ROBBERY AND EXTORTION.

Definition.

397. Robbery is theft accompanied with violence or threats of violence to any person or property used to extort the property stolen, or to prevent or overcome resistance to its being stolen.

Aggravated Robbery.

398. Every one is guilty of an indictable offence and liable to imprisonment for life *and to be whipped* who—

(*a*) robs any person and at the time of, or immediately before or immediately after, such robbery wounds, beats, strikes, or uses any personal violence to, such person; or

(*b*) being together with any other person or persons robs, or assaults with intent to rob, any person; or

(*c*) being armed with an offensive weapon or instrument robs, or assaults with intent to rob any person. R. S. C. c. 164, s. 34. 24-25 V. c. 96, s. 43 (Imp.).

This clause provides for five offences: 1. Being armed with any offensive weapon or instrument, robbing any person.

2. Being so armed, assaulting any person with intent to rob this person.

3. Together with one or more person or persons, robbing any other person.

4. Together with one or more person or persons, assaulting any person with intent to rob this person.

5. Robbing any person, and at the time of or immediately before, or immediately after such robbery, wound-

ing, beating, striking, or using any other personal violence to *any* person.

1. *Indictment for a robbery by a person armed*.....that J. S., on.....at.....being then armed with a certain offensive weapon and instrument, to wit, a bludgeon, in and upon one D. unlawfully did make an assault, and him the said D. in bodily fear and danger of his life then unlawfully did put, and a sum of money, to wit, the sum of ten dollars, of the moneys of the said D., then unlawfully and violently did steal.....

2. *Indictment for an assault by a person armed with intent to commit robbery*.....that J. S. on.....at..... being then armed with a certain offensive weapon and instrument, called a bludgeon, in and upon one D. unlawfully did make an assault, with intent the moneys, goods and chattels of the said D. from the person and against the will of him the said D., then unlawfully and violently to steal.....

3. *Indictment for robbery by two or more persons in company*.....that A. B. and D. H. together, in and upon one J. N. unlawfully did make an assault, and him the said J. N. in bodily fear and danger of his life then and there together unlawfully did put, and the moneys of the said J. N. to the amount of.....from the person and against the will of the said J. M. then unlawfully and violently together did steal. (*If one only of them be apprehended it will charge him by name together with a certain other person, or certain other persons, to the jurors aforesaid unknown*).

4. *Indictment for, together with one or more person or persons, assaulting with intent to rob.*—Can be drawn on forms 2 and 3.

5. *Robbery accompanied by wounding, etc.*— that J. N. at on in and upon one A. M. unlawfully did make an assault, and him the said A. M. in bodily fear

and danger of his life then unlawfully did put, and the moneys of the said A. M. to the amount of ten dollars and one gold watch, of the goods and chattels of the said A. M. from the person and against the will of the said A. M. then unlawfully and violently did steal, and that the said J. N. immediately before he so robbed the said A. M. as aforesaid, the said A. M. did unlawfully wound.

(*It will be immaterial, in any of these indictments, if the place where the robbery was committed be stated incorrectly.*)

The observations *ante*, applicable to robbery generally, apply to these offences.

Under indictment No. 1 the defendant may be convicted of the robbery only, or of an assault with intent to rob. The same, under indictments numbers 3 and 5. And wherever a robbery with aggravating circumstances, that is to say, either by a person armed, or by several persons together, or accompanied with wounding, is charged in the indictment, the jury may convict of an assault with intend to rob, attended with the like aggravation, the assault following the nature of the robbery: R. v Mitchell, 2 Den. 468, and remarks upon it, in Dears. 19.

By s. 713 a verdict of common assault may be returned if the evidence warrants it. And by s. 711, if the offence has not been completed, a verdict of guilty of the attempt to commit the offence charged may be given, if the evidence warrants it.

Upon an indictment for robbery charging a wounding the jury may convict of unlawful wounding under s. 242, or of an assault causing actual bodily harm under s. 262.

See remarks under next section.

PUNISHMENT OF ROBBERY.

399. Every one who commits robbery is guilty of an indictable offence and liable to fourteen years' imprisonment. R. S. C. c. 164, s. 32.

Indictment for robbery.— in and upon one J. N. unlawfully did make an assault, and him, the said J. N., in bodily fear and danger of his life then did put, and

the moneys of the said J. N., to the amount of ten dollars, from the person and against the will of the said J. N. then unlawfully and violently did steal.

The indictment may charge the defendant with having assaulted several persons and stolen different sums from them, if the whole was one transaction.

If the robbery be not proved the jury may return a verdict of an assault with intent to rob, if the evidence warrants it, and then the defendant is punishable as under s. 400. By s. 713, if the intent be not proved a verdict of common assault may be given: R. v. Archer, 2 Moo. 283; R. v. Hagan, 8 C. & P. 167; R. v. Ellis, 8 C. & P. 654; R. v. Nicholls, 9 C. & P. 267; R. v. Woodhall, 12 Cox, 240, is not to be followed here, as the enactment to the same effect is now, in England, repealed.

The word "together" is not essential in an indictment for robbery against two persons to show that the offence was a joint one: R. v. Provost, M. L. R. 1 Q. B. 477.

ASSAULT WITH INTENT TO ROB.

400. Every one who assaults any person with intent to rob him is guilty of an indictable offence and liable to three years' imprisonment. R. S. C. c. 164, s. 33; 24-25 V. c. 96 s. 42 (Imp.).

Fine, s. 958: *see* annotation under the three next preceding sections.

Indictment.— in and upon one C. D., unlawfully did make an assault with intent the moneys, goods and chattels of the said C. D., from the person and against the will of the said C. D. unlawfully and violently to steal: R. v. Huxley, Car. 2 M. 596; R. v. O'Neil, 11 R. L. 334.

STOPPING THE MAIL WITH INTENT TO ROB.

401. Every one is guilty of an indictable offence and liable to imprisonment for life, or to any term not less than five years, who stops a mail with intent to rob or search the same. R. S. C. c. 35, s. 81. 7 Wm. IV. and 1 V. c. 36 (Imp.).

Section 4, *ante*, as to definitions, and s. 624, *post*, as to indictment.

Indictment.— a certain mail for the conveyance of post letters, unlawfully did stop with intent to rob the same.

A verdict of attempt may be given, if the evidence warrants it, s. 711.

COMPELLING EXECUTION OF DOCUMENTS.

402. Every one is guilty of an indictable offence and liable to imprisonment for life who, with intent to defraud, or injure, by unlawful violence to or restraint of the person of another, or by the threat that either the offender or any other person will employ such violence or restraint, unlawfully compels any person to execute, make, accept, endorse, alter or destroy the whole or any part of any valuable security, or to write, impress or affix any name or seal upon any paper or parchment, in order that it may be afterwards made or converted into or used or dealt with as a valuable security. R. S. C. c. 173, ss. 5 & 6 (*Amended*). 24-25 V. c. 96, s. 48 (Imp.).

The obtaining money by accusing or threatening to accuse of any treason, felony or any crime, now falls under ss. 405-406, *post*.

"Valuable security" defined, s. 3.

On this clause, Greaves says: "This clause is new. It will meet all such cases as R. v. Phipoe, 2 Leach, 673, and R. v. Edwards, 6 C. & P. 521, where persons by violence to the person or by threats induce others to execute deeds, bills of exchange or other securities.

The defendants, husband and wife, were indicted under this clause, for having by threats of violence and restraint induced the prosecutor to write and affix his name to the following document: "London, July 19th, 1875. I hereby agree to pay you £100 on the 27th inst, to prevent any action against me."

Held, that this document was not a promissory note, but was an agreement to pay money for a valid consideration which could be sued upon and was therefore a valuable security. To constitute a valuable security within the meaning of the statute an instrument need not be negotiable. A wife who takes an independent part in the commission of a crime when her husband is not present is not

protected by her coverture: R. v. John, 13 Cox, 100; *see* cases under s. 405, *post*.

See that case of R. v. John as to form of indictment.

EXTORTION BY LETTER.

403. Every one is guilty of an indictable offence and liable to *fourteen years'* imprisonment who sends, delivers or utters, or directly or indirectly causes to be received, knowing the contents thereof, any letter or writing demanding of any person with menaces, and without any reasonable or probable cause, any property, chattel, money, valuable security or other valuable thing. R. S. C. c. 173, s. 1. 24-25 V. c. 96, s. 44 (Imp.).

"Valuable security" and "writing" defined, s. 3.

An indictment on this clause should always contain a count for uttering without stating the person to whom the letter or writing is uttered: Greaves, Cons. Acts, 135.

Indictment for sending a letter, demanding money with menaces.— that J. S., on unlawfully did send to one J. N. a certain letter, directed to the said J. N. by the name and description of Mr. J. N., of demanding money from the said J. N. with menaces, and without reasonable or probable cause, he the said J. S. then well knowing the contents of the said letter; and which said letter is as follows, that is to say, (*here set out the letter verbatim*). And the jurors aforesaid, do further present, that the said J. S. on the day and in the year aforesaid, unlawfully did utter a certain writing demanding money from the said J. N. with menaces and without any reasonable or probable cause, he the said J. S. then well knowing the contents of the said writing and which said writing is as follows, that is to say (*here set out the writing verbatim*). *See* s. 613.

Where the letter contained a request only, but intimated that, if it were not complied with, the writer would publish a certain libel then in his possession accusing the prosecutor of murder, this was holden to amount to a demand: R. v. Robinson, 2 Leach, 749. The demand must be with menaces, and without any reasonable or probable cause, and it will be for the jury to consider whether the letter does

expressly or impliedly contain a demand of this description. The words "without any reasonable or probable cause" apply to the demand of money, and not to the accusation threatened by the defendant to be made against the prosecutor; and it is, therefore, immaterial in point of law, whether the accusation be true or not: R. v. Hamilton, 1 C. & K. 212; R. v. Gardner, 1 C. & P. 479. A letter written to a banker, stating that it was intended by some one to burn his books and cause his bank to stop, and that if 250 pounds were put in a certain place the writer of the letter would prevent the mischief, but if the money were not put there it would happen, was held to be a letter demanding money with menaces: R. v. Smith, 1 Den. 510. The judges seemed to think that this decision did not interfere with R. v. Pickford, 4 C. & P. 227. In R. v. Pickford the injury threatened was to be done by a third person. It is immaterial whether the menaces or threats hereinbefore mentioned be of violence, injury or accusation to be caused or made by the offender, or by any other person. *See* R. v. Tranchant, 9 L. N. 333 and R. v. Grimwade, 1 Den. 30.

32 & 33 V. c. 21, s. 43 made it a felony to send "any letter demanding of any person with menaces, and without any reasonable or probable cause, any money, etc." *Held*, that the words "without reasonable or probable cause" apply to the money demanded, and not to the accusation threatened to be made: R. v. Mason, 24 U. C. C. P. 58.

DEMANDING WITH INTENT TO STEAL.

404. Every one is guilty of an indictable offence and liable to two years' imprisonment who, with menaces, demands from any person, *either for himself or for any other person*, anything capable of being stolen with intent to steal it. R. S. C. c. 173, s. 2. 24-25 V. c. 96, s. 45 (Imp.).

The repealed clause had the words "or by force" after menaces. The words in italics are new.

Indictment.— unlawfully with menaces did demand of A. B. the money of him the said A. B. with intent the said money from the said A. B. unlawfully to steal.

The prosecutor must prove a demand by the defendant of the money or other thing stated in the indictment "by menaces" with intent to steal it. It is not necessary to prove an express demand in words; the statute says "with menaces." "Demands," and menaces are of two kinds, by words or by gestures; so that, if the words or gestures of the defendant at the time were plainly indicative of what he required, and tantamount in fact to a demand, it should seem to be sufficient proof of the allegation of demand in the indictment: R. v. Jackson, 1 Leach, 267. If a person, with menaces, demand money of another, who does not give it him, because he has it not with him, this is a felony within the statute; but if the party demanding the money knows that it is not then in the prosecutor's possession, and only intends to obtain an order for the payment of it, it is otherwise: R. v. Edwards, 6 C. & P. 515. That would now fall under this section.

See R. v. Walton, L. & C. 288; R. v. Robertson, L. & C. 483; 3 Russ. 203, *note* by Greaves.

Why is the punishment only two years under this section, and fourteen under the next preceding one?

EXTORTION BY CERTAIN THREATS.

405. Every one is guilty of an indictable offence and liable to fourteen years' imprisonment who, with intent to extort or gain anything from any person—

(*a*) accuses or threatens to accuse either that person or any other person, *whether the person accused or threatened with accusation is guilty or not*, of

(i) any offence punishable by law with death or imprisonment *for seven years or more*;

(ii) any assault with intent to commit a rape, or any attempt or endeavour to commit a rape, *or any indecent assault*;

(iii) *carnally knowing or attempting to know any child so as to be punishable under this Act*;

(iv) any infamous offence, that is to say, buggery, an attempt or assault with intent to commit buggery, *or any unnatural practice, or incest*;

(v) counselling or procuring any person to commit any such infamous offence; or

(*b*) threatens that any person shall be so accused by any other person; or

(*c*) causes any person to receive a document containing such accusation or threat, knowing the contents thereof;

(*d*) by any of the means aforesaid compels or attempts to compel any person to execute, make, accept, endorse, alter or destroy the whole or any part of any valuable security, or to write, impress or affix any name or seal upon or to any paper or parchment, in order that it may be afterwards made or converted into or used or dealt with as a valuable security. R. S. C. c. 173, ss. 3, 4, 1, 5, & 6 (*Amended*). 24-25 V. c. 96, ss. 46, 47, 48 (Imp.).

The words in italics are new.

"Valuable security," defined, s. 3.

Extortion at common law: *see* R. v. Tisdale, 20 U. C. Q. B. 272.

Indictment.— that J. S., on unlawfully did send to one J. N., a certain letter, directed to the said J. N., by the name and description of Mr. J. N., threatening to accuse him, the said J. N., of having attempted and endeavoured to commit the abominable crime of buggery with him the said J. S., with a view and intent thereby then to extort and gain money from the said J. N., he the said J. S., then well knowing the contents of said letter, and which said letter is as follows, to wit (*here set out the letter verbatim*): *see* s. 613.

An indictment for sending a letter threatening to accuse a man of an infamous crime need not specify such crime for the specific crime the defendant threatened to charge might intentionally by him be left in doubt: R. v. Tucker, 1 Moo. 134. The threat may be to accuse another person than the one to whom the letter was sent. It is immaterial whether the prosecutor be innocent or guilty of the offence threatened to be imputed to him; s-s. (*a*): R. v. Gardner, 1 C. & P. 479; R. v. Richards, 11 Cox, 43.

Where it was doubtful from the letter what charge was intended parol evidence was admitted to explain it, and the prosecutor proved that having asked the prisoner what he meant by certain expressions in the letter, the prisoner said that he meant that the prosecutor had taken indecent liberties with his person; the judges held the conviction to be right: R. v. Tucker, 1 Moo. 134.

The court will, after the bill is found, upon the application of the prisoner, order the letter to be deposited with an officer, in order that the prisoner's witnesses may inspect it: R. v. Harrie, 6 C. & P. 105.

In R. v. Ward, 10 Cox, 42, on an indictment containing three counts for sending three separate letters, evidence of the sending of one only was declared admissible. The threat need not be by letter under s. 405.

It is immaterial whether the menaces or threats hereinbefore mentioned be of accusation to be caused or made by the offender or by any other person;" s-s. (*b*).

Indictment.— unlawfully did threaten one J. N., to accuse him the said J. N., of having attempted and endeavoured to commit the abominable crime of buggery with the said J. S., with a view and intent thereby then to extort and gain money from the said J. N.

It must be a threat to accuse, or an accusation; if J. N. be indicted or in custody of an offence, and the defendant threaten to procure witnesses to prove the charge, this will not be a threat to accuse within the meaning of the statute. But it need not be a threat to accuse before a judicial tribunal; a threat to charge before any third person is sufficient: R. v. Robinson, 2 M. & Rob. 14. It is immaterial whether the prosecutor be innocent or guilty of the offence charged, and therefore, although the prosecutor may be cross-examined as to his guilt of the offence imputed to him, with a view to shake his credit, yet no evidence will be allowed to be given, even in cross-examination of another witness, to prove that the prosecutor was guilty of such offence: R. v. Gardner, 1 C. & P. 479; R. v. Cracknell, 10 Cox, 408. Whether the crime of which the prosecutor was accused by the prisoner was actually committed is not material in this, that the prisoner is equally guilty if he intended by such accusation to extort money; but it is material in considering the question whether, under the circumstances of the case, the intention

of the prisoner was to extort money or merely to compound a felony: R. v. Richards, 11 Cox, 43. In Archbold, 482, this last decision seems not to be approved of.—A person threatening A's father that he would accuse A. of having committed an abominable offence upon a mare for the purpose of putting off the mare, and forcing the father, under terror of the threatened charge to buy and pay for her at the prisoner's price, is guilty of threatening to accuse within this section: R. v. Redman, 10 Cox, 159, Warb. Lead. Cas. 142. On the trial of an indictment for threatening to accuse a person of an abominable crime, with intent to extort money, and by intimidating the party by the threat, in fact obtaining the money, the jury need not confine themselves to the consideration of the expression used before the money was given, but may, if those expressions are equivocal, connect with them what was afterwards said by the prisoner when he was taken into custody: R. v. Kain, 8 C. & P. 187.

See R. v. Popplewell, 20 O. R. 303.

As to what is a "valuable security," *see* cases under ss. 353 and 402.

A letter sent to a tavern keeper demanding a sum of money and threatening, in default of payment, to bring a prosecution under the Liquor License Act, is not a menace within the meaning of c. 173, s. 1.

The test is whether or not the menace is such as a firm and prudent man might and ought to have resisted: R. v. McDonald, 8 Man. L. R. 491.

EXTORTION BY OTHER THREATS. (*New*).

406. Every one is guilty of an indictable offence, and liable to imprisonment for seven years' who—

(*a*) with intent to extort or gain anything from any person accuses or threatens to accuse either that person or any other person of any offence other than those specified in the last section whether the person accused or threatened with accusation is guilty or not of that offence; or

(*b*) with such intent as aforesaid, threatens that any person shall be so accused by any person; or

(*c*) causes any person to receive a document containing such accusation or threat knowing the contents thereof; or

(*d*) by any of the means aforesaid, compels or attempts to compel any person to execute, make, accept, endorse, alter or destroy the whole or any part of any valuable security, or to write, impress or affix any name or seal upon or to any paper or parchment, in order that it may be afterwards made or converted into, or used or dealt with as a valuable security.

"At present a policeman or gamekeeper who levies blackmail under threats of larceny or poaching, if criminally responsible at all, is only punishable with imprisonment and fine."—Imp. Comm. Rep.

This section extends the provisions of the preceding section to threats of every accusation whatever.

BURGLARY.

GENERAL REMARKS.

See R. v. Hughes, Warb. Lead. Cas. 190, and cases there cited.

Burglary, or nocturnal housebreaking, *burgi latrocinium*, which, by our ancient law, was called *hamesecken*, has always been looked upon as a very heinous offence for it always tends to occasion a frightful alarm, and often leads by natural consequence to the crime of murder itself. Its malignity also is strongly illustrated by considering how particular and tender a regard is paid by the law of England to the immunity of a man's house, which it styles its castle, and will never suffer to be violated with impunity; agreeing herein with the sentiments of Ancient Rome, as expressed in the words of Tully (*Pro Domo.* 41) "*quid enim sanctius, quid omni religione munitius, quam domus uniuscujusque civium?*" For this reason no outward doors can, *in general*, be broken open to execute any civil process, though, in criminal cases, the public safety supersedes the private. Hence, also, in part arises the animadversion of the law upon eavesdroppers, nuisancers, and incendiaries; and to this principle it must be assigned, that a man may assemble people together lawfully (at least if they do not exceed eleven), without danger of raising a riot, rout or unlawful assembly, in order to protect and defend his house, which he is not permitted to do in any other case: 4 Stephens' Blacks. 104; s. 79, s-s. 3 *ante*.

Burglary is a breaking and entering the mansion-house of another in the night, with intent to commit *some felony* within the same, whether such felonious intent be executed or not: now any indictable offence, s. 410, *post*. In which definition there are four things to be considered, the *time*, the *place*, the *manner*, and the *intent*.

The time.—The time must be by night and not by day, for in the day time there is no burglary. As to what is reckoned night and what day for this purpose, anciently the day was accounted to begin only at sunrising, and to end immediately upon sunset; but the better opinion afterwards was that if there were daylight or *crepusculum* enough, begun or left, to discern a man's face withal, it was no burglary. But this did not extend to moonlight, for then many midnight burglaries would have gone unpunished; and besides, the malignity of the offence does not so properly arise from its being done in the dark, as at the dead of night, when all creation is at rest. But the doctrines of the common law on this subject are no longer of practical importance, as it is enacted by s. 3, *ante,* that the night commences at nine of the clock in the afternoon of each day, and concludes at six of the clock in the forenoon of the next succeeding day, and the day includes the remainder of the twenty-four hours. The breaking and entering must both be committed in the night-time; if the breaking be in the day, and the entering in the night, or *vice versa*, it is no burglary: *see* s. 410, *post;* 1 Hale, 551. But the breaking and entering need not be both done in the same night; for if thieves break a hole in a house one night, with intent to enter another night and commit felony and come accordingly another night and commit a felony, this seems to be burglary, for the breaking and entering were both *noctanter*, though not the same night: 2 Russ. 39. The breaking on Friday night with intent to enter at a future time, and the entering on the Sunday night constitute burglary: R. v. Smith, R. & R. 417. And then, the burglary is supposed to have taken place on the night of the entry, and is to be charged as such: 1 Hale, 551. In Jordan's Case, 7 C. & P. 432, it was held that where the breaking is on one night and the entry on another, a party present at the breaking, but absent at the entry, is a principal.

The place.—The breaking and entering must take place in a *mansion* or *dwelling-house* to constitute burglary.

At common law, Lord Hale says that a church may be the subject of burglary, 1 Hale, 559, on the ground, according to Lord Coke, that a church is the mansion house of God, though Hawkins, 1 vol. 133, does not approve of that *nicety*, as he calls it, and thinks that burglary in a church seems to be taken as a distinct burglary from that in a house. However, this offence is now provided for: ss. 408 and 409, *post*.

What is a *dwelling house?—See* s. 407, *post*. From all the cases it appears that it must be a place of actual *residence*. Thus a house under repairs, in which no one lives though the owner's property is deposited there, is not a place in which burglary can be committed: R. v. Lyons, 1 Leach, 185; in this case neither the proprietor of the house, nor any of his family, nor any person whatever had yet occupied the house.

In Fuller's Case, 1 Leach, 186, note, the defendant was charged of a burglary in the dwelling-house of Henry Holland. The house was new built, and nearly finished; a workman who was constantly employed by Holland slept in it for the purpose of protecting it, but none of Holland's family had yet taken possession of the house, and the Court held that it was not the dwelling-house of Holland, and that where the owner has never by himself or by any of his family slept in the house, it is not his dwelling house, so as to make the breaking thereof burglary, though he has used it for his meals, and all the purposes of his business: *see* R. v. Martin, R. & R. 108.

If a porter lie in a warehouse for the purpose of protecting goods, R. v. Smith, 2 East, P. C. 497, or a servant lie in a barn in order to watch thieves, R. v. Brown, 2 East, P. C. 501, this does not make the warehouse or barn a dwelling-house in which burglary can be committed. But if the agent of a public company reside at a warehouse belonging to his employers this crime may be committed by breaking it, and he may be stated to be the owner: R. v. Margetts, 2 Leach,

930. Where the landlord of a dwelling-house, after the tenant, whose furniture he had bought, had quitted it, put a servant into it to sleep there at night, until he should re-let it to another tenant, but had no intention to reside in it himself, the judges held that it could not be deemed the dwelling-house of the landlord: R. v. Davies, 2 Leach, 876. So where the tenant had put all his goods and furniture into the house, preparatory to his removing to it with his family, but neither he nor any of his family had as yet slept in it, it was holden not to be a dwelling-house in which burglary can be committed: R. v. Hallard, 2 East, P. C. 498; R. v. Thompson, 2 Leach, 771. And the same has been ruled when under such circumstances the tenant had put a person, not being one of the family, into the house for the protection of the goods and furniture in it, until it should be ready for his residence: R. v. Harris, 2 Leach, 701; R. v. Fuller, 1 Leach, 186. A house will not cease to be the house of its owner, on account of his occasional or temporary absence, even if no one sleep in it provided the owner has an *animus revertendi*: R. v. Murry, 2 East, P. C. 496; and in R. v. Kirkham, 2 Starkie, Ev. 279, Wood, B., held that the offence of stealing in a dwelling-house had been committed, although the owner and his family had left six months before, having left the furniture and intending to return: *Id.*, Nutbrown's Case, 2 East, P. C. 496. And though a man leaves his house and never means to live in it again, yet if he uses part of it as a shop, and lets his servant and his family live and sleep in another part of it for fear the place should be robbed, and lets the rest to lodgers, the habitation by his servant and family will be a habitation by him, and the shop may still be considered as part of his dwelling-house: R. v. Gibbons, R. & R. 442. But where the prosecutor and upholsterer left the house in which he had resided with his family, without any intent of returning to live in it, and took a dwelling-house elsewhere, but still retained the former house as a warehouse and workshop; two women employed by him as workwomen in his

business, and not as domestic servants, slept there to take care of the house, but did not have their meals there, or use the house for any other purpose than sleeping in it as a security to the house; the judges held that this was not properly described as the dwelling-house of the prosecutor: R. v. Flannagan, R. & R. 187. The occupation of a servant in that capacity, and not as tenant, is in many cases the occupation of a master, and will be a sufficient residence to render it the dwelling-house of the master: R. v. Stock, R. & R. 185; R. v. Wilson, R. & R. 115. Where the prisoner was indicted for burglary in the dwelling-house of J. B., J. B. worked for one W., who did carpenter's work for a public company, and put J. B. into the house in question, which belonged to the company, to take care of it, and some mills adjoining. J. B. received no more wages after than before he went to live in the house. It was held not rightly laid: R. v. Rawlins, 7 C. & P. 150. If a servant live in a house of his master's at a yearly rent the house cannot be described as the master's house: R. v. Jarvis, 1 Moo. 7. Every permanent building, in which the renter or owner and his family dwell and lie, is deemed a dwelling-house, and burglary may be committed in it. Even a set of chambers in an inn of court or college is deemed a distinct dwelling-house for this purpose. And it will be sufficient if any part of his family reside in the house. Thus where a servant boy of the prosecutor always slept over his brew-house, which was separated from his dwelling-house by a public passage, but occupied therewith, it was holden, upon an indictment for burglary, that the brew-house was the dwelling-house of the prosecutor, although, being separated by the passage, it could not be deemed to be part of the house in which he himself actually dwelt: R. v. Westwood, R. & R. 495. Burglary cannot be committed in a tent or booth in a market or fair, even although the owner lodge in it, because it is a temporary not a permanent edifice: 1 Hale, 557; but if it be a permanent building, though used only for the purpose of a fair, it is a dwelling-house: R. v.

Smith, 1 M. & Rob. 256. So even a loft, over a stable, used for the abode of a coachman, which he rents for his own use and that of his family, is a place which may be burglariously broken: R. v. Turner, 1 Leach, 305. If a house be divided, so as to form two or more dwelling-houses within the meaning of the word in the definition of burglary, and all internal communication be cut off, the partitions become distinct houses and each part will be regarded as a mansion: R. v. Jones, 1 Leach, 537. But a house the joint property of partners in trade in which their business is carried on may be described as the dwelling-house of all the partners, though only one of the partners reside in it: R. v. Athea, 1 Moo. 329. If the owner, who lets out apartments in his house to other persons, sleep under the same roof and have but one outer door common to him and his lodgers, such lodgers are only inmates and all their apartments are parcel of the one dwelling-house of the owner. But if the owner do not lodge in the same house, or if he and the lodgers enter by different outer-doors, the apartments so let out are the mansion for the time being of each lodger respectively, even though the rooms are let by the year: 2 East, P. C. 505. If the owner let off a part, but do not dwell in the part he reserves for himself, then the part let off is deemed in law the dwelling-house of the party who dwells in it, whether it communicates internally with the other part or not; but the part he has reserved for himself is not the subject of burglary; it is not his dwelling-house for he does not dwell in it, nor can it be deemed the dwelling-house of the tenant for it forms no part of his lodging: R. v. Rogers, R. v. Carrell, R. v. Trapshaw, 1 Leach, 89, 237, 427. If the owner let the whole of a dwelling-house, retaining no part of it for his or his family's dwelling, the part each tenant occupies and dwells in is deemed in law to be the dwelling-house of such tenant, whether the parts holden by the respective tenants communicate with each other internally or not: R. v. Bailey,

1 Moo. 23; R. v. Jenkins, R. & R. 244; R. v. Carrell, 1 Leach, 237.

The term *dwelling-house* includes in its legal signification all out-houses occupied with and immediately communicating with the dwelling-house. But by s. 407, *post*, no building, although within the same curtilage with any dwelling-house, and occupied therewith, shall be deemed to be part of such dwelling-house for any of the purposes of this Act, unless there shall be a communication between such building and dwelling-house, either immediate or by means of a covered and enclosed passage leading from the one to the other. Where the prosecutor's house consisted of two living-rooms, another room used as a cellar, and a wash-house on the ground floor, and of three bed-rooms upstairs, one of them over the wash-house and the bedroom over the house-place communicated with that over the wash-house, but there was no internal communication between the wash-house and any of the rooms of the house, but the whole was under the same roof, and the defendant broke into the wash-house, and was breaking through the partition-wall between the wash-house and the house-place, it was holden that the defendant was properly convicted of burglary in breaking the house: R. v. Burrowes, 1 Moo., 274. But where adjoining to the house was a kiln, one end of which was supported by the wall of the house, and adjoining to the kiln a dairy, one end of which was supported by the wall of the kiln, the roofs of all three being of different heights, and there being no internal communication from the house to the dairy, it was held that burglary was not committed by breaking into the dairy: R. v. Higgs, 2 C. & K. 322. To be within the meaning of this section the building must be occupied with the house in the same right; and therefore where a house let to and occupied by A. adjoined and communicated with a building let to and occupied by A. and B., it was holden that the building could not be considered a part of the dwelling-

house of A.: R. v. Jenkins, R. & R. 244. If there be any doubt as to the nature of the building broken and entered a count may be inserted for breaking and entering a building within the curtilage, under s. 413, *post*.

It has always been held necessary to state with accuracy in the indictment to whom the dwelling-house belongs: *see* now, s. 613, *post*. But in all cases of doubt the pleader should vary in different counts the name of the owner, although there can be little doubt that a variance in this respect would be amended at the trial: Archbold, 496. As to the local description of the house it must be proved as laid; if there is a variance between the indictment and evidence in the parish, etc., where the house is alleged to be situate, the defendant must be acquitted of the burglary unless an amendment be made. To avoid difficulty different counts should be inserted, varying the local description. If the house be not proved to be a dwelling-house the defendant must be acquitted of the burglary but found guilty of the simple larceny, if larceny is proved: Archbold, 489, 496.

The manner.—There must be both a *breaking* and an *entering* of the house: *see* s. 407, *post*. The breaking is either actual or constructive. Every entrance into the house by a trespasser is not a breaking in this case. As if the door of a mansion-house stand open and the thief enter, this is not breaking; so if the window of the house be open, and a thief with a hook or other engine draweth out some of the goods of the owner, this is no burglary because there is no actual breaking of the house. But if the thief breaketh the glass of a window, and, with a hook or other engine draweth out some of the goods of the owner, this is burglary for there was an actual breaking of the house: 1 Hale, 551. Where a window was a little open, and not sufficiently so to admit a person, and the prisoner pushed it wide open and got in, this was held to be sufficient breaking: R. v. Smith, 1 Moo. 178; s. 407, *post*.

If there be an aperture in a cellar window to admit light, through which a thief enter in the night, this is not burglary: R. v. Lewis, 2 C. & P. 628; R. v. Spriggs, 1 M. & Rob. 357. There is no need of any demolition of the walls or any manual violence to constitute a breaking. Lord Hale says: "and these acts amount to an actual breaking, viz., opening the casement, or breaking the glass window, picking open a lock of a door with a false key, or putting back the lock with a knife or dagger, unlatching the door that is only latched, to put back the leaf of a window with a dagger." In Roberts' case, 2 East, P. C. 487, where a glass window was broken, and the window opened with the hand, but the shutters on the inside were not broken, this was ruled to be burglary by Ward, Powis and Tracy, JJ.; but they thought this the extremity of the law; and, on a subsequent conference, Holt, C.J., and Powell, C.J., doubting and inclining to another opinion, no judgment was given. In Bailey's Case, R. & R. 341, it was held by nine judges that introducing the hand between the glass of an outer window and an inner shutter is a sufficient entry to constitute burglary. If a thief enter by the chimney it is a breaking, for that is as much closed as the nature of things will permit. And it is burglarious breaking though none of the rooms of the house are entered. Thus, in R. v. Brice, R. & R. 450, the prisoner got in at a chimney and lowered himself a considerable way down, just above the mantel piece of a room on the ground floor. Two of the judges thought he was not in the dwelling-house till he was below the chimney-piece. The rest of the judges, however, held otherwise, that the chimney was part of the dwelling-house, that the getting in at the top was breaking of the dwelling-house, and that the lowering himself was an entry therein.

Where the prisoner effected an entry by pulling down the upper sash of a window, which had not been fastened but merely kept in its place by the pulley weight, the

judges held this to be a sufficient breaking to constitute burglary, even although it also appeared that an outside shutter, by which the window was usually secured, was not closed or fastened at the time: R. v. Haines, R. & R. 451. Where an entry was effected, first into an outer cellar by lifting up a heavy iron grating that led into it, and then into the house by a window, and it appeared that the window, which opened by hinges, had been fastened by means of two nails as wedges, but could, notwithstanding, easily be opened by pushing, the judges held that opening the window so secured was a breaking sufficient to constitute burglary: R. v. Hall, R. &. R. 355. So where a party thrust his arm through the broken pane of a window, and in so doing broke some more of the pane, and removed the fastenings of the window and opened it: R. v. Robinson, 1 Moo. 327.

But if a window thus opening on hinges, or a door, be not fastened at all opening them would not be a breaking within the definition of burglary. Even where the heavy flat door of a cellar, which would keep closed by its own weight, and would require some degree of force to raise it, was opened; it had bolts by which it might have been fastened on the inside, but it did not appear that it was so fastened at the time, the judges were divided in opinion whether the opening of this door was such a breaking of the house as constituted burglary: R. v. Callan, R. &. R. 157. It was holden in Brown's Case that it was: 2 East, P.C. 487. In R. v. Lawrence, 4 C. & P. 231, it was holden that it was not. In R. v. Russell, 1 Moo. 377, it was holden that it was. *See* s. 407, *post.*

Where the offender, with intent to commit a felony, obtains admission by some artifice or trick for the purpose of effecting it he will be guilty of burglary, for this is a constructive breaking. Thus, where thieves, having an intent to rob, raised the hue-and-cry, and brought the constable, to whom the owner opened the door; and when

they came in they bound the constable and robbed the owner, this was held a burglary. So if admission be gained under pretense of business, or if one take lodging with a like felonious intent and afterwards rob the landlord, or get possession of a dwelling-house by false affidavits, without any colour of title, and then rifle the house, such entrance being gained by fraud, it will be burglarious. In Hawkins' Case she was indicted for burglary; upon evidence it appeared that she was acquainted with the house, and knew that the family were in the country, and meeting with the boy who kept the key she prevailed upon him to go with her to the house by the promise of a pot of ale; the boy accordingly went with her, opened the door and let her in, whereupon she sent the boy for the pot of ale, robbed the house and went off, and this being in the night time it was adjudged that the prisoner was clearly guilty of burglary: 2 East, P. C. 485. If a servant conspire with a robber, and let him into the house by night, this is burglary in both: 1 Hale, 553; for the servant is doing an unlawful act, and the opportunity afforded him of doing it with greater ease rather aggravates than extenuates the guilt. But if a servant, pretending to agree with a robber, open the door and let him in for the purpose of detecting and apprehending him, this is no burglary for the door is lawfully open: R. v. Johnson, Car. & M. 218.

And the breaking necessary to constitute burglary is not restricted to the breaking of the outer wall or doors or windows of a house; if the thief got admission into the house by the outer door or windows being open, and afterwards breaks or unlocks an inner door for the purpose of entering one of the rooms in the house, this is burglary: 1 Hale, 553; 2 East, P. C. 488. So if a servant open his master's chamber door, or the door of any other chamber not immediately within his trust, with a felonious design, or if any other person lodging in the same house, or in a public inn, open and enter another's door with such evil intent, it is burglary: 2 East, P. C. 491; 1 Hale, 553; R.

v. Wenmouth, 8 Cox, 348. The breaking open chests is not burglary: 1 Hale, 554. The breaking must be of some part of the house; and therefore, where the defendant opened an area gate with a skeleton key, and then passed through an open door into the kitchen, it was holden not to be a breaking, there being no free passage from the area to the house in the hours of sleep: R. v. Davis, R. & R. 322; R. v. Bennett, R. & R. 289; R. v. Paine, 7 C. & P. 135. It is essential that there should be an entry as well as a breaking, and the entry must be connected with the breaking: 1 Hale, 555; R. v. Davis, 6 Cox, 369; R. v. Smith, R. & R. 417. It is deemed an entry when the thief breaketh the house, and his body or any part thereof, as his foot or his arm, is within any part of the house; or when he putteth a gun into a window which he hath broken, though the hand be not in, or into a hole of the house which he hath made, with intent to murder or kill, this is an entry and breaking of the house; but if he doth barely break the house, without any such entry at all, this is no burglary: 3 Inst. 64; 2 East, P. C. 490. Thieves came by night to rob a house; the owner went out and struck one of them; another made a pass with a sword at persons he saw in the entry, and, in so doing, his hand was over the threshold: this was adjudged burglary by great advice: 2 East, P. C. 490.

In Gibbon's Case evidence that the prisoner in the night time cut a hole in the window-shutters of a shop, part of a dwelling-house, and putting his hand through the hole took out watches, etc. was holden to be burglary although no other entry was proved: 2 East, P. C. 490. Introducing the hand through a pane of glass, broken by the prisoner, between the outer window and the inner shutter, for the purpose of undoing the window latch, is a sufficient entry: R. v. Bailey, R. & R. 341. So would the mere introduction of the offender's finger: R. v. Davis, R. & R. 499. So an entry down a chimney is a sufficient entry in the house for

a chimney is part of the house: R. v. Brice, R. & R. 450; s. 407, *post*.

It is even said that discharging a loaded gun into a house is a sufficient entry: 1 Hawk. 132. Lord Hale, 1 vol. 155, is of a contrary opinion, but adds *quære*? 2 East, P. C. 490, seems to incline towards Hawkins' opinion. Where thieves bored a hole through the door with a centre-bit, and parts of the chips were found in the inside of the house, this was holden not a sufficient entry to constitute burglary: R. v. Hughes, 2 East, P. C. 491. If divers come in the night to do a burglary, and one of them break and enter, the rest of them standing to watch at a distance, this is burglary in all: 1 Burn, 550.

In R. v. Spanner, 12 Cox, 155, Bramwell, B., held, that an attempt to commit a burglary may be established on proof of a breaking with intent to rob the house, although there be no proof of an actual entry. The prisoner was indicted for burglary, but no entry having been proved a verdict for an attempt to commit a burglary was given.

The intent.—There can be no burglary but where the indictment both expressly alleges, and the verdict also finds, an intention to commit *some felony* (now any indictable offence); for if it appear that the offender meant only to commit a trespass, as to beat the party or the like, he is not guilty of burglary: 1 Hale, 561. The intent must be proved as laid. Where the intent laid was to kill a horse, and the intent proved was merely to lame him in order to prevent him from running a race, the variance was holden fatal: R. v. Dobbs, 2 East, P. C. 513. It is immaterial whether the felonious intent be executed or not; thus, they are burglars who, with a felonious intent, break any house or church in the night, although they take nothing away. And herein this offence differs from robbery, which requires that something be taken though it be not material of what value. The felonious intent with which the prisoner broke and entered the house cannot be proved by positive testimony;

it can only be proved by the admission of the party, or by circumstances from which the jury may presume it. Where it appears that the prisoner actually committed a felony after he entered the house this is satisfactory evidence and almost conclusive that the intent with which he broke and entered the house was to commit that felony. Indeed, the very fact of a man's breaking and entering a dwelling-house in the night time is strong presumptive evidence that he did so with intent to steal, and the jury will be warranted in finding him guilty upon this evidence merely: R. v. Brice, R. & R. 450; R. v. Spanner, 12 Cox, 155. If the intent be at all doubtful it may be laid in different ways in different counts: R. v. Thompson, 2 East, P. C. 515; 2 Russ. 45. It seems sufficient, in all cases where a felony has actually been committed, to allege the commission of it, as that is sufficient evidence of the intention. But the intent to commit a felony (now any indictable offence), and the actual commission of it, may both be alleged; and in general this is the better mode of statement: R. v. Furnival, R. & R. 445.

As to punishment *see post*, s. 410.

PART XXX.

BURGLARY AND HOUSEBREAKING.

Definitions.

407. In this part the following words are used in the following senses:

(*a*) "Dwelling-house" means a permanent building the whole or any part of which is kept by the owner or occupier for the residence therein of himself, his family or servants, or any of them, although it may at intervals be unoccupied;

(i) A building occupied with, and within the same curtilage with, any dwelling-house shall be deemed to be part of the said dwelling-house if there is between such building and dwelling-house a communication, either immediate or by means of a covered and inclosed passage, leading from the

one to the other, but not otherwise. R. S. C. c. 164, s. 36. 24-25 V. c. 96, s. 53 (Imp.).

(*b*) To "break" means to break any part, internal or external, of a building, or to open by any means whatever (including lifting, in the case of things kept in their places by their own weight), any door, window, shutter, cellar-flap or other thing intended to cover openings to the building, or to give passage from one part of it to another;

(i) An entrance into a building is made as soon as any part of the body of the person making the entrance, or any part of any instrument used by him, is within the building;

(ii) Every one who obtains entrance into any building by any threat or artifice used for that purpose, or by collusion with any person in the building, or who enters any chimney or other aperture of the building permanently left open for any necessary purpose, shall be deemed to have broken and entered that building.

These definitions are taken from the English draft where they are given as existing law.

BREAKING PLACES OF WORSHIP.

408. Every one is guilty of an indictable offence and liable to *fourteen years'* imprisonment who breaks and enters *any place of public worship* and commits *any indictable offence* therein, *or who having committed any indictable offence therein,* breaks out of such place. R. S. C. c. 164, s. 35. (*Amended*). 24-25 V. c. 96, s. 50 (Imp.).

A tower of a parish church is a part of the church; so is the vestry: R. v. Wheeler, 3 C. & P. 585; R. v. Evans, Car. & M. 298.

The goods of a dissenting chapel, vested in trustees, cannot be described as the goods of a servant put in charge of the chapel and the things in it: R. v. Hutchinson, R. & R. 412. Where the goods belonging to a church are stolen they may be laid in the indictment to be the goods of the parishioners: 2 Russ. 73.

Indictment for breaking and entering a church and stealing therein.— a place of public worship, to wit, the church of the parish of in the county of unlawfully did break and enter, and there, in the said church, one silver cup of the goods and chattels of unlawfully did steal: *see* ss. 619-620.

Indictment for stealing in and breaking out of a church.— that at A. B., one silver cup,

of the goods and chattels of in a place of public worship, to wit, the church of the said parish there situate, unlawfully did steal, and that the said (*defendant*) so being in the said church as aforesaid, afterwards, and after he had so committed the said offence in the said church, as aforesaid, on the day and year aforesaid, unlawfully did break out of the said church: *see* ss. 619-620.

If a chapel which is private property be broken and entered lay the property as in other cases of larceny. If the evidence fails to prove the breaking and entering a church, etc., the defendant may be convicted of simple larceny. Upon the trial of any offence under this section the jury may, under s. 711, convict of an attempt to commit such offence.

BREAKING PLACE OF WORSHIP WITH INTENT.

409. Every one is guilty of an indictable offence and liable to seven years' imprisonment who breaks and enters *any place of public worship* with intent to commit *any indictable offence* therein. R. S. C. c. 164, s. 42 (*amended*). 24-25 V. c. 96, s. 57 (Imp.)

See form under s. 412, *post*.

BURGLARY—PUNISHMENT.

410. Every one is guilty of the indictable offence called burglary, and liable to imprisonment for life, who—

(*a*) breaks and enters a dwelling-house by night with intent to commit *any indictable offence* therein; or

(*b*) breaks out of any dwelling-house by night, either after committing *an indictable offence* therein, or after having entered such dwelling-house, either by day or by night, with intent to commit *an indictable offence* therein. R. S. C. c. 164, s. 37 (*Amended*). 24-25 V. c. 96, ss. 51, 52 (Imp.).

Section 3, *ante*, declares what is "night."

If a person commits a felony in a house, and afterwards breaks out of it in the night-time, this is burglary, although he might have been lawfully in the house; if, therefore, a lodger has committed a larceny in the house and in the night-time even lifts a latch to get out of the house with the stolen property, this is a burglarious breaking out of the house: R. v. Wheeldon, 8 C. & P. 747.

It has been held that getting out of a house by pushing up a new trap-door, which was merely kept down by its own weight, and on which fastenings had not yet been put, but the old trap-door, for which this new one was substituted, had been secured by fastenings, was not a sufficient breaking out of the house: R. v. Lawrence, 4 C. & P. 231. On this case Greaves says: "unless a breaking *out* of a house can be distinguished from the breaking *into* a house, this case seems overruled by R. v. Russell, 1 Moo. 377."

If the felon, to get out of the dwelling-house, should break an inside door the case would plainly enough be within the statute. But the facts of the cases seem not to have raised the question, absolutely to settle it, whether where the intent is not to get out the breach of an inner door by a person already within, having made what is tantamount to a felonious entry, but not by breaking, is sufficient to constitute burglary, if there is no entry through the inner door thus broken. There are indications that the breaking alone in such circumstances may be deemed enough: R. v. Wheeldon, *supra*. On the other hand, it was held that burglary is not committed by an entry, with felonious intent, into a dwelling-house, without breaking, followed by a mere breaking, without entry, of an inside door: R. v. Davis, 6 Cox, 369; 2 Bishop Cr. L. 100. But in Kelyng's Cr. C. 104, it is said that if a servant in the house, lodging in a room remote from his master in the night-time, draweth the latch of a door to come into his master's chamber, with an intent to kill him, this is burglary.

On any indictment for burglary the prisoner may be convicted of the offence of breaking the dwelling-house under s. 412, *post*.

On an indictment for burglary the prisoner cannot be found guilty of felonious receiving: St. Laurent v. R., 7 Q. L. R. 47.

Indictment for burglary and larceny to the value of twenty-five dollars.— that J. S., on about the hour of eleven of the clock, of the night of the same day, the dwelling-house of J. N., situate unlawfully and burglariously did break and enter, with intent the goods and chattels of one K. O. in the said dwelling-house then being, unlawfully and burglariously to steal; and then in the said dwelling-house, one silver sugar basin, of the value of ten dollars, six silver table-spoons of the value of ten dollars, and twelve silver tea-spoons of the value of ten dollars, of the goods and chattels of the said K. O. in the said dwelling-house then being found, unlawfully and burglariously did steal.

Upon this indictment the defendant, if all the facts are proved as alleged, may be convicted of burglary; if they are all proved, with the exception that the breaking was by night, the defendant may be convicted of housebreaking, under s. 411; if no breaking be proved, but the value of the property stolen proved to be, as alleged, over twenty-five dollars, the verdict may be of stealing in a dwelling-house to that amount, under s. 345, *ante;* if no satisfactory evidence be offered to show, either that the house was a dwelling-house or some building communicating therewith, or that it was the dwelling-house of the party named in the indictment, or that it was locally situated as therein alleged, or that the stolen property was of the value of twenty-five dollars, still the defendant may be convicted of a simple larceny; s. 713: 1 Taylor, Ev. 216; R. v. Comer, 1 Leach, 36; R. v. Hungerford, 2 East, P. C. 518. Where several persons are indicted together for burglary and larceny the offence of some may be burglary and of the others only larceny: R. v. Butterworth R. & R. 520. *See post,* remarks under s. 415.

If no indictable offence was committed in the house the indictment should be as follows:—

that A. B., on about the hour of eleven in the night of the same day, at the dwelling-house of J. N. there situate, unlawfully and burglariously did break and enter, with intent the goods and chattels of the said J. N. in the said dwelling-house then and there being found, then and there unlawfully and burglariously to steal.

The terms of art usually expressed by the averment "burglariously did break and enter" are essentially necessary to the indictment. The word *burglariously* cannot be expressed by any other word or circumlocution; and the averment that the prisoner broke and entered is necessary, because a breaking without an entering, or an entering without a breaking, will not make burglary: 2 Russ. 50: *see* s. 611, *post*. The offence must be laid to have been committed in a mansion-house or dwelling-house, the term *dwelling-house* being that more usually adopted in modern practice. It will not be sufficient to say a *house:* 2 Russ. 46; 1 Hale, 550. It has been said that the indictment need not state whose goods were intended to be stolen, or were stolen: R. v. Clarke, 1 C. & K. 421; R. v. Nicholas, 1 Cox, 218; R. v. Lawes, 1 C. & K. 62; nor specify which goods, if an attempt or an intent to steal only is charged: R. v. Johnson, L. & C. 489: *see* s. 613, *post*.

It is better to state at what hour of the night the acts complained of took place, though it is not necessary that the evidence should correspond with the allegation as to the exact hour; it will be sufficient if it shows the acts to have been committed in the night as this word is interpreted by the statute. However, in R. v. Thompson, 2 Cox, 377, it was held that the hour need not be specified, and that it will be sufficient if the indictment alleges *in the night*.

Indictment for burglary by breaking out.— that J. S., on about the hour of eleven in the night of the same day, being in the dwelling-house of K. O., situate

one silver sugar-basin of the value of ten dollars, six silver table-spoons of the value of ten dollars, and twelve silver tea-spoons of the value of ten dollars, of the goods and chattels of the said K. O., in the said dwelling-house of the said K. O., then being in the said dwelling-house, unlawfully did steal, and that he, the said J. S., being so as aforesaid in the said dwelling-house, and having committed the offence aforesaid, in manner and form aforesaid, afterwards, to wit, on the same day and year aforesaid, about the hour of eleven in the night of the same day, unlawfully and burglariously did break out of the said dwelling-house of the said K. O.

An indictment alleging "did break to get out" or "did break and get out" is bad; the words of the statute are "break out:" R. v. Compton, 7 C. & P. 139. *See pages 471 et seq. ante;* R. v. Lawrence, 4 C. & P. 231; R. v. Wheeldon, 8 C. & P. 747, and remarks on burglary. If it be doubtful whether an indictable offence can be proved, but there be sufficient evidence of an intent to commit such an offence, a count may be added stating the intent. To prove this count the prosecutor must prove the entry, the intent as in other cases, and the breaking out.

Upon the trial of any offence hereinbefore mentioned the jury may convict of an attempt to commit such offence, if the evidence warrants it, under s. 711, *post*.

HOUSEBREAKING AND COMMITTING AN OFFENCE.

411. Every one is guilty of the indictable offence called housebreaking, and liable to fourteen years' imprisonment, who—

(*a*) breaks and enters any dwelling-house by day and commits *any indictable offence* therein; or

(*b*) breaks out of any dwelling-house by day after having committed *any indictable offence* therein. R. S. C. c. 164, s. 41 (*Amended*). 24-25 V. c. 96, s. 56 (Imp.).

See cases cited in R. v. Hughes, Warb. Lead. Cas. 190.

The words "schoolhouse, shop, warehouse or counting-house," in the repealed section have been omitted: *see post*, s. 413.

The breaking and entering must be proved in the same manner as in burglary, except that it need not be proved to have been done in the night-time. But if it be proved to have been done in the night-time, so as to amount to burglary, the defendant may, notwithstanding, be convicted upon this indictment: R. v. Pearce, R. & R. 174; R. v. Robinson, R. & R. 321; Archbold, 399. And so, also, any breaking and entering which would be sufficient in a case of burglary would be sufficient under this section. Thus, where the prisoner burst open an inner door in the inside of a house, and so entered a shop, in order to steal money from the till, it was held that this was a sufficient breaking to support an indictment for housebreaking: R. v. Wenmouth, 8 Cox, 348. The value of the goods is immaterial if a breaking and entry be proved; but if proved and alleged to be of the value of twenty-five dollars, the prisoner may be convicted of the offence described in s. 345, *ante;* if the prosecutor succeed in proving the larceny, but fail in proving any of the other aggravating circumstances, the defendant may be convicted of simple larceny. The same accuracy in the statement of the ownership and situation of the dwelling-house is necessary in an indictment for this offence as in burglary. But it must be remembered that any error in these matters may now be amended.

As in simple larceny, the least removal of the goods from the place where the thief found them, though they are not carried out of the house, is sufficient upon an indictment for house-breaking. It appeared that the prisoner, after having broken into the house, took two half-sovereigns out of a bureau in one of the rooms, but being detected he threw them under the grate in that room; it was held that if they were taken with a felonious intent this was a sufficient removal of them to constitute the offence: R. v. Amier, 6 C. & P. 344.

As to what was a shop under the repealed section (*see post*, s. 413), it was once said that it must be a shop for the

sale of goods, and that a mere workshop was not within the clause: R. v. Sanders, 9 C. & P. 79; but in R. v. Carter, 1 C. & K. 173, Lord Denman, C.J., declined to be governed by the preceding case, and held that a blacksmith's shop, used as a workshop only, was within the statute. A warehouse means a place where a man stores or keeps his goods which are not immediately wanted for sale; R. v. Hill, 2 Russ. 95. Upon an indictment for breaking and entering a counting-house, owned by Gamble, and stealing therein, it appeared that Gamble was the proprietor of extensive chemical works, and that the prisoner broke and entered a building, part of the premises, which was commonly called the machine-house, and stole therein a large quantity of money. In this building, there was a weighing machine, at which all goods sent out were weighed, and one of Gamble's servants kept in that building a book in which he entered all goods weighed and sent out. The account of the time of the men employed in different departments was taken in that building and their wages were paid there; the books in which their time was entered were brought to that building for the purpose of making the entries and paying the wages. At other times they were kept in another building called the office, where the general books and accounts of the concern were kept. It was objected that this was not a counting-house; but, upon a case reserved, the judges held that it was a counting-house within the statute: R. v. Potter, 2 Den. 235.

An indictment for house-breaking is good if it alleges that the prisoner broke and entered the dwelling-house, and the goods of in the said dwelling-house then and there being found, then and there (omitting "in the said dwelling-house") unlawfully did steal: R. v. Andrews, Car. & M. 121, overruling R. v. Smith, 2 M. & Rob 115, which Coleridge, J., said Patteson, J., was himself since satisfied had been wrongly decided: 2 Russ. 76, note by Greaves.

Indictment.— the dwelling-house of J. N., situate unlawfully did break and enter, by day, with intent the goods and chattels of the said J. N., in the said dwelling-house then being, unlawfully to steal, and one dressing-case of the value of twenty-five dollars, of the goods and chattels of the said J. N., then in the said dwelling-house, then unlawfully did steal.

Upon the trial of an indictment for an offence under this section the jury may, under s. 711, convict the defendant of an attempt to commit the same, if the evidence warrants it. But they can only convict of the attempt to commit the identical offence charged in the indictment; the prisoner was indicted for breaking and entering a dwelling-house, and stealing therein certain goods specified in the indictment, the property of the prosecutor. It was proved at the trial that at the time of the breaking the goods specified were not in the house, but there were other goods there, the property of the prosecutor; the prisoner had not had time to steal anything, having been caught immediately after his entering the house. The jury acquitted the prisoner of the felony charged, but found him guilty of breaking and entering the dwelling-house of the prosecutor, and attempting to steal his goods therein. *Held*, that the conviction was wrong, and that an attempt must be to do that which, if successful, would amount to the felony charged: R. v. McPherson, Dears. & B. 197. The prisoner, under such circumstances, may be convicted of breaking and entering *with intent* to commit an indictable offence, under s. 412, *post*. But only if, as in the form above given, the intent is alleged, which was not the case in R. v. McPherson. *See* s. 64, p. 42, *ante*.

HOUSEBREAKING WITH INTENT.

412. Every one is guilty of an indictable offence and liable to seven years' imprisonment who, by day, breaks and enters any dwelling-house with intent to commit *any indictable offence* therein. R. S. C. c. 164, s. 42 (*Amended*). 24-25 V. c. 96, s. 57 (Imp.).

The words "schoolhouse, shop, warehouse and counting house" were in the repealed clause.

Indictment.— on the dwelling-house of J. N., situate unlawfully did break and enter by day with intent to commit an indictable offence therein, to wit, the goods and chattels of the said J. N., in the said dwelling-house there being, then to steal.

Where there is only an attempt it is not always possible to say what goods the would-be thief meant to steal, and an indictment for an attempt to commit larceny need not specify the goods intended to be stolen: R. v. Johnson, L. & C. 489.

Upon an indictment under this section the prisoner may be convicted, under s. 711, of attempting to commit the offence charged: R. v. Bain, L. & C. 129.

Greaves says: "This clause is new, and contains a very important improvement in the law. Formerly the offence here provided was only a misdemeanour at common law. Now it often happened that such an offence was very inadequately punished as a misdemeanour, especially since the night was made to commence at nine in the evening; for at that time, in the winter, in rural districts, the poor were often in bed. Nor could anything be much more unreasonable than that the same acts done just after nine o'clock at night should be liable to penal servitude for life, but if done just before nine they should only be punishable as a misdemeanour. It is clear that if, on the trial of an indictment for burglary with intent to commit a felony, it should appear that the breaking and entry were before nine o'clock the prisoner might be convicted under this clause. But upon an indictment *in the ordinary form* for house-breaking, the prisoner could not be convicted under this clause, because it does not allege an intent to commit a felony (as in McPherson's Case, *ante*, under last preceding section). It will be well, however, to alter the form of these indictments, and to allege a breaking and

entry with intent to commit some felony (any indictable offence), in the same manner as in an indictment for burglary with intent to commit felony, and then to allege the felony that is supposed to have been committed in the house. If this be done, then, if the evidence fail to prove the commission of that felony, but prove that the prisoner broke and entered with intent to commit it, he may be convicted under this clause."

BREAKING SHOP, SCHOOL-HOUSE, ETC., AND COMMITTING AN OFFENCE.

413. Every one is guilty of an indictable offence and liable to fourteen years' imprisonment who, either by day or night, breaks and enters and commits *any indictable offence* in a school-house, shop, warehouse or counting house, or any building within the curtilage of a dwelling house, but not so connected therewith as to form part of it under the provisions hereinbefore contained. R. S. C. c. 164, s. 40 *(Amended)*. 24-25 V. c. 96, ss. 55-56 (Imp.).

Section 407 defines what is within the curtilage.

See ante, under s. 411 what is a shop, or warehouse, or counting-house: also as to indictment.

"Curtilage" is a court-yard, enclosure or piece of land near and belonging to a dwelling-house.—*Toml. Law Dict.*

The breaking and entering must be proved in the same manner as in burglary, except that it is immaterial whether it was done in the day or night. If this proof fail the defendant may be convicted of simple larceny.

The building described in the statute is "any building within the *curtilage* of a dwelling-house, but not so connected therewith as to form part of it under the provisions hereinbefore contained," that is, not communicating with the dwelling-house, either immediately or by means of a covered and enclosed passage leading from the one to other as described in s. 407. To break and enter such a building was, before the present statute, burglary, or house-breaking, and although this enactment, which expressly defines the building meant thereby to be a building within the *curtilage*, appears to exclude many of those buildings which were formerly deemed parcel of the dwelling-house, from their adjoining the dwelling-house, and being occupied there-

with, although not within any common enclosure or curtilage, yet some of the cases decided upon these subjects may afford some guide to the construction of the present section. Where the defendant broke into a goose-house, which opened into the prosecutor's yard, into which yard the prosecutor's house also opened, and the yard was surrounded, partly by other buildings of the homestead, and partly by a wall in which there was a gate leading to the road, and some of the buildings had doors opening into the lane, as well as into the yard, the goose-house was holden to be part of the dwelling-house: R. v. Clayburn, R. & R. 360. Where the prosecutor's house was at the corner of the street, and adjoining thereto was a workshop, beyond which a coach-house and stable adjoined, all of which were used with the house and had doors opening into a yard belonging to the house, which yard was surrounded by adjoining buildings and was altogether enclosed, but the shop had no internal communication with the house, had a door opening into the street, and its roof was higher than that of the house, the workshop was holden to be a parcel of the dwelling-house: R. v. Chalking, R. &. R. 334. So, a warehouse which had a separate entrance from the street, and had no internal communication with the dwelling-house with which it was occupied but was under the same roof, and had a back door opening into the yard into which the house also opened and which enclosed both, was holden to be part of the dwelling-house: R. v. Lithgo, R. & R. 357. So, where in one range of buildings the prosecutor had a warehouse and two dwelling-houses, formerly one house, all of which had entrances into the street, but had also doors opening into an enclosed yard belonging to the prosecutor, and the prosecutor let one of the houses between his house and the warehouse together with certain easements in the yard, it was holden that the warehouse was parcel of the dwelling-house of the prosecutor; it was so before the division of the house and remained so afterwards: R. v.

Walters, 1 Moo. 13. And where the dwelling-house of the prosecutor was in the centre of a space of about an acre of land, surrounded by a garden wall, the front wall of a factory, and the wall of the stable-yard, the whole being the property of the prosecutor who used the factory, partly for his own business and partly in a business in which he had a partner, and the factory opened into an open passage into which the outer door of the dwelling-house also opened, it was holden that the factory was properly described as the dwelling-house of the prosecutor: R. v. Hancock, R. & R. 170. But a building separated from the dwelling-house by a public thoroughfare cannot be deemed to be part of the dwelling-house: R. v. Westwood, R. & R. 495. So neither is a wall, gate or other fence, being part of the outward fence of the curtilage, and opening into no building but into the yard only, part of the dwelling-house: R. v. Bennett, R. & R. 289. Nor is the gate of an area, which opens into the area only, if there be a door or fastening to prevent persons from passing from the area into the house, although that door or other fastening may not be secured at that time: R. v. Davis, R. & R. 322.

Where the building broken into was in the fold-yard of the prosecutor's farm, to get to which from the house it was necessary to pass through another yard called the pump-yard into which the back door of the house opened, the pump-yard being divided from the fold-yard by a wall four feet high in which there was a gate, and the fold-yard being bounded on all sides by the farm buildings, a wall from the house, a hedge and gates, it was held that the building was within the curtilage: R. v. Gilbert, 1 C. & K. 84. *See* R. v. Egginton, 2 Leach, 913.

Indictment.— a certain building of one J. N., situate unlawfully did break and enter, the said building then being within the curtilage of the dwelling-house of the said J. N. there situate, and by the said J. N. then and there occupied therewith, and there being then

and there no communication between the said building and the said dwelling-house, either immediate or by means of any covered and enclosed passage leading from the one to the other, with intent the goods and chattels of the said J. N. in the said building then being to steal, and that the said J. S. then and there, in the said building, one silver watch of the goods and chattels of the said J. N. did steal.

This count may be added to an indictment for burglary, house-breaking or stealing in a dwelling-house to the amount of twenty-five dollars, and should be added whenever it is doubtful whether the building is in strictness a dwelling-house. If the evidence fail to prove the actual stealing, but the breaking, entry and intent to steal be proved, the prisoner may be convicted, under this indictment, of the offence described in s. 414, as this indictment alleges the intent as well as the act.

Under s. 711 a verdict of guilty of an attempt to commit the offence charged may be given upon an indictment on this section, if the evidence warrants it.

BREAKING SHOP, SCHOOL-HOUSE, ETC., WITH INTENT.

414. Every one is guilty of an indictable offence and liable to seven years' imprisonment who, either by day or night, breaks and enters any of the buildings mentioned in the last preceding section with intent to commit *any indictable offence* therein. R. S. C. c. 164, s. 42 *(Amended)*. 24-25 V. c. 96, s. 57 (Imp.).

See remarks under ss. 412 & 413, *ante*.

BEING FOUND IN DWELLING-HOUSE BY NIGHT.

415. Every one is guilty of an indictable offence and liable to seven years' imprisonment who unlawfully enters, or is in, any dwelling-house by night with intent to commit *any indictable offence* therein. R. S. C. c. 164, s. 39. 24-25 V. c. 96, s. 54 (Imp.).

Greaves says: "This clause is new and contains a great improvement of the law. It frequently happened on the trial of an indictment for burglary where no property had been stolen that the prisoner escaped altogether for want of sufficient proof of the house having been broken into, though there was no moral doubt that it had been so. This

clause will meet all such cases. It will also meet all cases where any door or window has been left open, and the prisoner has entered by it in the night. It is clear that if, on the trial of an indictment for burglary with intent to commit a felony, the proof of a breaking should fail, the prisoner might nevertheless be convicted of the offence created by this clause for such an indictment contains everything that is required to constitute an offence under this clause, in addition to the allegation of the breaking, and the prisoner may be acquitted of the breaking and convicted of the entering with intent to commit felony, in the same way as on an indictment for burglary and stealing he may be acquitted of the breaking and convicted of the stealing. And this affords an additional reason why, in an indictment for burglary and committing a felony, there should always be introduced an averment of an intent to commit a felony, so that if the proof of the commission of the felony and of the breaking fail the prisoner may nevertheless be convicted of entering by night with intent to commit it."

Indictment.— that J. S., on about the hour of eleven in the night of that same day, the dwelling of K. O., situate unlawfully did enter, with intent the goods and chattels of the said K. O., in the said dwelling-house then being, to steal.

As to what is night, and what is a dwelling-house, in the interpretation of this clause the same rules as for burglary must be followed. Under s. 711 the jury may, if the evidence warrants it, convict of an attempt to commit the offence charged upon an indictment under this section.

BEING FOUND ARMED WITH INTENT.

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

(*a*) armed with any dangerous or offensive weapon or instrument *by day*, with intent to break or enter into any *dwelling-house*, and to commit *any indictable offence* therein; or

(*b*) armed as aforesaid by night, with intent to break into *any* building and to *commit any indictable offence* therein. R. S. C. c. 164, s. 43 (*Amended*). 24-25 V. c. 96, s. 58 (Imp.).

"Offensive weapon" defined, s. 3.

The punishment was three years under the repealed clause.

The word "by day" is new. *By day* the offence is as to a dwelling-house only. *By night* it is as to any building: *see* form of indictment under next section.

BEING DISGUISED OR IN POSSESSION OF HOUSE-BREAKING INSTRUMENTS.

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

(*a*) having in his possession by night, without lawful excuse (the proof of which shall lie upon him) any instrument of housebreaking; or

(*b*) having in his possession *by day* any such instrument with intent to commit any indictable offence; or

(*c*) *having his face masked or blackened, or being otherwise disguised, by night, without lawful excuse (the proof whereof shall lie on him);* or

(*d*) having his face masked or blackened, or being otherwise disguised, *by day*, with intent to commit any indictable offence. R. S. C. c. 164, s. 43 (*Amended*). 24-25 V. c. 100, s. 58 (Imp.).

"Having in possession," defined, s. 3.

The words in italics are new.

Sub-sections (*b*), (*c*), (*d*) are also new or extensions of the repealed statute.

"It is thought that being disguised by night affords sufficient *prima facie* evidence of a criminal intent."—Imp. Comm. Rep.

The punishment was three years under the repealed clause.

Indictment under s. 416 for being found by night armed.— that A. B. on about the hour of eleven of the night of the same day at was found unlawfully armed with a certain dangerous and offensive weapon (*or instrument*), with intent to break and enter into a dwelling-house (*or any other building*) of C. D. there situate, and the goods and chattels in the said dwelling-house (*or any other building*), then being, unlawfully to steal.

It is not necessary to aver that the goods and chattels were the property of any particular person: R. v. Lawes, R. v. Clarke, 1 C. & K. 62, 421; R. v. Nicholas, 1 Cox, 218.

See, ante, s. 3, as to the interpretation of the word "night."

In R. v. Jarrald, L. & C. 301, it was held, upon a case reserved, that an indictment under the repealed section, for being found by night armed with a dangerous and offensive weapon and instrument, with intent to break and enter into a building and commit a felony therein, must specify, as in burglary, the building to be broken into. Crompton, J., was of opinion that the particular felony intended must also be specified.

On this case Greaves, 2 Russ. 70, note *g*, says: "With all deference it is submitted that this decision is clearly erroneous. The ground on which Cockburn, C.J., rests the decision of the first point (as to a particular house to be specified, *now* s. 417) is answered by the second clause of the same section; for, under it, the mere possession, without lawful excuse, of any instrument of housebreaking in the night constitutes the offence without any intent to commit felony at all; and this offence is plainly one step further from the attempt to commit a felony than where the intent to commit some felony exists, though the particular felony is not yet fixed . . . As to the rules of criminal pleading these seem, in this case, to have been misconceived. It is quite a mistake to suppose that these rules require the specification of particulars where it is impracticable to specify them. Wherever this is the case the rules allow general or other statements instead. . . . It cannot be doubted that this decision, instead of promoting the object of the Act in this respect, is substantially a repeal of it, for it is hardly conceivable that, in the majority of cases, it will be possible to prove an intent to commit any particular felony."

To this Cave answers, (3 Burn, 252, *note a*): " . . . . But a close consideration of the statute appears to confirm it (the decision in *Jarrald's Case*): it may well be that in all the other cases except 'having implements of house-breaking' an intent must be clearly proved; for the 'being armed with a dangerous weapon' or 'having the face blacked' or 'being by night in a dwelling-house' are clearly no offences unless done for a felonious purpose. And the very essence of the offence is such felonious purpose. But, with regard to 'having instruments of house-breaking,' the statute implies the intent from the nature of the instrument, and throws the proof of innocence upon the prisoner. The general intention of the statute is thus well carried out; for if a man be found by night anywhere with house-breaking implements, or such as the jury shall think he intended to use as such, he may be indicted for that offence. But if he has not any house-breaking implements, but is 'armed with a dangerous weapon' not usable for house-breaking, then the particular intent under s. 416 must be laid and proved as laid."

Indictment under s. 417 (a) for having in possession, by night, implements of house-breaking.— on about the hour of eleven in the night of the same day, at was found, he the said (*defendant*) then and there, by night as aforesaid, unlawfully having in his possession, without lawful excuse, certain implements of house-breaking (to wit).

An instrument capable of being used for lawful purposes is within the statute if the jury find that such instrument may also be used for the purposes of house-breaking, and that the prisoner intended to use it as an implement of house-breaking when found at night in possession of it: R. v. Oldham, 2 Den. 472.

Where an indictment for having in possession without lawful excuse certain implements of house-breaking by night the jury found the prisoners guilty of the possession without

lawful excuse, but that there was no evidence of an intent to commit a felony, and the indictment omitted the words "with intent to commit a felony," it was held that the omission did not render the indictment bad, and that it was not necessary to prove an intent to commit a felony: R. v. Bailey, Dears. 244.

Indictment under s. 417 (d) for being found by day with a disguised face with intent to commit an indictable offence.

that at on A. B. was found by day, then and there having his face blackened (*masked, blackened or otherwise disguised*) with intent then and there to kill and murder one C. D.

In R. v. Thompson, 11 Cox, 362, *held*, that where several persons are found out together by night for the common purpose of house-breaking and one only is in possession of house-breaking implements all may be found guilty of the misdemeanour created by this section, for the possession of one is in such case the possession of all. *See* s. 3 for definition of "having in possession."

PUNISHMENT AFTER PREVIOUS CONVICTION.

418. Every one who, after a previous conviction for any *indictable offence*, is convicted of *an indictable offence* specified in this part for which the punishment on a first conviction is less than fourteen years' imprisonment is liable to *fourteen years'* imprisonment. R. S. C. c. 164, s. 44 *(Amended)*. 24-25 V. c. 96, s. 59 (Imp.).

The imprisonment was for ten years under the repealed clause. As to trial of an offence after a previous conviction *see post*, ss. 628 and 676.