Criminal Law.

1835
May 13th
Criminal Law.

That branch of municipal law which treats of public wrongs is called criminal law—pleas of the crown, or crown law. § 136.3.

The term public wrongs includes all crimes & misdemeanors, i.e., all offenses agt. municipal law. For all wrongs are not offenses. § 136.1. Public wrongs are offenses agt. the State in its aggregate capacity. Private wrongs are offenses agt. private persons. it.

A crime, or misdemeanor, is an act committed, or omitted, in violation of a public law, forbidding or commanding it. § 136.5.

The words, crimes, and misdemeanors, are strictly synonymous; the in common acceptance, the former denotes offenses of the more atrocious kind, the latter those of the less heinous character. § 136.5.

A crime or misdemeanor of any kind is an infraction or violation of a public right, inherent in the whole State, or community, in its aggregate capacity. A civil injury is an infraction of a private right.

In almost every case, a public wrong actually includes at least civil injury, e.g., assault & battery is a violation of public peace, & private security. So of libel, murder, theft,
voluntary arson. Some offences, however, created by positive law, do not include a civil injury as damages. But offences punishable by the common law almost always do.

There are other cases, in which a public wrong may or may not include, or produce, a civil injury, as a futurum nuisance.

And in these cases the object of the law is, to give, as far as possible, a twofold redress, i.e., to the public, and to the individual—punishment for the public wrong, damages for the civil injury, ch. 36, § 7.

Yet if the offence amounts to felony, the private injury is, regularly at common law, merged in the crime, no private redress can be had. ex. Treason murder, Larceny, &c. 36, § 6. Bull. 181. 2 Beav. 377. 15. 10. 1 Mod. 283. 3 Com. 382.

The doctrine of merger has been said to be founded on the policy of the law; the object of which is to prevent the compounding of felonies on private satisfaction, and thus criminals escaping punishment. But the only true and rational foundation seems to be, that in cases of felony the punishment, for the public wrong, renders private redress, for the civil injury, impossible; the punishment being, in general, a forfeiture of life and property. 4 T. R. 875. 5 T. R. 1572. 3 T. R. 176-7. arg. This rule, not practically harsh, crowns generally doly justice to individuals.
If a crime, not amounting to felony, injures an individual, he has his private remedy. The doctrine of merger does not apply. The crime does not work a forfeiture of life or property. 4 Wh. 6.

In Con't., this doctrine of merger seems not to have been regarded. Civil suits have been here sustained for perjury, arson, etc. Forfeiture of property for crimes, here, takes place only in two cases—destroying magazines, etc. of U.S. in time of peace, and manslaughter. 6 Id. 4. And in neither case is life forfeited.

The right of punishing for crimes is founded on the law of nature, and in some instances, authorized by the revealed law of God; as in case of murder. This right, in a state of nature, was vested in every individual, injured by a crime; for it must have existed somewhere, as otherwise there would be no execution of the law of nature—no sanction; and it cannot exist elsewhere than in the individual injured. 7 Id.

In a state of civil society, this right resides in the sovereign power; men are no longer their own judges or avengers.

Society's right to punish is said by some, to be derived from the consent of its members, express or tacit;
Criminal Law.

Therefore, to be founded on compact. 2 Bl. 8. This foundation is broad enough to authorize most punishments, but not all. Ex. not sufficient for capital punishment for mala prohibita, nor any punishment for such offences -- for such could not exist in a state of nature.

But, in regard to the right of society to punish offences mala in se, a consistent theory may be made out from compact: for, in these cases, the individuals, who had the right to punish, in a state of nature, might transfer it. This notion of compact is, however, very artificial, and wholly unnecessary. 4 Tst 8-9. Tattell (Quart) 74. Paley moral Philosophy 341. i.e. 2. Burlemagne 142.

Consent of the Criminal can in no case, be sufficient to authorize capital punishment. Id.

But the most rational and broad ground of the right of punishing, not only in case of mala prohibita, but of all offences, is (1) expediency, or (2) necessity; for what is expedient, is agreeable to the law of reason -- agreeable to justice. Men are formed for civil society: But civil society cannot exist, without a right of punishing, for offences against the society. A sovereign state, that regarded as a moral person, has different attributes, from those of a natural person -- different rights, different duties -- different nature, & essence. Tattell, prof. 78.

1 Paley 13. 4 Bl. 9, 10. Paley, 341. i.e.
Criminal Law.

The end of all human punishment is the prevention of crime. Punishment is neither an atonement, nor a satisfaction, for the injury. The prevention of crimes is to be attained in one, or more, of 3 ways. 1. By reforming the offender. 2. By deterring him of the power of committing future crimes. 3. By deterrence others from offending. The first object is attained by disciplinary punishment — as penitentiary or. The second, by death or perpetual imprisonment. The third, by infamous punishments. 1 Bl. 11. Coke 224.

Of the Persons capable of committing crimes.

Regularly, all persons are liable to punishment, for disobedience to the laws, except such as are expressly exempted. 4 Bl. 20.

All the excuses, which exempt the perpetrator of a forbidden act, from punishment, are reducible to this single consideration — viz. the want, or defect, of will — i.e. moral agency. To constitute a crime, there must be a will to a forbidden act, or neglect, concurren: for, nemo fit reg, nisi mens sit sob. See 2 as to forgive civil injuries 4 Bl. 20-1. 1 Heck 2.
Criminal Law.

Defect of will exists in three cases: 1. Where there is a defect of understanding. Ex. Infants, under the age of discretion. They are deemed in law, not capable of distinguishing between right and wrong. They are therefore, not punishable, by any criminal prosecution, in any case. 2. Clark. 1 D. 64. 1 Ed. 92.

If the offence is an omission, infants are not, generally, punishable at C.L., the age of discretion, Ex. not repairing roads, bridges, &c. 1 Moore 24. 32. 1 Bl. 20. Lackey not imputable to infants. The offence is ascribed rather to a want of forethought & providence than to a positive criminal disposition.

The age of legal discretion, as the law now stands, is that of 14 years. Under this age, the presumption is in favour of the infant's innocence. But, as to all infants between 14 & 17, this presumption may, in capital cases, at least, be rebutted. If under 17, it cannot, in any case, be rebutted. (This distinction subjecting infants under 14, if doli capaciæ, is laid down by Blackstone, with respect to felonies only.) 1 Nerv. 2. 4 Bl. 23. 1 H. 27. 135. 27. 1 Hale, 25. 6.

May not an infant under 14, be punished for breach of peace, riot, & common misdemeanors? It seems not, according to Blackstone. 4 Bl. 92. 3. Sed lu.
Criminal Law.

Idiots, Lunatics, are not punishable for their acts while under these incapacities. 4 Bl. 24. Inst. 6. 1 Hale 10. 43. 55. 1 Warr 2. Sec. in case of a Lunatic, if he offend in a lucid interval. 4 Bl. 25. 17 Hale 31.

A person deaf & dumb, from nature, may be tried, and punished, for even a capital crime, if ideas can be conveyed to him, by signs. Search. 105. 394. 2 Hale 317. 2 Warr. 462. 4 Bl. 324. 1 Mer. 158. — When this is the case, he is supposed doli capax — capable of a guilty intention, or motive. — Otherwise, not.

If one commit a capital offence, & before arraignment becomes insane, he cannot be arraigned; — if after arraignment, he cannot be tried; — if after verdict against him, no judgment; — if after judgment, execution must be stayed. 1 Warr 2. Inst. 45. 1 Hale 10. 34. 370. 4 Bl. 24. 395.

If doubtful, in any of these cases, whether the prisoner is non compos, the fact must be tried by a jury. 4 Bl. 25.

No, who incites a madman to do an unlawful act, is himself the offender. The principal. 1 Warr 3. 1 Hale 617. Hely. 53. 2. 1 Bl. 35.
Criminal Law.

Voluntary intoxication is no excuse, but rather an aggravation. (Co. Litt. 242. a. 4 Bl. 235. 6. 1 Hare. 23. (3rd.) 2 Horn. 13. a. 2 Co. 125. 1 Hare. 32.

But in case of habitual debility of mind, produced by a long course of intoxication, it is, otherwise, I presume. It thus becomes a disease. So, if intoxication is not voluntary, but produced by force, or fraud, I presume.

2. There is a defect of will, when the understanding, the sufficient, is not exerted. Here the will is neutral; it does not concur with the act.

General rule that, if one commits an unlawful act, by misfortune, or chance, he is excused. Here is a defect of will. 2 Bl. 171. 5 Hare. 39. 4 Co. 124. 1 Leic. 123.

But if one, intentionally, doing an unlawful act, does an intentional mischief, he is not excused. 4 Bl. 271. 4 Hare. 59. He has the mens rea; it must abide the consequences of his voluntary act.

Ignorance, or mistake, in point of fact, excuse. Here is a defect of will. Hence, if a mistake in law, here the will concurs with the act. 4 Co. 528. 4 Bl. 273. 5 Hare. 514. 3 Horn. 343. 3 Tay. 407. 8. 1 Hare. 35. 110. 1 Hare. 22. 3. 3.
Criminal Law.

3. There is a defect of will, arising from compulsion, or necessity. Hence, the will opposed the deed, or, at least, does not approve it. Ex. If the Legislature enacted an iniquitous law, commanding an act contrary to religion or morality— the subject is excused in obeying. Do he acts under the obligation of civil subjection. 4 M. 21, 275.

A wife covert is, in many instances, excused from punishment, when she does an unlawful act through the coercion of her husband; or (which is the same thing), in his company. Ex. Theft, & burglary. (See "House," &c.) 10 Mod. 53, Helg. 31-7; 1 Hale 457, 41 Bl. 28. — Reason of the rule seems to be in the ancient law relative to benefit of clergy. 4 Bl. 29, n.

But if she commits these crimes voluntarily, or by the bare command of her husband, or in his absence, she is not excused. 4 Bl. 29, 1 Bac. 294, 9 Co. 71, 1 Harr. 3.


In case of treason, murder, &c., it is said, robbery, even coercion by the husband does not excuse. 1 Harr. 2, 1 Bac. 294, 4 Bl. 29, 1 Hale 47, Helg. 31. — Reason, fearlessness of the crime.

So, in manslaughter. (4 Bl. 29, n. 17 Hale 47, 20. 42, ag to robbery; 1 Harr. 4, n.) But, it seems, she is thus excused in all cases of felony, except murder & manslaughter. 4 Bl. 29, n.
Neither a child, nor a servant, is, as such, excuse, for any crime, by the command of parent or master. 4731. 23. 9. 17Harr. 3. [1867]
37Bil. 34. 4 Moore. 813. 17Hale. 44.

Another species of compulsion, working a defect of will, is duress per minas. This excuses many unlawful acts. E.g.
Reasonable acts excused by compulsion of enemy, or rebels. 37Bil.
30. 1Hale. 50. 1Harr. 55.

But the last excuse holds, chiefly, with regard to positive offences, only, as treason, not as to natural offenses; as killing an innocent man to escape death.

Another kind of necessity arises from legal compulsion. The will, in this case, is justified. E.g. An officer of the law is bound to make an arrest, or disperse rioters, and if resistance is made, killing may be justified. 37Bil. 31. 1Hale 53.

Stealing to relieve extreme want of food, or clothing, is not justified by C.L. 37Bil. 31. 1Hale 54. Means not justified by the end. It would leads to dangerous evasions.
Criminal Law.

Degrees of Guilt: Of Principals & Accessaries.

One may be a principal, in an offence, in two degrees: A principal in the first degree, is he, who is the actor, or absolute perpetrator: - In the second, he, who is present, &abetting, the actual perpetration. 2 Pll. 34. Song. 197. 17 Cal. 513. Flom 97.

According to Hawkins, the offenders, in the last case, are principals in the first degree. 2 Tenm. 258, 326. 441. 2 M. & N. 523. 533-8. 1 Hall. 437. 4 Bar. 2075. The latter were anciently considered as accessories only. 2 M. & N. 523. 17 Cal. 437.

The presence, necessary, to make a principal in the 2nd degree, need not be an actual standing by, within sight, or hearing: Constructive presence is sufficient. E.g. Keeping watch, or guard, at a convenient distance. 2 M. & N. 524. Post. 352. Song. 197. M. & N. 539.

To aid & abet a person unknown, will make a principal in felony. 2 Leach. 291. 2 M. & N. 534.

The above rules hold as well of Stat., as of C.S., felonies. 2 M. & N. 525.

Even a constructive presence is not always necessary to make a principal in the first degree. E.g. preparing poison, & exposing it, which is taken, in the offender's absence: - A trap: a pit fall.

Letting out a wild beast, with intent to do mischief, from the offender is principal in the first degree. 473 Cr. 34. 5
Hely. 52. Post 349. 3 Inst. 138. 1 Hale. 617. 2 Vern. 315. 443. 4 Co. 44. 9 Co.
81. - He cannot be principal in the 2d degree; for the words imply, that another person is guilty in the first degree, which, in such cases, cannot be.

A special verdict, finding, only, that the prisoner was present, is not sufficient to warrant a judgment ag. him. 2 K. & B. 527. 531. 535. Hely. 77-9. 47 Barr. 2078.

An accessory is one, who is not the chief actor in the offense, nor present at the perpetration, but is, in some way, concerned in it, before, or after, the fact. 273 Cr. 25.

In high treason, there can be no accessory. All concerned are principals, on account of the atrocity of the crime. Besides, the base intent to commit treason, if, in some cases, actual treason. 2 Mc. 35. 9 Inst. 138. 1 Hale. 617. 2 Vern. 439-440. C. L. 57.
12 Co. 81-2. - Under the Constitution of U.S., treason is lying war ag. U.S.

Whatever, then, will make an accessory, in felony, makes him a principal, in high treason. (Formerly, questioned ag. to accessories after the fact.) 473 Cr. 35. 1 Vern. 57. 2 Mc. 439-440. Inst. 518. 12 Co. 81-2. Sy.
296.
Criminal Law. Principals of

There may be accessories in petit treason, murder, and other felony, except those, which, in judgment of law, are unpunished, or manslaughter; in such, there can be none before the fact.

On the other hand, in petit larceny, and all crimes under the degree of felony, there can be no accessories. All concerns are guilty as principals. 4 Th. 35. 191. 1 T. C. 673. 675-676. 1 T. C. 115. 132. 2 S. 441. Co. L. 37. 1 El. 767. 1 El. 312. Cro. 8. 757. 12 Co. 81.

For such minor offenses, minute differences, in the degrees of guilt, do not require legal discrimination.

An accessory cannot be guilty of a higher crime than his principal. If a servant caused a stranger to murder his master, or a wife, her husband: The servant, being absent, is accessory to the crime of murder only. But if he has been present, and assisting, he must have been guilty of petit treason, as principal; and the stranger, also as principal, of murder only.

4 Th. 35. 1 S. 139. 1 Ham. 132. 2 D. 445. 1 B. 128. 332. 1 Bot. 91. 1 T. C. 675.

Accessories are of two descriptions: First, before the fact; second, after the fact. An accessory before the fact is one, who procures, counsels, or commands another to commit a felony; being himself absent, at the time of the act. Absence is necessary; otherwise, he is principal. 1 T. C. 675-676. 4 Th. 35. 1 T. C. 445. 1 B. 128. 275.
Criminal Law.  Accessories.

He, who puts another to an unlawful act, is guilty of, (or,
accessory to), all that ensues upon that act: but not to any
thing substantially distinct from it, or not directly ensuing
upon it. Ex. A. commands B. to beat C. - B. beats him till he die.
A. is guilty of the murder, as accessory. So, A. commands B.
to poison C. - B. poisons, or slays him; A. is accessory. Killing
C. is the substance of the crime abetted - the manner is but
circumstance. But if A. commands B. to burn C.'s house, B.
in doing it, robs the house, A. is not accessory to the robbery.
The act done, is substantially different from that commanded.

To solicit one to commit a felony, or, it seems, any other offense,
is a misdemeanor, if the crime be not committed. 3 East. 5.
6 Mod. 101. 2 Thor. 1, 6 Cal. 1377, 3 East. 381. - Tending dangerous -
therefore punishable.

If the abettor retracts, before the act done, he is not ac-
cessory, it seems. 2 Harr. 445 (n. 2) 9 Sas. 57. 17 Cal. 537. 7 Foot. 354.
Florn. 473-5.

Stat. felonies, as well as those at C.L., admit of accessories;
the, the statute is silent, as to them. The former having the inci-
dents of C.L. felonies. 54, 1 Harr. 164.
Criminal Law. Accomplices.

The bare concealing of an intended felony, is only a misprision of felony; which is punished only with fine and imprisonment.

2 Term. 184. 3 Eng. 199. 142. 4 Bl. 109. — Misprision, what.

4 Bl. 170. 3 Inst. 35. 1 Hale. 127.

Persons, who are accidentally present, when a felony is committed, do not endeavour to prevent it, or to apprehend the felon, are guilty of a misdemeanor — fined and imprisoned. Exception in favour of infants — to them no lashes is imposed.

2 Term. 115. 6. 4 Va. 2. Roy. 50.

4. An accessory, after the fact, is one, who receives, relieves, comforts, or debt of a felon, knowing him to be such. 4 Bl. 37. 2 Term. 184. 204. 1. 448. re. 1 Hale. 518-20. But the assistance given, must be with intention to hinder public justice: as to prevent the felon from being apprehended, tried, or punished. 4 Bl. 38. Et. harbouring & concealing — furnishing with a horse &c. to escape — rescuing — assisting in an escape from gaol; by instruments — bribing the gaoler, &c. 2 Term. 25. 77.

To relieve a felon, in gaol, with necessaries, is no offence.

4 Bl. 38. So. of any of the com. offices of mere humanity.

Buying, or receiving, stolen goods, knowing them to be such, made no accessory, at C. L. — The offence was a mere misdemeanor. See, in Eng. for, by Stat. 2 Ann. 14 Geo. I.

1 Hale. 620. 4 Bl. 38. 2 Term. 204. 50. C. 288. All. 57. Debr. 4. 5. 1 Feb. 65.

(over)
Criminal Law. Accessory to a principal.

By our law, the receiver is made a principal.

The felony must be complete, at the time of the assistance, to make one an accessory, after the fact. Ex. Case of a mortal wound — assistance given before death. 4 Bl. 38. 2 T. & R. 487. (2d) 17 Cal. 219. 62d.

A wife is excused for assisting her husband (ut supra) to a felon — presumed coercion. But no other relative excuses — as parent, child, master. If (4 Bl. 38-9. 2 T. & R. 457. 10 Bl. 4. 17 Cal. 621. 3 Inst. 168.) It even the husband is not excused — in assisting his wife, a felon, the reason of the excuse not existing; 1 St. 8. 10. 12.

If one is indicted as accessory to two principals, proof that he was accessory to one is sufficient. 9 Co. 19 a. 2 N. Y. 540. 542.

General rule of the C. S. that accessories suffer the same punishment, as principals. (4 Bl. 39. 3 Inst. 188.) But accessories after the fact, are now by Eng. Stat. allowed the benefit of clergy, in most cases — whereas the principal, & accessories before the fact, are not.

Formerly, it was held that an accessory could not be compelled to answer, till the principal was attainted. (4 Bl. 32.) Cont. now held, but he cannot, now, except by Stat. be tried, (unless he desire it), till the principal is attainted — or,
Criminal Law. Accessors of

unless the principal is tried at the same time. 2 Halm. 453. 453-6. 4 Th. 40. 323-4. Viz. Sleach. 181. — But by Stat. 1 Ann. 4 & 5 Geo. III., the accessory may be tried, in certain cases, the principal has not been attained, or even tried. 4 Th. 323-4. 2 Halm. 453. Sleach. 107, i.e. as for a misdemeanor only. Sleach. 107. 353.

If the principal is acquitted, the accessory is discharged. 2 Halm. 452. 17 Coke. 623-4. 4 Co. 4. & 4. And if the attainder of the principal is reversed, that of the accessory is, ipso facto reversed. 2 Halm. 452-3. 17 Coke. 77. 9 Co. 119. — Sicque, while the first attainder is unreversed, the erroneous. 2 Halm. 452.

But the death, or pardon, of the principal, after attainder, does not, even at C.S., avail the accessory. 2 Halm. 453. 3 Co. 6. 541. 4 Co. 43-4. Nal. 477. Br. 120. For neither shall prove the attainder unjust, or illegal.


If one is acquitted, as accessory, before, or after, the fact, he may afterwards be indicted as principal. But if acquitted as principal, but whether he can afterwards be indicted as
Criminal Law. Accomplices.

Accessory before the fact, the as accessory after the fact, he may be 2 B. 40. 17 Cal. 525. 6 Post. 307. 2 Me. R. 325 - 30. Any there any sufficient objection to the same course, in first case? For, proof that the prisoner is guilty as accessory, will not support an indictment against him, as principal. 2 Me. N. 298.

... The indictment against one, as accessory, need not state that the principal committed the offense — sufficient to state that the principal was convicted of it — to then to charge the prisoner as accessory. 7 T. 403. 17 Cal. 525. 2 Me. N. 484. Post. 353.

Yet the accessory, on his trial, the it be after the conviction of the principal, may controvert the latter's guilt, either in point of fact, or of law. 2 Me. N. 453. 47 B. 324. Post. 121. 365. 2 Me. N. 464. 5 G. Co. 118. For the conviction is neg inter alias acta.

So he may when both are tried together.

2 Me. N. 453 - 4.
Felony

Felony is any offence, which occasions, at C. L. a total forfeiture of goods, or lands, or both (24 El. 94. 5) The term is general i.e. not designating any one specific violation of law, but a whole class of offences - Scots, of the terms, murder, manslaughter &c.

The word did not, originally, denote any crime, but the personal consequences of certain crimes. Synonymous with forfeiture of a fee, or feud. Afterwards used to signify the offence, wrought the forfeiture - & by an easy transition, to denote offences, wrought a forfeit of goods only. 2 Tils. 95-7.

Treason is strictly a felony, because it works a forfeiture. Anciently comprised under that name. 1 Harr. 99. 3 P.I. 15. 4 Tils. 94-5. Now, clasped by itself, as a crime standing alone, by general usage. 4 Tils. 98.

Capital punishment is not necessarily a consequence of felony - (the almost always superadded). Ex. Selfmurder, homicide by chance - murder & petit larceny. Vide 2 Tils. 287.

So & 208. 2 Tils. 475. 4 W. & M. 206.

So it contra, some capital offences are not felonies: Ex. Here easy at C. L. - standing muti, when arraigned on indictment.

1 Harr. 99. 4 Tils. 95-7. 5 Inst. 48.
Criminal Law.

All felonies, which are punishable with death, work a forfeiture of all lands, in fee simple, & of goods & chattels. Others, (not so punished), of goods & chattels only. (1736, 97, 98, 99. Co. L. 391.) For a fee cannot be forfeited but by attainder.

But, by general usage, the word, felony, is now made to import a capital crime, & indeed, to include all capital crimes, below treason. 4736, 98.

Hence, if a Stat. creates a new felony, the law implies that it shall be punished with death, as well as forfeiture. So, contra, if the Stat. expressly annexes capital punishment to any offence, that offence is, in consequence, a felony. 4736, 98. 17 Harr. 158. 17 Hale, 637. 641. 703. Co. L. 391. 2. Bac. 459. Hob. 179.

But if a Stat. prohibit an act, under pain of the perpetra-
tory forfeiting all he has; it is only a misdemeanour. 47 Bac. 544. Co. L. 391. Hob. 270. 1 Harr. 107. (p. 158, 180.) No offence being made felony by doubtful, & ambiguous, words.

Crime, which, in Eng., cause forfeiture, are, in Cont., called felonies; the no forfeiture ensues here, (except in one case,) I believe, viz. manslaughter.
Felony.

Clergyable felonies, are those, in which the Benefit of Clergy is allowed. This is a kind of pardon, in effect, exemping the convicted, from the punishment of death. 4 Bl. 368. 373. 2 Ham. 26. 1 Bl. 124. 213. But their goods are forfeited by conviction, & are not restored. 1 Bl. 378. 387. Its origin, 4 Bl. 368, &c.

At 13 L. it was allowed in petit treason, & in most capital felonies: but not in all: Not in high treason, petit larceny, or mere misdemeanors. 4 Bl. 368. 374. 2 Ham. 479. Its allowance, in most capital felonies, sanctioned by Stat. 25 Ed. III. 374. 4 Bl. 374. extended to petit treason 2 Ham. 479. Still not allowed in high treason, nor in petit larceny, nor for mere misdemeanors. Last two cases, not capital.

Originally allowed only to Clerks in orders, or the clergy—afterwards, to every man, who could read: this being evidence of his being a Clerke. (2 Ham. 274. 5. 2 Hale 372. 2 Bl. 365. 7.) but not to women; they being excluded by sex, from the clerical office. 4 Bl. 369.

Now, in almost every State, especially (1st. 9. 4. 4 Bl. 367. 370.) the privilege is extended (in case of clergyable offences), to all persons, whatever—readers, or not. 4 Bl. 367. 370.

But common persons, taking the benefit of clergy, are, by Stat. 4 Bl. VII. burnt in the hands, or whipped, or imprisoned, or fined.
Felony.

or suffer some other inferior punishment. 1 M. N. 214. 15. 219.
4736. 373. But Clerks, Priests, &c., as are not burnt of.

And lay persons are entitled to it, but once — Clerks, as often as
they commit clergyable offences. 4736. 375. 2 Hale. 375. 1 M. N. 214.
Stat. 4 Wait. VII. 11 Edw. VII.

By its allowance for any particular felony, the offender is dis-
charged forever, not only of that, but of all clergyable felonies,
before committed. 4736. 374. 1 M. N. 217.

At present, in Eng., clergy is allowable in all felonies, whether
by Stat. or C. L., unless expressly taken away by act of Parliament.
4736. 373. 2 Hale. 335.

Benefit of clergy formerly pleaded, in Eng., (declaratory plea);
now prayed before judgment, after conviction, usually. 4736.
332. 2 Hale. 285.

No benefit of clergy, in Cont.
Homicide.

Homicide is the killing of any human creature. 4 Thc. 177. 2 Bac. 567. 1 Harr. 100.

Of homicide there are three kinds:— justifiable, excusable, and felonious. 4 Thc. 177. 1 Harr. 104. 111, 115.

Homicide, therefore, is not necessarily criminal. The first kind has no guilt—the second, very little, even in judgment of law; and only a nominal punishment. 4 Thc. 177. 188. Post. 283. 2 Harr. 539. 1 St. 168–9.

II. Justifiable. This is of several kinds. 1. Homicide is justifiable, when occasioned by necessity. E.g. Sheriff, in the execution of the duties of his office, executes a condemned malefactor. 4 Thc. 178. 1 Harr. 105. — Legal necessity.

But, in this case, the law must require the act to be done, it must be done by the person required, by law, to do it; or this deputy. For, if a private person, voluntarily, or wantonly, kills a person attainted of it, it is murder. 4 Thc. 178. 17 Cal. 497. 801. 3 Thc. 174. 1 Harr. 105.

5. The officer himself, in executing a sentence of death, must pursue the sentence—Sec. guilt of murder. E.g. Beheading for hanging, or vice versa. E.g. 4 Thc. 179. 3 Thc. 174. 2 Mcr. 559. Finch. 31. 1 Harr. 105. Co. L. 128. 17 Cal. 53.

The sentence must be by a court of competent jurisdiction. E.g. If C.B. in Eng., or C.C. in Can., give sentence of death on a
Justifiable Homicide.

Prosecution for a crime, of which they have not cognizance, if it is executed. The officers, who execute it, and the judge are guilty of murder. 4 T. 178. 3 T. 165. 10 Co. 76. 3 Co. 106. 1 T. 105 B. 105. 10 B. 102. 497. 500. Mo. 333. Cro. 98.

But if the court has cognizance of the offence, and passes sentence of death, when the offence does not subject to it, the officer is not guilty — bound to obey the order of the law. It is not *coram non judice.* 1 T. 106. 3 T. 165. 574.

D. Justifiable, in certain cases, when committed for the advancement of public justice. Ex. An officer, in making arrests, is resisted, a.k.a. dispersing rioters, etc. This last holds of private persons. 1 T. 109. 177. 79. Here justified by permission of law, rather than the common law. 1 T. 179. 73. 12 M. 817. 370. 11 T. 494. 1 T. 106-7. 3 T. 165. 574. 9 Co. 68.

So, if an actual felon resists, or flies from, his pursuers, even private persons without warrant. 1 T. 106. 2 M. 817. 572. 9 Co. 68.

So, if an innocent person, indicted of felony, resists the officer, having a warrant. 1 T. 105. Hence, if a private person, without authority, attempt to arrest an innocent person, on suspicion. 2 M. 817. 572. 9 Co. 68.
Justifiable Homicide.

Justifiable when an officer, attempting to make a lawful arrest, in a civil case, is resisted, so that death cannot be avoided, as held above. 1 Namm. 107. 1 Coll 189. Post. 270. 3 Bro. 75. — 66, in other cases, to prevent an escape, or rescue. 1 Namm. 499. Post. 292-4. 2 Mcn. 560.

1. Justifiable, to prevent any forcible or atrocious crime: Ex. one attempting to murder, or rob another, is killed. So, breaking a house, in the night. Seem of crimes not accompanied with force: as, picking pockets, mere breaking house in the day. 4 Trl. 180-1. 3 Sra. 675. 1 Namm. 108-9. 1 Coll. 488-9. 493-4. 3 Rob. 137. Post. 274-5. 2 Mcn. 562.

Not justifiable, when merely to defend one's house, goods, or person, from a bare trespass. 4 Trl. 180-1. Post. 273. 3 Sra. 558. 1 Namm. 108. 1 Coll. 488-9. 8. Tho', if the trespasser is apt. his person, it may be excusable, as defender. (post ). 1 Namm. 108. 119-4. 4 Trl. 184-5.

If the trespasser is apt. property only, it is manslaughter. (So, if he kill one, breaking his window, to arrest him in a civil case. 1 Namm. 108. — May it not be homicide as defender in the last case, i.e. if he cannot otherwise escape death, or great bodily harm? 4 Trl. 185.)

General Principle is this: When a crime, itself capital, is attempted with force; the force may be lawfully repelled by the death of the party. There the homicide is justifiable. 4 Trl. 181.
Justifiable Homicide

A woman may lawfully kill one, who attempts, with force, to violate her chastity. 4 Tred. 487. 1 Tenor. 102-10. 2 Pint. 274. — Her husband, or parent, may kill a ravisher. 1 Tenor. 108. 4 Tred. 487. 1 Eal. 487. 1 Holy. 157. 2 1 Mcr V 502. — To may any other person, &c. supra. 1 Tenor. 109. 3 Inst. 198. analogy to case of widows.

According to the old opinions, justification of homicide may be specially pleaded. Later opinions are, that it must be given in evidence, under the general issue. 1 Tenor. 105. 3 Nott. 673. 6. 1 Eal. 478. (Always agreed, that an excuse cannot be pleaded. 1 Tenor. 105. 78. 1 Supra.) — Special plea in bar would amount to the general issue.

Justifiable Homicide not punished at all — not even nominally. 4 Tred. 132.

III. Excusable Homicide.

Difference between justifiable & excusable; — one lawful, the other criminal. 4 Tred. 182.

Of 2 kinds. 1. For infortunium — by misadventure. 2. Of defendants — in self defence. 4 Tred. 181. 1 Tenor. 118. 1 Eal. 38. 41. 39. 49. 49. The first purely involuntary — the second voluntary, but commits 1 Tred. 573.

led from motives, & under circumstances, constituting an excuse 1 Eal. 474.
Excusable Homicide.

1. By misadventure: Happening, where one, doing a lawful act, without any design to do hurt, involuntarily kills another. Sanction of the act, is essential. Ex: Using an axe - head flies off. So, a third person which a horse, which kills another, rider guilty of homicide by misadventure, whipper of manslaughter, at least. 1 H. 611, 1 Cal. 472. Post. 208, 2 473, 172, 3 73a. 476. H. 40-1

A parent, in reasonably correcting a child, accidentally kills him - master - school master &c. It is by misadventure. 1 261. 1762. 17 693. 171. 693-3. 1764. 2d 693. 1762, 2d. 1 M. N. N. 38-7.

So, of an officer, corporally punishing a convicted criminal - excusable. If, however, the beating is outrageous, it will be manslaughter, at least. If with an instrument apparently endangering life, murder. 1 H. 611, 1 Cal. 472, 1764. 17 693. 1762. 1 M. N. N. 38-7.

But if death accidentally ensue, in consequence of an unlawful act, which is mala in se; the author is guilty of manslaughter, at least - in some cases, of murder. 2 M. N. N. 383-4.

Distinction: If the act is trespass only, it is manslaughter; if felony, it is murder. 3 73a. 676-7. 1 H. 611, 13, 126-7, 1 Post. 134. 4 73a. 131, 5 472, 1 73a. 472-5. Post. 258, 292. 4 499, H. 117.
Excusable Homicide.

If one accidentally kills another, in the execution of a malicious or deliberate purpose to do him personal hurt, it is murder. H. 17; 17 McEl. 2d. 200. 17 Co. 29. 475.

So, if it be in consequence of any unlawful act, which naturally tended to bloodshed, 474. 190. H. 115-14. 17 McEl. 119.

So, if one does an idle act, which must, manifestly, endanger the person of some one, and accidentally kills, it is manslaughter. E. Thorne, alone at another in sport. This is an unlawful act. 17 McEl. 181. 17 McEl. 207. 474. 173.

But if death accidentally happen, in consequence of any lawful sport, as football, wrestling, &c., if it be by misadventure only. 17 McEl. 125. 207. 2 Mc. R. 274. 524.

2. In Self Defence: This takes place, where one in a sudden affray, kills his assailant, in his own defence. 474. 183-4. 3 BAC. 677. This is excusable. (Distinct from that, which is committed to prevent the perpetration of a capital crime.)

Said not to be material, who gives the first blow, if he, who kills in self defence, is forced to fight. 3 BAC. 677. - 2 Mc. R. 17. 2d. 27. 7. 29.

But to excuse this kind of homicide (when voluntary), it must appear to have been the only, probable (or, at least, probable), means (over)
Execusable Homicide.

When it is to preserve one's own life, it seems nearly akin to justifiable homicide, committed to prevent a forcible atrocious crime.

Difficult, often, to distinguish from manslaughter; General rule: If both are fighting, i.e., striving for victory, when the mortal blow is given, it is manslaughter. But if the slayer has not begun to fight, or having begun, tried to decline, or cannot without danger to his life, or of great bodily harm; it is for defendants.

According to some, the aggressor himself, when pursued (ut supr.), trying to escape, is excusable in killing to save his own life (3 Bac. 57). Nor is this doctrine at hand, it seems, for it is his fault.

And if one strikes, with malice aforehand, having fled, tried to decline, kills the other, even to save his own life; it is murder.

If two agree, beforehand, to fight a duel, and one being pursued (ut supr.) kills the other, he is not excusable; it is murder, for there
Execrable Homicide,

3 Bac. 677-8. Hel. 129-31. 4 Th. 115. 1 Cal. 443.
479. 1 How. 113. 122-3-4.

Same rule applies to cases of fighting, in general, by a preconcerted agreement; i.e. where it is not all one continues act of force. 1 How. 125-6. 112. 123. Hel. 117. 1 Cal. 39. 478.

So, the seconds of him, who kills in a duel, are murderers; according to some, the others’ seconds. 4 Th. 199. 1 How. 124.
1 Freem. 274. 1 Cal. 443. 37 Bac. 565-6.

This excuse of self defence extends to the chief civil or natural relations. Ex. Husband & Wife. Hel. 137. Parent & Child, Master & Serv. The act of the relation is construed the act of the party attacked. 4 Th. 186. 1 Cal. 484-5. 37 Bac. 568-675. as to prevent great bodily harm (sub). — A Stranger may justify homicide, only to prevent a forcible capital crime. Secun. 1 How. 125.

Killing an officer, who attempts to arrest the slayer, in the execution of his office, not excusable — murder. (So, the warrant is irregular, & illegal, if good upon the face of it.) 2 Mc. 438-9. 357. 757. 76 438.

None can excuse the killing of another, by pleading misadventure, or self defence. It must appear in evidence, under the general issue. 3 Bac. 576. 1 How. 478. 1 How. 105. 115. 39 Ir. 73. 246. Co. 6. 283. Geo. 3. 26 that
Excusable Homicide.

Such a plea would be ill, as amounting to the general plea.

Punishment: Excusable Homicide, whether by misadventure or be defended, is said by Coke, to have been anciently punished with death. 2 Inst. 146. 315. Denied by later writers. 4 Tholm. 188. 1 How. 125. 1 Cosk. 114. 2 Inst. 262. 10.

The punishment seeming to have consisted, anciently, of a total, or partial, forfeiture of goods & chattels. 4 Tholm. 188. 1 How. 115. (If total, the offence would be felony, which Blackstone says it is. 4 Tholm. 188. 1 How. 114. 2 Inst. 447.) 'It seems to be, strictly, (by the ancient law at least,) a felony; but it is not charged with felonious homicide, because not capital. Felony being now used as synonymous with capital crime. 4 Tholm. 188.

But as far back, as Eng. law records reach, the party has ever been, as he still is, entitled, of course, of right, to garden & restitution of goods. So that the punishment is, at worst, but nominal. 4 Tholm. 188. 2 Inst. 288. 176am. 115. 2 Tholm. 38, 8. 6 Selw. 38.

Indeed the Eng. Judges usually direct, or permit, a general verdict of acquittal. 4 Tholm. 188. 2 Inst. 288.

No acquiesces in excusable homicide, because not felonious. 2 Inst. 114. 7. 1 How. 518-15.
Felonious Homicide

III Felonious Homicide. This is the killing of a human creature, without justification, or excuse, and may be committed by killing either one's self, or another. 1 Bl. 188. 13 Crim. 102.

1. Homicide by killing one's self, is called self-murder, the party, Felo de se. 4 Bl. 189. 13 Crim. 102.

Felo de se is one, who deliberately puts an end to his own existence; or commits any unlawful malicious act, the consequence of which is his own death. 1 Bl. 189. 13 Crim. 102. Ex. One attempting to kill another, the gun bursts, and kills himself. 2 Bl. 189. 13 Crim. 102.

If one requests another to kill him, & it is done, the former is not felo de se, but the latter is a murderer. If sent, or request, utterly void. 13 Crim. 102. 13 Crim. 102. 13 Crim. 102. 13 Crim. 102.

A person, to be a felo de se, must be of years of discretion, and competent, as in other felonies: not infants, under 7 years, lunatics, &c. 1 Bl. 189. 13 Crim. 102. 1 Bl. 189. 13 Crim. 102. 13 Crim. 102.

It admits of access before the fact, not after. Ex. One persuades another to this crime, guilty of murder. 1 Bl. 189.

The consequences, at 1 L. are ignominious burial in the highway, limbo, forfeiture of all goods & chattels, loss of his land, for no attainder. 1 Bl. 189. 13 Crim. 102. 1 Bl. 189. 13 Crim. 102. 1 Bl. 189. 13 Crim. 102.
Felonious Homicide.

Flor. 243, 279, 282, 323. Ray. 7. These indignities have, in most cases, been cluded — now abrogated by Eng & Jael. (1723.)
In Con. no such consequences, I suppose.

2. The second kind of felonious homicide consists in killing another person, without justification or excuse; it is either with, or without, malice. 1Harr. 115. Post. 2. 5. 478c. 192.

Hence two kinds: manslaughter, & murder; the one, with malice — the other, without. 1Harr. 115. 478c. 190. 1Cal. 466. — Malice is any unlawful, or wicked, motive. 2731. 90-9. any evil design.
Post. 256.

First of manslaughter: It is the unlawful killing of another, without malice, express, or implied, 1Cal. 466, 478. (91) It is either voluntary, or involuntary.

No accessories before the fact — unmensitated. 478c. 90. 1Harr. 115.

As to voluntary: If two persons, upon a sudden quarrel, fight, & one kills the other, it is manslaughter — (Co. if they immediately go aside & fight) — for it is one continued act of passion.

Different from the case of duelling by previous agreement. There is a deliberate intent to kill — previous malice, & formanor. (See, sent, in case of preconcerted agreements to fight, generally.)
1Harr. 122, 122. 4. Hyl. 95. 131.
Felonious Homicide.

If a person attempting to part others, who are fighting upon a sudden affray, is killed; the offence is murder, provided the slayer knew, or had notice, that the object was to part them.


If one is greatly provoked by another's misconduct, as holding his nose, or other great indignity, & immediately kills him, manslaughter generally. 4 Thrl. 111. Hely. 135-5. 11 Cam. 117. n. 128. 11 Cal. 410.

Sed, if sufficient time elapsed for passion to subside; it is then murder. 4 Thrl. 111. Port. 294-5. 2: 310. — To, in every case of homicide upon provocation. Hely. 315. 12 M. 87. 11 Cal. 480. Ray. 212. 1 Tent. 138.

Sed, if on a sudden provocation, one executes his revenge immediately, but in such a manner as manifests a deliberate intent to kill, or de other great bodily harm, & death ensues, even accidentally, it is murder. &. Tying a boy to horse's tail; Parent correcting a child, in an outrageous manner, of 1 Thrl. 121. C. 131. 8 cam. 121. Hely. 127. 126. 126. 484. 472-4. 12 Port. 292. 476. 119. 11 M. 2. 504-5.

If a husband, take a man in the act of adultery with his wife, & kills him instantaneously, manslaughter in the least degree. 4 Thrl. 191-2. 1 Cal. 480. Ray. 212. Hely. 137. 12 Cam. 128. 1 Tent. 138.
Felonious Homicide.

Rare words, or gestures, breaking promise, trespass on land—never a sufficient provocation to reduce even a sudden killing to manslaughter; where the killing is voluntary, or the manner of beating manifests endangering life. 17 Cal. 485. 6. 478. Oss. 77. 4to. 171. Post. 290. 315. 5647.

Second, if it appears clearly, from the manner of beating that he intended only to chastise, so that the killing was unintentional. 17 Harr. 425. 5. 17 Cal. 456. Post. 291. 5. 476. 200. 2 Me. 3. 364.

If upon an affray between A. and B. the friend of A. suddenly interposes, kills B., he is guilty of manslaughter only, no malice presumed. Hely 136. 81. 12 C. 19. Post. 315 et seq. (De). Is not this rule too general? 17 Harr. 125.

Manslaughter on a sudden provocation, differs from homicide as defendants in this: In the latter case, there is an apparent necessity for self preservation. In the former, no necessity—act of sudden revenge. 27 Sel. 188. 192.

As to involuntary: This, as the term imports, is always unintentional; but entering upon some unlawful act, malum in se, 27 Sel. 192. 1 Harr. 117. 12. Post. 287. 51. 2 Me. 3. 83. It differs from homicide by misadventure, in this, that the latter enters upon a lawful act. 27 Sel. 192. Corp. 830.
Felonious Homicide.

If death ensues upon an act, which is merely malum prohibitum, the rule is the same as if the act were unlawful; i.e., the homicide is by misadventure. Post. 287. 1 Bl. 475. 2 M. N. S. 523-4.

2. If one accidentally kills another, while engaged in any riot, idle, or dangerous sport (as by sword-playing, or manslaughter). These are unlawful acts. 3 Bl. 193. 192. 3 Inst. 55. 1 Bl. 472-3. Post. 261. 292. 1 Harr. 112. 1 Harr. 134.

So, if an act, in itself lawful, is done in an unlawful manner, for here, under certain circumstances, the act is unlawful. Ex. Throwing down a piece of timber, or a stone, into the street, in a city, where the person goes, menacing. Hyl. 49-1. So shooting a gun where people usually resort. 3 Bl. 472. 192. 1 Harr. 112. 1 Harr. 487. 1 Harr. 472-35. Post. 263-292. 2 M. N. S. 525-75.

If the unlawful act is a trespass only, the killing is manslaughter. If felony, it is murder. (ante) 2 Bl. 322-3. 1 Harr. 125-7. Hyl. 117. Post. 241. 292. 9 Co. 31. 1 Harr. 457.

Punishment: It is a punishable felony, unless, not cattle, being in the first instance. But the offender profits all his goods, chattels, &c., burned in the hands; land not forfeited, because not capital—no attainder. 2 Bl. 192. 201. 257.
Felonious Homicide

In Cont. it is punished by state. (other voluntary) with forfeiture of goods & chattels to the state - whipping - branding - & debar

tility to give verdict or evidence. - Involuntary, not within our
state. - What at C. L. is involuntary manslaughter. is in Cont.
but a misdemeanor. (v. Baron & & By Term 1807. State in Roger)
But voluntary may still be punished here, as at C. L.

Murder

This name was anciently applied to the secret killing of another.
for which the wili, or if too poor, the hundred, was answered. 473c.
194-5. 1Harr. 17. Cyl. 121-4. 1Cat. 447. Post. 281. 3Vizc. 661.

Murder is now described this: Where a person of sound memory
+ discretion, unlawfully kills any reasonable creature, in body
+ under the peace, with malice aforethought, express or implied.
473c 173c. 193c. 17Harr. 118. It is: The unlawful killing of an-
other, with malice aforethought.

Difference between this & voluntary, manslaughter: The latter
proceed from sudden passion. The former, from wickedness +
malice. 473c. 190.

"Of sound memory." So must every offender be, to be pun-
ishable. 473c. 20. 125.
Felonious Homicide

"Unlawfully kills another." 6. Unlawfulness arises from killing without warrant, or excuse. Must be actual killing, assault with intent to kill, is a misdemeanor only; the forger, murder.

17 Cal. 495-6. # Bl. 196. 373 R. 694.

Not only, directly, or forcibly taking away life, (as by a blow, or shot) is killing within the definition, but first any act, of which the probable consequence is death, & which eventually occasions death, & which is wilful & deliberate, is murder. Ex. Poisoning, starving.


So of a son, who carried out his sick father, agt. his will, in a cold frosty season. So of the woman, who left her child in the field, covered with leaves only, & it was struck by a kite. This is killing, and murder. 17 Cal. 495-6. 17 Can. 118, 3 R. 197. Palm 345. — So, parish officers, who shoved a child about, till it died. 17 Bl. 196. 17 Leach 141. So a gader, knowing a prisoner to have an infectious disease, mantaly confines him with another, who takes it, & dies. 17 Can. 119, 3 R. 693. St. 836. So, if the mantaly confines a prisoner in a low, unwholesome, room, depriving common convenience. 17 Can. 119, St. 837. 4 R. 1578. 17 Leach 456.

If a person, having a beast, used to do violent mischief, suffers it to go abroad, or turns it loose, even to frighten people, & it kills, the owner is guilty of the killing; & in the 1st case of manslaughter, in the 2d of murder. 17 Bl. 197. Palm 421. 17 Cal. 495-6. 671. 17 Can. 118, 3 R. 693-4.
Delinquent Homicide.

2. To in some cases, where the actual killing is by another & if the incites a madman to kill another (or lays poison for him & takes it) 17 Car. 115. 1 Ch. 474, 92, 51. (Or by means of imprisonment, compels another to accuse an innocent person, who is condemned to death on the latter's evidence. Stat. 14 Edw. III. 17 Car. 9, 115. 3 Inst. 91 11 Edw. 41, 642, 465. 37 H. 6, 663. 11 Edw. 94. 2 Feb. 33).

Whether bearing false witness, with intent to take away one's life, is such a killing as to amount to murder at Q. L. For which the innocent person is condemned & executed. 13 St. 4 Ch. 44. 3 Inst. 182. It may, by the ancient Q. L. - no instance for many ages. 21 Edw. 1957. Inst. 130-2. 17 Car. 197. 1 Inst. 48.

In fact, by Stat., bearing false witness wilfully, or of purpose to take away any man's life, is punished with death.

If a Physician, gives a potion to cure, but which kills, homicide by misadventure only. But it has been holden, that if the person be not a regular Physician of it is, at least, manslaughter. 21 Edw. 197. 1 Inst. 237. 11 Edw. 38. 3 H. 654, 47 Car. 191.

But no person can be adjudged to have killed another, in law, unless the death happen within a year & a day, or in combatin which the whole day, or which it is to be reckoned the first. 21 Edw. 197. 31 H. 65.
Felonioua Homicide.

But if he die within that time, no excuse, that he might have recovered, if he had not neglected the 17th of Feb. 17th of Oct. 26th of Nov., 17th of July. If the wound, or hurt, be not mortal, or the party is killed by the remedies used, or not by the wound, it is not homicide. But this must appear clearly. 3 Blaq. 1665. 17 Cal. 428.

A person, indicted for one species, or mode, of killing, not convicted, by evidence of a totally different species. E.g. poisoning for shooting, or burning for drowning of a hog, when they differ only in circumstance. E.g. Wounds given with an axe, club, &c., but alleged to have been given with a sword. 2 Blaq. 196. 3 Inst. 319.

2 Blaq. 135. 29. 12 M. N. 530. 2. 93. 97.

10. But if several are indicted, A. as giving the blow. B. as giving the wound, C. as ferrying of evidence that B gave the blow, & that A. was present, aiding, &c. Will maintain the indictment. 1 Blaq. 437. 5. 2 Blaq. 232. 56. 87. 112. 4 Blaq. 42. 5. 1 Blaq. 98. 2 M. N. 522. 5. 39. For both are guilty as principals, the difference is only in circumstance.

The indictment must state, that the poisoner gave the deceased a mortal wound, or bruise. Black. 98. I. E. Suppose, where the means employed were violent, as stabbing, striking, &c. See, of poisoning. Starring, &c. I conclude.
Felonious Homicide.

"A reasonable creature in being, under the peace! Aliens, and outlaws, are within the rule of killing any person whatever except an alien enemy, in time of war, with malice foreseen, is murder. All others are under the peace." 476. 191-6. 5 Stat. 52. 17 Cal. 433. 378 a. 665. 17 Cal. 122.

Killing a child in ventre to more, is a great misdemeanor only, not in remum natura for this purpose. 378 a. 665. 476. 198. 17 Cal. 121. (Misdemeanor is a high offence, under the degree of capital, but bordering upon it. 476. 191. 5 Stat. 113. 17 Cal. 874. 17 Cal. 185.)

But if the child be born alive, and afterwards dies, within a year or day, of the wound received in ventre to more, it is murder. By the better opinion. 476. 198. 17 Cal. 121. 3 Stat. 52. 17 Cal. 433. 439. But the death must be within a year or day. 476. 197.

Epithet "reasonable," in the definition, means human; not, "having the faculty of reason." Madmen, idiots, are within the definition. Actor of a madman to kill himself, guilty of murder, as principal. 17 Cal. 118. 17 Cal. 431-5.

If one counsels another to kill a child in ventre to more, 

"On, it is killed, in pursuance of, he is accessory to murder. 17 Cal. 21. 187. 1 Stat. 121. 17 Cal. 121. 429. 433."
Felonious Homicide.

By Stat. 21. I. 9. the late Stat. law of Ont., if the mother of a bastard child, (found dead), endeavouring to conceal its death by burying it privately, or in any other way; deemed guilty of murder, unless she can prove, by one witness, at least, that it was born dead. (Harr. 121. 3B. &. 185. 2. Mcn. 371.) — Now, the former Stat. of Ont. repealed. Punishment, under new Stat. sitting or gallows, or binding to good behaviour. + imprisonment, at the discretion of the Court.

The construction, practically given to these Stats. here is in Eng., makes necessary, to the mother's conviction, presumptive evidence, at least, that the child was born alive. 478. 198.

"With malice aforethought, express or implied — grand criterion — it is not, spite or malevolence to the deceased, but evil design in general; the dictate of a wicked heart, depraved, malignant, mind. 2. Mcn. 548. 478. 198-9. Stat. 255. 2. H. &. R. 461. Hely. 185-7.

"The court, not the jury, are judges of the malice. (S. P. 1493. 2. Sc. 713-4. Burr. 395. 474. 1987. 2 B. R. 412.) i.e. of what amounts in law, to malice — So that, the facts being given, the point is a question of law. 2. Mcn. 547-6.

Malice foreseen is express, or implied. Said to be express, 1st, when one, with a deliberate, or formed, design to kill, or otherwise
Felonyous Homicide.

personally to injure, some particular individual, kills him, in executing that design: Lying in wait, — former messages, old grudges, &c. are evidence of that formed design. 1 Cal. 457. 1706. 121-2. 37 B. of A. 566. Hely. 127-30.

2. Where one kills by an act, which indicates enmity to all mankind, e.g., shooting into a crowd. This is express. 473-479. 199-200. 2nd. 207. 3 B. 635. 17 Cal. 7. 46.

Distinctions not well taken by Blackstone. Express malice p. 45.

seems to me to be, that, which, in point of fact, concurs with the act of killing — implied, that, which so concurs, only by implication of law. (1706. 122.) Ex. 1. Discharging a ball, with intent to kill, or hurt. J. S. or whoresover it may strike. — 2. Doing same act, with intent to kill, &c. ab ox.

So, in the case of deliberate dwelling, it is express. 1706. 122. 1 Boul. 86-7. Hely. 129. — No excuse, that the party slay at
lacked first, or that the intent was, not to kill, but disarrange: for the deliberate design to obtain the mastery is express malice. 3 Boul. 171. 17 Cal. 452. 367. 197. Hely. 271. 3 Eas. 571. 2nd. 245-7.

So, the acts of the person killing, are guilt of murder by express malice; — according to some, those of the opposite party.

Ex. 479. 1706. 124. 3 Green. 574. 1 Cal. 443. 451.
Felonious Homicide.

Giving a challenge is, at C. L., a high misdemeanor. Est. 581. Hence, the punishment is prescribed by stat.

If a person, upon no provocation, or a slight one, suddenly attacks one & kills, it is murder by malice express. Hely. 27. 52. 127-9. For to enrol a ferocious act, in such a case, is evidence of hardened, deliberate, malignity, towards the deceased. 1766. 124. Post. 265. (Pl. calls this implied malice 476. 200. Ex. It seeming to me express.)

So, generally, if on even a sudden, or great, provocation, one beats the other in a cruel, or unusual, manner, & kills him, it is murder by express malice. 476. 199. Ex. Roy. tried to horses tail &c. 1766. 479-4. Hely. 127. 1766. 126. Ex. 8. 471. Ex. 8. 128. 414.

So, if on a sudden quarrel, the who kills, seems to have been master of his passion, at the time, it is murder, & the malice is express. 1766. 123. 128. Hely. 56.

If one, committing a breach of peace, (as by fighting of,) suddenly kills an officer of the peace, who attempts to suppress it, he is guilty of murder. 1766. 127. Ex. 85. 2 M. S. 509-73. 9 Ex. 52. 464. 48. 2. 58. Post. 508. 510.
Felonioues Homicide.

So. of a private person, acting in aid of the officer, or, if no officer be present, Hely, 65. 116. 99. But the object of the interference must be made known—except in the case of an officer known to be such—acting within his district—Suss only manslaughter. 18uarr. 127.

11. Malice is implied, when the killing is in consequence of an unlawful act, intended altogether, or principally, for some other purpose than that of killing the person slain. 17uarr. 122. 5. 17uarr. 202. 1. Ex. One shoots at a fox, with intent to steal, & kills a person accidentally, or shoots at A. & kills B. or, lays poison for A. which B. takes, & dies. 25c. & Hely. 111-17. 7uarr. 465. 474. No. 87. 37uarr. 1. 37uarr. 667.

But the intended act must be felony—Suss, the killing is, regularly, manslaughter. 37uarr. 676-7. (673) 17uarr. 119-122. 126-8. Hely, 111-17. 47uarr. 183. 198-3.

Express malice seems to be that, which, in point of fact, concerns with 343. the act of killing the person slain. Implied, that, which concerns only by implication of law. 25uarr. 529. 27uarr. 132-6. Ex. A.—one gives poison to a woman, to procure abortion, & it kills the woman—malice implied. 47uarr. 201. Tarr, 439. 25uarr. If the act intended felony?

Husband gave his wife a poisoned apple, to kill her—She gave it to her child, & killed it, not herself—Implied malice. 7uarr. 125. 47uarr. (over)
But when one kills, in consequence of what an act as indicates en 3.43. mity to all mankind, the not to the deceased, in particular, it is enfore. Ex. wilfully shooting into a collection of people, & killing one. 47 U.S. 199-200. 2 M.N. 3.34. 1 Fed. 174. 170. 115. 110. 17 U.S. 5. 2 Cal. 261. 2 Port. 261. 2 Share the intent, consurs mit the act of killing; the intent being to kill any one, whom the ball might strike.

If one kills an officer, in a struggle to escape from lawful arrest, it is murder by matic impless. Design was principal to escape. (177 U.S. 189-90. 10 Cal. 489. 2 Port. 135. 198.) not to injure the officer.

In the last case, it is no excuse, that the process was erroneous, not void, by being so.

Same rule, the officer did not inform for what cause he was about to arrest. So, the officer (if he was a public one), did not show his warrant; beforehand. 17 U.S. 125-30. 160-61. 19 U.S. 66-8. 2 Port. 137. 91-2. 8 Cal. 489. 6 Cal. 571. 62 M.N. 345.

All homicide is presumed to be malicious — Onus probandi is on the accused. 2 M.N. 261. 9 Co. 6-7. 17 U.S. 285. 2 Port. 124. 17 U.S. 27. 112. 2 M.N. 345.
Felonious Homicide.

Therefore, all homicide is murder, of course, unless justified by command, or permission of law. 2d. Excused, on ground of misadventure, or self defence; or, either the involuntary consequence of some unlawful act, not amounting to felony, or occasioned by some sudden and violent provocation. 21 M. 201.

If several are engaged in a preconcerted unlawful act, one of them, in execution of the general design, kills a third person, they are all guilty of murder. Secus, if the killing is not in execution of the Common design, or the others do not aid, or consent to, it. Then, the Slayer only is guilty. Hely. 113. 4th. Part. 397. (So if the unlawful act is not preconcerted, as in a sudden affray. Hely. 115)

Punishment of murder is death. Originally, execrable (So that unlearned offenders, only, were capital; others, banished. 4 M. 201. 1665. 23 M. 399.

Now, by 3 Eng. 4th. Att. 23 Hen. VIII. 1 Edw. IV. 445. 44 Edw. IV. & M. Clergy, is taken away from murderers, their abettors, procurers, or counsellors. 44 Edw. IV. 2 Hen. IV. 531. 3 Inst. 43. 27 Cal. 399. These Stats. seem not to extend to accessories after the fact.

In Eng. it is death by law. Judgment that he be hanged by the neck till he be dead. 2 Hen. 531. 27 Cal. 399. 3 Inst. 43. 1147. 463.

A woman condemned during gestation (quick with child), execution is respected, till her delivery. But this is no excuse for not having, or for judgments being delayed. 2 Hen. 638. 3 Inst. 478. 9 Inst. 17. 27 Cal. 430. 47 M. 395. But respecting for this cause can be had but once.
Felony and Homicide:

As to becoming insane, see 7.7. 4TR. 395.

Execution is not complete, till the convict is dead — on revival,
he must be again hanged: Former hanging being no execution.
4TR. 405. 2 Rec. 412. 2 7Cal. 635. Finch 407.

N.B. When one murders an officer, endeavoring to arrest him,
the prosecutor is not bound to show that the deceased was an officer,
otherswise, than by proving that he acted as such. 4TR. 752.
2W. 148. Is. May not the prisoner then prove that the deceased
was not an officer? I trust he may: The rule relates only to
the proof necessary to be adduced, by the prosecutor.
Petit Treason

There are certain instances, in which, murder, as being more than ordinarily heinous, is denominated petit treason. It is, indeed, no other than murder, in its most odious form, degree.


At E. S. many offences were called petit treason, which are not now, Ex. Treachery by a subject — grand jurors discovering the King’s counsel. When attempting to kill her husband of 1669. 3 Inst. 20-1. 1711, 377, 382, 87 Bac. 140.

Now, by Stat. 35 Edw. III, no offence can be petit treason, except in the following instances: 1. Where a servant kills his master. 2. Wife, her husband. 3. In Eng. an ecclesiastic, his prelate. 5 Bac. 144-5. 4 H. 203. 1769. 131. 2 M. N. 574-5.

Called treason, by reason of the violation of private allegiance in addition to murder. 4 H. 203. Stat. 107, 324, 335.

12. Killing of a husband is not petit treason, unless under such circumstances, as would make the killing of another person, murder. 5 Bac. 144. 1769. 132. By 287, 1711, 378, 380. As petit treason includes murder. 2 M. N. 574-5.

If a wife, divorced a mensa et habenda, kills her husband, petit treason: 4 H. 203. 1711, 380-1. 1769. 133, n. 5 Bac. 141.
Petit Treason.

If a wife procure a stranger to murder her husband, being herself absent, at the time, she is accessory to murder only. But if a stranger procure the wife to do it, he is accessory to petit treason. 11 B. 13, 13 Edw. 3, 3 Inst. 20, 139, 17 Cal. 24, 5, 17 Hen. 8, 1332. For the nature of the accessory's guilt follows that of the principal.

Murder of one's mistress, or master's wife, petit treason, not within the letter of 26 Edw. III, 57 B. C. 142, 3 Inst. 20, 139, 17 Hen. 8, 1332.

So murder of one who has been master, upon malice conceived during the service, is petit treason; because in execution of a treasonable intention. 17 Hen. 8, 1332, 26 Edw. 3, 57 B. C. 142, 47 Edw. 4, 17 Cal. 24, 3 Stat. 20, 17 Hen. 8, 1332. Murder of a master by a child, not held treason, unless the latter is by a reasonable construction, a servant to the master. 1312, 3 Inst. 20, 17 Cal. 380.

Originally answerable: Clergy taken away by 12 H. VIII, from above, &c. 3 Stat. 20, 17 Hen. 8, 1332, 26 Edw. 3, 57 B. C. 142, 47 Edw. 4, 17 Cal. 24, 3 Inst. 20, 139, 17 Hen. 8, 1332. Clergy takes it from accessory after the fact. 17 Hen. 8, 1332.

Punishment, in case of a male, to be drawn to the place of change. Female, to be drawn & burnt. 17 Hen. 8, 1332, 17 Cal. 382, 2 Inst. 31, 27 Hen. 8, 1332, 17 Hen. 8, 1332.

On an indictment for petit treason, the prisoner may be convicted of murder. 17 Hen. 8, 1332.
Arson is the malicious and wilful burning of the house, or out-house, of another. 476. 220. 17 Cal. 235. 3 Inst. 56. 216. 186. 1 Leech. 208.

Not only the bare dwelling house, but all out houses, that are parcel of it (i.e. within the curtilage or homestead), as barns, stables &c. may be the subject of arson. 476. 220. 17 Cal. 53. 46. 20. 17 Exam. 185.

So a barn, filled with corn, is within the definition, the not parcel of it. 476. 220. 17 Exam. 53. 6. 3 Inst. 39. 7. Burning a stack of corn anciently arson -- not now. 476. 220. 17 Exam. 185.

Burning the frame of a house is not arson, because not within the meaning of "domus." 17 Exam. 106. 17 Cal. 588. 3 Inst. 109. 1 Exam. 269. Burning a portion of a house, being the house of the corporation which owns it. Leech. 67.

Arson may be committed by burning one's own house (it is said) if another's house is burnt in consequence of it. But here, the offence consists in burning the latter. 476. 220. Cor 317. 1 Exam. 185. 27-9. For, if one seized in fee, or possessed for years only, of a house standing at a distance from all others, burns it, not arson. 1 Exam. 106. Cor. 317. 1 Sir 357. Foot. 110.

And if one, so seized, or possessed, in turn, burns his own, with evident intent to burn another, but actually burns his own only, not arson. 1 Exam. 106. 17 Cal. 588-9. 476. 220. 13 Cal. 129. Foot. 115-16. Cor. 338.
By much the stronger opinion — Lead. 217—19. Feb. 29. If it is in 
pos. under an agreement for a lease for years. Lead. 24.
So, of tenant from year to year. Lead. 235.

But the malicious firing of one's own house, in a town, is a high mis-

demeanor, incurring fine, imprisonment, ball and forfeiting for good

behaviour, during life. 4 R. 221. 1 V. R. 573. 1 D. R. 1557. Feb. 29. The

indictment should not be for arson. Feb. 29.

If a landlord, or reversioner, burn his own house, while in 
pos. of his tenant, it is arson. It is, for term, tenant's house. 4 R. 241.

Post. 1135. 1 V. R. 160.

Arson in C.t., is, substantially, the same as at C.S. except that

by our Stat. the burning of any barn, house, or outhouse, is arson.

The punishment here is different under certain circumstances,

from the same at C.S. (Stat. extends to ships & vessels.) Is the

meaning, that burning these, in C.t., is arson? The Statute

is the same, but the offence, I trust, would hardly be called arson.
Burning must be "malicious." There is only a breach—burning through negligence or accident, not arson. 1769, 11 Kt. 59, 10th 476, 478, 478, 482. 22. If one in shooting accidentally fires a house—Yet, if one intends maliciously to burn a house, accidentally burns it, it is arson: for the felonious intent: 1769, 11 Kt. 189.

It is a C. L. Crime, punishable with death: (burnt to death in the reign of Ed I. 176, 22-2). It is not feloniously. 1773, 187. But it seems to me to have been entitled to clergy, by Stat 25 Ed III, but was omitted of it, first in Ed IV. which being repealed by Ed V., it was restored again by 15 Ed IV. 176, 22-2. 27 Kt. 1873.

Denied also to accessories before the fact, by 21 Ed IV. 176, 22-2.

By our Stat. this offence, if committed by a person of the age of 16 or more, is punished with death, if prejudicial, or hazard, happen to the life of any one. It extends to burning outhouses, sheds, &c. Houses of a person under 15 commit the act punishable for a misdemeanor.

By another Stat. of ours, if any male of the age of 15 or more shall shall wilfully, or feloniously, burn, or attempt to burn, by setting on fire, any State house, Court house, townhall, Schools, Church, out-house, shed, store, ship or vehicle, to no prejudice, or hazard, &c. Remove all the absolution of the court, not exceeding 7 years.
Arson.

For the second offence, confinement in Newgate, for an unlimited period, or for life. But, according to the general rule, the second offence must be committed, after a conviction for the first. 12 Can. 183. 12 Cal. 324. 7 P. 613. 323. 2 Febt. 349.

In the case of a female, confinement in the common workhouse, or common gaol, in the county, in which she offended, for the same period as males in Newgate. — Must she be 15?

Do the words in this statute, "attempts to burn by setting on fire," mean such burning as fully within the P.C. definition? It seems the do. If so, it may be argued, that the burning driven by the first statute, must be total. Even cloth made at night time—burning has a determinate meaning in law. — Does then the partial burning of a ship, or vessel, come within the meaning of the first statute? I conceive it does. The same act is contemplated in case of a vessel, as in case of a house.
Burglary.

13. Burglary is the act of breaking & entering into the mansion house of another, in the night season, with intent to commit a felony.

(1792. 24. 34: 6. 33, 1792. 179. 178. 335. 1792. 32. 34. 335.) The usual relief.

As to the place: Seems not absolutely necessary, that the breaking should be of a mansion house: Wall of a town, or a church. 1792. 179. 335.

The necessity of the subject being a mansion house, obtain, in the case of a private building, only. 1792. 24: 6. 33, 1792. 32. 34. 335. The definition ought to include churchyards, & walls of a town. 1792. 32. 34.

The insertion of the words mansion, seems indispensable, in the indictment, when the breaking is of a private house; Jesus, not it seems. 1792. 32. 335.

The term "mansion house", includes all out buildings, which are "barrizal", i.e., within the curtilage & homestead (p. 5). Being protected, or privileged, by the capital house. 24: 6. 33, 1792. 32. 34. 335. The curtilage seems to be that portion of ground, which is inclosed with the house, by one common fence, or connected with it, directly by a fence. Therefore, an outhouse 8 feet distant, not connected by any fence, separated by an open passage, not within, nor connected by any fence enclosing both, adjudged not within the curtilage. 1792. 14: 6. 335. 1792. 335.
Burglary.

Room, or lodging, in a private house. If the owner does not lodge in it, or if the tenant by a different outward door, is the mansion house of the lodger. As, if the owner lodges in it, he enters by the same outward door. Here, there is only one mansion house, that of the owner. 4 Th. 2:25. Hely. 83-4. 1 Th. 5:23. 1 Tim. 163-4. Comm. 2 Th. 5:21. 1 Th. 103. Cont. Hely. 27. Seach. 20. 230. 278. 354.

An unoccupied house cannot be the subject of burglary.

If a house, within his curtilage, is let to, for he never lodges in it, to work in; burglary cannot be committed in it. It is not a mansion house, being thereby by the lease; nor by the never lodges in it. 4 Th. 2:25. 2 Th. 5:23. 1 Th. 5:24. 1 Tim. 163. Cont. 33. 1 Th. 335. Hence, if the him lodged in it, 1 Th. 103. 27. or, if it were not leased by the owner.

A house, in which one sometimes resides, the left for a short season, a man's reversion; is a mansion house, the no one is in it, at the time. 4 Th. 2:25. 1 Th. 5:23. 1 Th. 163. Mo. 650. Hely. 105. 132. 167. 480. 351. Th. 40.

If a house, which one has hired to reside in, brought part of his goods into, the not lodged in. Hely. 105. 1 Th. 77. 5:25. 1 Th. 163. The house of a corporation is within the definition; if officers living in it - mansion house of the corporation. 4 Th. 2:25. 1 Th. 77. 35:9. 1 Th. 335. Not committed in a tent, or booth, temporary - it is a tabernacle. 1 Th. 335. 4 Th. 2:25. 1 Th. 164.
Burglary.

Under our Shot, burglary may be not only as at 3 in the night, but by breaking into a shop, in which are goods, wares, & merchandise, the goods at a distance, not lodged in.

Decided, in Cont. that the cabin of a vessel, containing goods, may be the subject of burglary. Post. 63. Deut. xix. 9.

It is essential that the name of the owner, or occupier, of the house, be inserted in the indictment. Lev. xix. 36.

"Night season." Formerly, it might be committed at any time between sunset & sunrise, 47Ue. 524. 17Cal. 334. But now, the term includes only the time between the evening & morning, twilight. 47Bac. 224. 17Col. 350.

31St. 63. Cannot be committed, during twilight.

It is said, if there be so much daylight, or twilight, that one's countenance can be clearly discerned, not "night season," within the definition: But it must be daylight, or twilight, not moonlight. 47Ha. 224. 17Coar. 100. 7Gl. Ca. 6. 17Col. 524. 21Mer. 600-1.

As to the manner—both breaking & entering necessary—need not be at same time: Breaking on one might entering on another. Sup. finibus. 47Ue. 225. 17Cal. 357. 17Feb. 17Feb. 35. 67-8. Leech, 342.
Breaking may be, not only by thrusting open a door, but by breaking or taking out a pane of glass—picking a lock, opening it with a key, lifting a latch, or loosing any fastening. 2 Bl. Comm. 60. 2 Bl. Comm. 167. 2 Dall. 326. 5 Bl. 266. 2 East. 76. 

Breaking down chimneys; for it is as much closed, as the nature of the thing will admit.

Breaking pictures, in the house, as cupboards, chests, or not within the definition. 2 Stark. 128. 9. 10 Bl. 327. 2 Bl. Comm. 608.

Entering by an open door, not breaking, within the definition. 2 Bl. Comm. 226. 17 Bl. Comm. 333. 7 2 East. 184. 2 Dall. 67. 2 Bl. Comm. 601-2. This last is breaking the house—breaking chest of not.

Whether breaking out, (the party having entered, with intent of without breaking, or, being in, by the owner's permission, is a breaking within the definition, at 2 Bl. Comm. opinions contrary. 2 Bl. Comm. 227. 17 Bl. Comm. 331. 7 2 East. 124. 2 Dall. 67. 2 Bl. Comm. 601. Here, the entry is before the breaking. 2 Bl. Comm. lodging, with intent of or if, being in, the house (without) without a previous intent of he commits a felony, a breaking out: Secs. in both cases, if he goes, without breaking. 2 Bl. Comm. 600.

Entry procured by fraud (with intent of) or dupe, is burglary. 2 Bl. Comm. 201. Being let in under pretense of business, or for conceiving an officer to enter under pretense of searching for
Burglary.

On an indictment for breaking & stealing, left may be acquitted of the breaking, but found guilty of the stealing. 1 Easte 54. 1 Heale 58-1. 2 Br. 337. 1 Vame. 102. 1 Bost. 350. 1 Hely. 111. 2 N.R. 674.

If several join to commit a burglary, none of whom stand at a distance, & match, while others break the wall guilty of the breaking. 1 Bost. 59. 1 Heale 58-1. 2 Br. 337. 1 Vame. 102. 1 Bost. 350. 1 Hely. 111. 2 N.R. 674.

With intent: To constitute burglary, there must be a felonious intent. Save the breaking of a mere tramp. 4 Tho. 327. 1 Vame. 104. B. 99. Hely. 30. 67. 1 Heale 58-1. 2 Br. 337. 1 Easte 54. A servant, having run away, he burned in to take his own money. 1 Vame. 104. - Sikes if it had been to rob murder, steal, etc. 1 Heale 58-1.

Sufficient if the intended act is a flat felony, tho' not a C.L. for rape, which is not a C.L. felony. 1 Vame. 104. 4 Tho. 327. 1 Bost. 350. - For a flat felony, has all the properties of a felony at C.L. 1 Bost. 336.

Not necessary that the intent should be executed. intent alone sufficient. If the intent, the jury are to judge. 4 Tho. 327. 8. 1 Vame. 104. 165. 1 Heale 58-1. 2 Br. 350. 1 Bost. 107. 1 Bost. 336.

After one has been acquitted, on an indictment for breaking a house & stealing the money of A., he cannot be indicted for the same breaking & stealing the money of B. But for the theft he may
Burglary.

Help 30 52 27 Proc. 837. - For the breaking of is the same, in both cases; alter of the stealing.

Punishment: Burglary is a felony at Q. E., but clergymen: Nor punished with death, a clergymen being taken away by Stat. 12 & 13.

18 Eliz., also taken away from accessories before the fact by Stat. 3 & 4. 17 Eliz. 27 Eliz. 27 & 28 Eliz. 1725. - This statute extends not to accessories after the fact.

In Cor., for the first offence, clergymen: - if a male, not exceeding 3 years - for the second, not exceeding 5 years - for the third, during life; in common cases. - But if the burglar be guilty in the perpetration, of personal abuse, force, or violence, or armed with any dangerous weapon, as clearly to indicate "violent intentions," - clergymen, during life, for the first offence, or a life be- naroned, at the discretion of the court - not, however, less than 7 years. "Dangerous weapon" - i.e. weapons of death, &c. &c.

"Violent intentions" - i.e. act on, person - or any one, who shall oppose them. I suppose. Decide, in Cor., that burglar, being an offence at Q. E., may be prosecuted as such; so that the fact only declares the punishment. Not 59.

Female. Confined in common work house, or common gaol, it is for the first offence not exceeding 3 years. C.
Larceny.


Simple, is plain theft, unaccompanied with any aggravation. Mixed, or compounded, includes in it the aggravation of taking from one's house, or person. 1 T. R. 229. 17 Coke, 134.

1 Simple. Simple larceny is the felonious taking, & carrying away of the personal goods of another. 1 T. R. 229. If the goods are above the value of 12 pence, the offence is grand larceny. If of that value only, or under it, it is petit larceny. 1 T. R. 573, 4. 2 St. 191. 2 B. & C. 415. 17 Coke, 134. 145-5. — For George J. in delivering the opinion of the court, (Leach 1087), "Larceny is the felonious taking of the goods of another, without his consent — at his will, with intent to convert them to the use of the taker."

If goods above the value of 12 pence are stolen by several, each guilty of grand larceny. 17 Coke, 145. Stealing under the value of 12 pence, at several times, from the same person — not grand. 17 Coke, 145. n. Leach, 265. — Cont. 1 T. R. 573. 2 St. 191. old.

The difference between grand, & petit, is the value of the goods: — Hence, the rules laid down with respect to the nature of simple larceny, in general, apply to both grand & petit. 1 T. R. 229. 17 Coke, 145. Post 98. — In punishment, they differ essentially, id.

"Taking." For, rule, that every felony includes a trespass. Hence, if the party is guilty of no trespass, in taking, he cannot, according
Sarcen.

to the rule, be guilty of felony, in carrying away. 2 N. & N. 586.

The goods must, therefore, be taken from the from the of the owner.
actual, or constructive. 17 Car. 352. a. a constructive is a
right of present . 21 T. 145. 480. 496. 489. 748. 9.

Hence if one finds goods, or converts them to one's own; not.
(Thetaken)
larrent, no crime. So, generally, one person, under a delusion is,
taking of the owner, is not guilty of larceny, it is said, by afterwards be left
embossed. 2 Bae. 472. 3. 2 Bl. 230. 1 Holk. 123. 17 Car. 346. 1 Holk. 354.
to. A carrier of goods, who converts it - a tailor, of cloth.

In, as to the cases of delivery to a tailor of. For lately holden.
as a general rule, that when the delivery is for a certain special
purpose, - owner having a right to countermand the delivery,
(Leadbeater) the from the owner, ergo, embossing, animo
futandi, is a felonious taking: Ex. A matchmaker, emboss-
ing, animo futandi, a match, delivered to clean. (O. Bally, 179.)
clothes, delivered to be washed. (O. Bally, 179). guinea, delivered to be
changed. (O. Bally, 179.) In these cases, a previous intent to
steal, being not to be supposed. But the constructive is,
being in the owner, taking of, with felonious intent, is a
felonious taking from the owner. 17 Car. 345. (The taking in
these cases, must be not to be treated.) - Ex. of goods, delivered for
sale custody. 17 Car. 345. a. Aylr. 84. 2 Com. 294. 287. - Qn. Ergo, as
to the general rule before. - Leadbeater, 242. 349. a. 5. 2 M. N. 588.
Larceny.

15. If one obtain a delivery, with intent to steal, it may be, or even to throw it away, it is larceny. So, by the ancient rule, e.g. Obtaining a bill of exchange, under pretence of discounting, but with intent to steal, it is then confected. 17th Car. 133, r. 137. Leach 265, 213, 233, 29, 1555, 1595. Kel. 81, 82.

Thom. 157, 7 Bac. 173, 3 Inst. 108. Rolle, 63, 1 Sid. 26, 20, 21. N. 1389. [In fraud of legist, of which he can take no advantage. 1595, in law, remains in the owner. (For the felonious intent, false, extinguishes the contract, or permission), Ergo, the owner retains image, in law. Kel. 173. 17th Car. 133, r. For the sake of this original intent, to be, not to take on the contract, but to steal. Raw. 275, 5. Kel. 81, 82. ]

What need is there of considering the contract extinguished, where there is, otherwise, a right to countermand, or constructive theft?

Scarcely, if the pretence were to buy, the property was sold and delivered. Here, both the actual and constructive theft, is parted with. Leach 157, 358, 401. Vindicta right of theft transferred, by the terms of the contract. Inter, in the above cases of bailment.

So, obtaining goods, from an officer, with intent to steal, under a replevin, or by virtue of an execution, on a judgment obtained by fraud in the Court of Ch., is a felonious taking. For the replevin, and judgment are void. 2 Bac. 173, 3 Inst. 108. Kel. 81, 82. Raw. 275, 17th Car. 133.

It seems clear, even according to the older authorities, that if a carrier, having carried the goods to the place, takes them, since horum, the taking is felonious, the no felonious intent originally; for the bailment is
Sarcem. 

determined, ergo he is a stranger. 16Bac. 156. 9Bac. 107. 17Bac. 508. 2Bac. 473. Hely. 83. 4Hely. 230.

So, if he takes them to a different place, from that of their destination, and under its, animo furandi. Hely. 81-2. 18Cal. 504-5. 8Maq. 518. - So, in the case of hiring. Leach. 538. Same reason - i.e. by the breach of trust, his "job" becomes wrongful.

So, if a carrier opens a bale of goods, or takes away part, or pieces a cask, &c., it is felonious taking. 16Bac. 504. 9Hely. 136. 4Maq. 386. 18Cal. 375. (Because, as some say, he had no property in the goods [Dy], the he had in the thing containing. 16Bac. 473-4. Hely. 238. because the animo furandi is manifest.) 18Cal. 237. 1Hely. 238 days, because the possessory of part, distinct from the whole, is gained by wrong. 18Hely. 137. 2Maq. 387. (The true reason seems to be, that the "job" is, in law, all the time, in the owner, or owner. Hely. 83. Leach. 442. There is, always, a right to com-

If one sells a horse to another, & the latter, on delivery, immedi-ately rides away, with him, with vendor's consent; no larceny, whatever the original intent might be; - absolute pojo, in vendor. Leach. 401. 2Maq. 392. "Vendor has parted with his right of pojo." It is only a fraud. pp. 64.

Said, that if A. lets B. a horse, & B. with intent to convert & rides away, with him, not larceny. (Because both the pojo & the right of
Sarceny.

6b. for the term of the bailment, are parted with, by baiar. During that term, he has no right to countermand the delivery. 7th R. 2 Mer. 592. 213. 357. 401. 47th. 230. 18th. 357. Here, the original hiring must be bona fide, and the intent to steal, fraud = ght. 213. 357. - Seep. it is larceny. p. 63. 213. 357.

Subhese, that, after the term, for which the hiring was, has expired, the hirer converts, animo furandi. 213. 357. 32n.

There, according to the terms of the bailment, bailor has no right to countermand, at the time of conversion, the conversion cannot be larceny; unless the delivery was obtained with intent to steal. Ex. Hord hired, bona fide, for a month, converted, animo in a week. 213. 357. 32n. Seep. if bailor, according to the terms of, had a right to countermand. - Constructive possession in last case; not in the first. 3. If bailment was obtained with intent to steal, it is always larceny.

The bare non-delivery of goods, by baiar to bailor, when the former is bound to redeem, is not, of course, evidence of a delousing intent, even in those cases, in which converting, animo furandi, is larceny: for it may happen from various other causes. 213. 230.
Sarcomy.

In C.C. according to the ancient rule, if a servant runs away with goods committed to his custody, not a felonious taking, but mere civil wrong, breach of trust. Now by Stat. 21. El. VIII, it is larceny if the goods are of the value of £40, except in apprentices, & servants, under 21. El. 23. 17 Cal. 304. 2 B. & A. 474. 17 1 St. 9. 138.

Dr. Why does not the case come within that of the matchmaker? Does it, as to the rule at C.C. Has not the law undergone a change, or modern times?

But at C.C., according to the older opinions, if the servant had not the pos.2, but merely the care & oversight of running away with, or entangling, it is a felonious taking. 27 Ed. 23. 11 Cal. 303. 5. 17 Ear. 136. No. 215. Pope & El. 2. A Shepherd, a Butler; pos. in master. 7 El. 35.

If goods stolen, are stolen from the thief, the d. takes is guilt of a felonious taking from the owner; for he prof. d. pos. in law, and in him. 1 Harr. 167. 2 B. & A. 473. 2 St. 60. 389.

If one steals goods in the county of A., & carries them into the county of B., he is guilty of a felonious taking, both in A. & B. & may be prosecuted in either court. For every moment continuance of the offence of taking, is a repetition of it. 17 Ear. 136. 7 Eaton. 9. 23 B. & A. 473. Strong, if the original taking be in a foreign state. 1 Harr. 137. 2 Johns. 117. 29. Rait & Coxe, in Cont. 1 Mass. 1 Mass. 118. 2 Coxe 185.
Larceny

It is not larceny to receive goods, clandestinely, from the wife of the owner. Leach. 44. - Because her taking is not felonious - she cannot be guilty, as principal: Ergo, no accessory.

"Carrying away." The least removal from the place is a carrying away (this he afterwards, leave them, or is detected). E.g. Leading a horse out of the close, he is apprehended. So, carrying goods down stairs only. - 20c, taking out of a trunk, & laying them on the floor. 2 B. & C. 108. 9 Sc. 140. 2 Vent. 215. 1 Coke. 508. - Hyl. 31. 2 B. & C. 474. 2 Vent. 108. 2 Coke. 572. &c.

Raising a tale of goods, on its end, not a carrying away - not removed from the spot. But removing from one end to the other, of a waggon, sufficient. 12 Sc. 141. n. Leach. 230. - Case of diamond carrying. Leach. 297.

"Felonious." The taking & carrying away must be felonious - i.e. animo furandi. (Hence, these wanting understanding are excluded - i.e. mere trespassers). E.g. A servant privately takes his master's horse to ride, & returns him, &c. taking one's blongth if without leave, & using it, returning it. 4 B. & C. 282. 1 Coke. 339. Intent to be discovered by acts. 4 B. & C. 232. 2 East. 568. 1 Coke. 574. - Usual evidence of such intent, is breaking secrecy, & concealment - with a purpose to convert, & to defraud the owner.

Whenever one takes personal goods, from the post of another, at his will, the law presumes a felonious intent, till the contrary appears. 3 C. Leach. 283.
Larceny.

Personal goods are things real, or alienating of the realty, are not the subjects of larceny. Land cannot, in its nature, be taken of.

And corn, grapes, apples, growing, or before severance, are not within the law, as they adhere to the freehold. 476. 233. Skech. 206. 213. &c. 470. 174. 187. 176. 181. 191. 199. 199-12. i.e. if they are severed
and carried away by one continued act; for then, they never were, as moveables, in the possession of the owner, actual, or constructive. Make larceny, in many cases by Stat. 2d Geo. II. 476. 233. 213. &c. 470. 174. 192.

Sence, if severed at one time, or taken away, at another, whether severed by the thief, or the owner, or any person. Here, when taken, they are personal, in the opinion of the law. 476. 233. 213. Stat. 191. 199. 199. 181. 174. 213. &c. 470. 174. 187.

Taking wool from a living sheep, or milk from a cow, animus is larceny. Skech. 181. 213. &c. &c. 393.

Reason for the distinction between personal chattels, & things joined to the freehold, may be: That, as the latter are not so easily taken, removed, not so liable to be stolen — ergo, a severe law not necessary, as to them. 174. 191. 142. &c. 476. 233. 3. 213. &c. 470-70. — Different reason: — Generally, not so valuable.

Taking chattels of land, cannot be larceny, it is said, because they relate to the realty, are monuments of the freehold, & descend to.
Sarceny.

The Lev. 2 Bae. 470. 9 Inst. 109. 17 Cal. 156. 370. 17 Ch. 231. 5 Pae. 1157. 2 Bae. 13.
Not treas' will lie for them.

The goods must be of some value, in themselves, or some one must have some property in them. Hence, the taking of choses in action cannot, at e. e., be larceny, of no value, intrinsically, but merely by relation to something else, viz. the right, of which they are the evidence. For this right is not property in the sense of 17 Wh. 2 Bae. 370. 3 Ch. 236. 27 Bae. 470. (17 Wh. 5 Inst. 7 Bae. 470.) Because they answer the purpose of money, at the camp. Made larceny by Stat. 2 Bae. 17 Wh. 17 Inst. 142. 17 Wh. 2 Bae. 470. 17 Inst. 142. 1. No such stat. here.

Taking animals, feræ naturæ, i. not tamed, or confined, cannot be larceny, at e. e., tho' of intrinsic value. Ex. Deer in a forest—wild fowl, in their natural state. 21 Wh. 2 Bae. 471. 17 Inst. 142. 4. Secur. if reclaimed, or confined, they may serve for food. Ex. Deer in a park—fish in a trunk of 21 Wh. 475. 5 Inst. 511. 2 Wh. 231.

But such animals, feræ naturæ, as will not serve for food, are generally, deemed of no value, in the law, on this subject. E. g., the 'reclaimed, or confined, taking them cannot be larceny, at e. e., Ex. Fries, monkeys, bears, of 17 Inst. 142. 3 Bae. 471. 5 Inst. 119. 17 Wh. 17 Wh. 231. 395. 4 Wh. 233. Ex. Even in these cases, a civil action will lie for the taking 2 Wh. 235.
Larceny.

Yet the taking of a lamb, tame, may be larceny, it is said, at C.L., as well as by Stat. 37 Edw. III. 273., 276., 278., 279., 283., 284. Stat. 15. Edw. III. 2d. at C.L. 476., 236.

But domestic animals may be valuable, this not serving for food, as horses, mules, &c. 
Therefore, are subjects of larceny. So, these which do serve for food - as neat cattle, poultry, &c., 476., 236.

Some domestic animals not deemed valuable, in the law on this subject. Ex. Dogs, cats, Ergo, taking, not larceny, at C.L., the it may be a civil trespass. 476., 235., 236., 237. Bac. 476., 235., 237. Bar. 149. 93.

Under a certain Erat. Stat. excluding clergy, in certain cases of goods, moving, merchandise, &c. stolen, money is held not to fall within the description. Leach. 48. 56. 234., 403.

Of another: Goods, of which no one is the owner, at the time of taking, not subjects of larceny. Ex. Treasure trove, marks of before that, are seized by the persons having the right, 175. 141. Stat. 5. 2d. 176. 295. 177. 298. 178. - Hence, at the time, the property is in dispute, or rather in no one. It may become the King's, or, in certain events, be reseized in the former owner.
Larceny.

But, the there must be a property in some one, at the time, yet said, that the owner need not be known, & that indictment lies for stealing the goods of a person unknown — i.e. the indictment is sufficient. 2 Bl. 233; 17 C. 144, 2 Y. 99. 17 Cal. 572.

But, in such case; it is said (2 Cal. 290, 2 Mo. 219) that, at the trial, unless the property is proved to be in a stranger, it shall be presumed in the possessor. 2 Cal. 290. 2 M. 250. 17 C. 145. 5 332.

Stealing the goods of a parish church is larceny; the goods of the parishioners. 17 C. 145. So, stealing a shadow from a dead body, it is the property of him who was the owner, when it was put on. 17 C. 145. 3 D. & St. 110. 12 Co. 113. — Stealing or taking up a dead body, not larceny, but an indictable offence — a high misdemeanour. 2 St. 733. Benitable, in some of these states, by Stat. law.

A person may commit larceny, by taking his own goods, in certain cases. En. One delivers goods to a carrier, tailor, or other bailee, afterwards secretly and fraudulently, takes them away, with intent to make the bailee answerable. 17 C. 145. 3 D. & St. 118. Cro. El. 330. So, if he not his own messenger, with intent to change the hundred. 17 C. 231.

If A's goods are sold to B. it seems, that one stealing them, may be indicted generally, as for taking B's goods. 16 C. 145. 7 Lees, 39. 073. 1713.
Larceny.

In an indictment for larceny, if a felonious taking is not found, the court cannot, on a special finding, give judgment at * * * for a trespass. "Help, D. Leach 17. The two offenses are generically different.

Punishment: Simple larceny, whether grand, or petit, is a C. L. felony.
Bac. 475; 16 Cal. 237; 16 Cam. 178; 42 Cal. 95-7. 2 Will. 19. 1 N. C. 268.

Grand larceny is a capital felony at C. L. but within the benefit of clergy; which, however, in many cases, is taken away by statute; as in horse stealing 5 47 237-8. 17 Cal. 12. 3 Inst. 58. 2 Cam. 159 = money.

Petit larceny, punished at C. L., with forfeiture of goods & chattels, whipping, or other corporal punishment (17 Cam. 165; 3 Inst. 218; 17 Cal. 170: 3 Inst. 218; 17 Cal. 170: 3 Inst. 218; 17 Cal. 170: 3 Inst. 218; 17 Cal. 170: 3 Inst. 218; 17 Cal. 170: 3 Inst. 218.) - not forfeiture of lands, not being a capital felony & of course, no attainder.

1. In C. L. no distinction between grand, & petit larceny: Fine, not exceeding $ 5. if of the value of the goods amounts to $ 5. if whipped, not exceeding 10 strokes - if of the value of 84 cents, or more; & under $ 5. if whipping 3 Treble damages to the owner.

In many of the States, statute, flogging, or confinement.
Sarceny.

III. Mixed Sarceny: This has all the properties of simple, save the rule laid down as to simple, will apply to this. It always, therefore, involves the felonious taking and carrying away of another person's goods. But it is also accompanied with the aggravation of taking from one house or person, or both. 4 H. 239. 17 Can. 137.

1. Sarceny from the house: This, the more aggravated, than simple, is not distinguished from it, at C. & L., either in its general nature, or kind of punishment. 17 Can. 137. 4 H. 239–40.

If, indeed, it is accompanied with a breaking of the house in the night season, it differs most essentially; but it then falls under a different description. 4 H. 240. It is then burglary. 35.

But by Lib. in Eng., the penal consequences of mixed larceny, differ from those of simple, in general: benefit of clergy being taken away from the former, in almost all cases. 4 H. 240. 17 Can. 137. 17 Eq. 581. 4th, 3d, Post. 74. Leach, 310.

In Cont. not distinguished, at all, from simple larceny.

2. Sarceny from the Person. This is either by stealing privately, or by open, violent, assault: the latter offence is called robbery. 4 H. 241. 17 Can. 147.
**Larceny.**

The offence of privately stealing from the person (as by pocket picking) is a felony at C.S. 5 if of above the value of 12 pence, capital, but disposable at C.S. Clergy is taken away, however, by Stat. 8 Eliz.

17 Bl. 244 Prat. 73. 17 Hol. 365. 17 Barr. 131.

If of the value of 12 pence only, or under, not capital, at C.S.

22 Bl. 244 Prat. 73. 2 Hol. 365. 17 Barr. 131.

Difference, then, in Punishment, between double larceny, or privately stealing from the person, is, that in the latter case, clergy is taken away, if above the value of 12 pence. Alter, in the former.

**Robbery.**

Open or violent larceny from the person, or robbery, is the felonious and forcible taking from the person of another of goods, or money of any value, by violence, or putting in fear. 17 H. 442. 17 Barr. 147. 8; value immaterial.

"Taking from the Person." There must be an actual taking, an attempt to take, not felony at C.S. 17 Hol. 532. 3 Stat. 60. (the formerly hold, to be 40, 47 H. 242.) It is a high misdemeanor, incurring fine and imprisonment. 17 Hol. 442. 47 H. 242. = 74th.
Robbery.

Such attempt made felony by 25 Geo II. transportation for 7 years 1746, 14 & 21. 242, 244, 22, 251.

If one takes the goods of another, in his presence, by violence or putting in fear (this not literally from his person), it is within the definition. E. g. First putting in fear, and then taking away one's horse, standing by him, or driving away his cattle, which are in his presence. 1746, 14 & 21. 242, 244, 22, 251. 252, 57. 1015, 594-5.

So, if having put me in fear, he takes goods from my servant, in my presence, it is a forcible taking from my person. 1746, 14 & 21.

So, who receives my money by my delivery, while I am under terror from his assault, is guilty of a forcible taking from my person. So, if by putting in fear, he extorts an oath from me that I will deliver it, he doth it, in pursuance of the oath. 1746, 14 & 21. 242, 244, 22, 251. 57, 594.

But a taking, which is not either directly from the owner, or in his presence, is not within the definition. no robbery. 1746, 14 & 244, 242, 244, 22, 251. 57, 594, 1015.
Robbery.

If several join to rob A., and seizing him, one of them goes from the rest, without their knowledge, and out of their sight, Rob. 2, then returns to them, all are guilty, because of the intent to rob, & to assist each other. 1 Sam. 14:9. 2 Cor. 5:14-7. D. M. Vr. 84. — On unless they collected for the purpose of robbing any person, who might fall in their way?

Redelivery, after the taking is complete, does not purge the offence of taking; it is still robbery. 145c. 242. 146. 157. Deut. 24:1. 30:24. 38:9. 49:4. 58:9. 88:5. So that the definition does not require the continuance of the goods in the robber’s power. Leech. 224. 156. 353. 214. 154. 59:4-5.

"By violence or putting in fear." The criterion which distinguishes robbery from all other larcenies. Without it, there can be no robbery. 45:2. 154. 157. 194. 30:2. 88:7. 69-70.

"Violence" in this case denotes more than is implied in the mere act of taking, which itself is violence, in judgment of law. & There is violence in pocket picking. But robbery requires more. It denotes violence of some kind, offered to the person, but it ought to be such, as is calculated to excite fear. 154. 194. 88:7. 143. 128-9.

But actual violence to the person, is not necessary. Putting in fear sufficient. Ex. Case of one at entitled 67. 86. 154. 157. 653. 4. 257.
Robbery.
The violence or putting in fear must be subsquent, or. If one steals privately from the person, and afterwards forces it by putting in fear, it is no robbery.

1768, n. 456; 212; 1787, 527; 1787, 526. "Taking it by violence."—

The violence of must be properly for the purpose of obtaining the money or taken. For where several, finding one drunk, + under pretense of carrying him home, dragged him, kicked him and privately took his money, no robbery. 2 Bent. 1768, n. 456; 1787, 527.

Handcuffing a prisoner to extort money from him, or then actually extorting, is robbery. 2 Bent. 1768, n. 456.

As to putting in fear, sufficient that so much force, or threatening by word or gesture is used, as might naturally create an apprehension of danger to the person. 2 Bent. 1768, n. 456; 1787, 527.

So, such threatening, as is likely, according to common experience, to excite an apprehension of danger to one's character or good name, sufficient putting in fear. 1768, n. 456; 1787, 527. Threatening to accuse one of an unnatural crime. 1768, n. 456; 1787, 527. By all the judges of Eng. so holden. 2 Bent. 1768, n. 456; 1787, 527. "Fear of personal violence not necessary."
Robbery.

Begging, with a claim or words sufficient for putting in fear, is robbery, 
by extorting money from another, under pretence of a sale, 12 M. 243. 1760.
14 Ed. 33. 4. Leach. 202. 2. m. VI. 39.

Whether compelling a market woman, or any dropper, by violence of a sell
in goods for the full value, is robbery, deit. 14 N. 1760.
intent. 17 Ed. 149. 17 Ed. 243.

So, Fluage case. R. 23. That taking goods under legal process, without
color of right, a with intent to rob, is robbery, in fraudem legis. 202.
where is the fear or sufficient cause of fear? Certamen it may be.

Putting in fear, not necessary in the indictment. "By violence, sufficient." 17 Ed. 149. 17 Ed. 243. 1760. R. 24. Leach. 204.

When the offence is laid to have been committed by putting in fear,
not necessary to prove actual fear. Such circumstances of violence
or such threats, as are calculated, & likely, to excite it, sufficient.
I.e. One knocks another down, without warning, & strikes him, while
senseless. - Robbery, no actual fear. 17 Ed. 243. 17 Ed. 33. 1760. 49.
17 Ed. 243. 17 Ed. 33. 1760. 149.

A claim of force, to the goods taken, without any colour of right
is no excuse. 17 Ed. 149. 17 Ed. 329.
Robbery.

Whether openly taking goods from the person, without violence, or putting in fear, is felony, of any kind, and. According to Saun, it is not. [Noam. 117, l. 220 & l. 224. & l. 243. n. 244.] Snatching a hat from one's head, or running away with it. Ray. 278, 6. & 284. It does not, strictly, fall under either of the divisions of larceny from the person. D'Coil. 107. Hely. 45. 70. & 284. Leach. 264.

Indictment for robbery on a highway, not supported by evidence of a robbery in a dwelling house. Leach. 53. & 276. & 285. & 287. & 288. 

"Highway," in this case, is part of the description of the offence.

Punishment: A capital felony, (whatever the value of the goods) but bailable at C.L. New, dated of burglary, by Year. 23. & 18 34. 4. H.M. ergo, death in Eng?--both in principals & accessories before the fact. 176n. 149. 50. & 276. & 283.

In Cont. like burglary: Vergeat, for first offence not exceeding 3 years C. if a male -- female in Can. gad or workhouse. If 301. with "personal abuse, force, or violence," or, armed of neme, gate for life, for first offence. -- What kind of robbery is meant in the first case?
Forgery, or the Crime false, is the fraudulent making or altering of a writing, to the prejudice of another's right. 4706. 277. 17Hecam. 335-210-12. 2138. 506.

Records, other authentic writings of a public nature, as parish registers, of deeds, &c. deeds, &c. acts, &c. are subject of forgery, at C.L. 17Hecam. 335-8. 2138. 508. 17Col. 53-5. 876. 3M.R. 85. 2Cr. 69. 17Reg. 81. No. 768. In decision at C.L. as to a mill. 17Hecam. 338. But it is now a subject of forgery, at any rate by Stat. 22Geo. II. 17Hecam. 210.

But according to a great number of opinions, the making or altering of any private writings, of a nature inferior to deeds and wills, is not forgery, at C.L. Be notes, orders, bills of exchange or notarie. 17Hecam. 335-8. 2138. 508. 17Col. 53-5. 876. 3M.R. 85. 2Cr. 69. 17Reg. 81. No. 838. 2Dec. 265. (And, according to some, there is no punishment in these cases. 17Hecam. 338. not even for a cheat.)

But it has been held, since Hawkins's time, that the fraudulent making of or any writing, by which another may be prejudiced is forgery, at C.L. 2TP. 737. 1465. 1777. 347. 17Reg. 210. Fraudulent making of a bill of exchange, or unattached paper, is forgery. 2TP. 506. 2Dec. 246. 2M.R. 480-5. 2Cr. 510.

In a variety of Eng. States, however, almost every species of writing is made the subject of forgery. 2TP. 247. 17Hecam. 330. Our Stat. includes all private writings, in the word "any other writing."
Forgery.

If one makes a false will, in the name of another, the forgery is complete, tho' the supposed testator is living. Lea. 103. 371. 6. Lea. 1703. 489.

Not only actually, making a false instrument, & subscribing another's name to it — or fraudulently altering one already made, is forgery; but many other acts are so. 12 Ear. 35. B. One employed to write a bill for a sick man, falsely of others' legacies, not directed to be inserted; hence, the name is not forged, nor is the writing altered — after being executed. H. 2 Bac. 67. Mo. 759. C. 127. 1. 3 B. 170. 6. 8. 28. 37. 103. 28. Col. — Suppose the will never executed: Not, forgery, I conceive, because there would be no complete instrument. 2 Bac. 170. 6. Mo. 759. 1. 7 Ear. 35.

So, writing an obligation, release, of one's own name, found. 2 Bac. 57. Hence, the name is not forged, but the instrument is. So, making a mark, in the name of another, may be forgery. Lea. 61. This being a mode of signing, by such as cannot write.

So, if one fraudulently inserts in an inditement, the name of one, agt. whom it was not found. This is an alteration of 17 E. 35. 3. Mod. 55. 8. 192. 12. 29. 497. 6. 27 Bac. 57.

Fraudulently altering a deed, in a material part, is forgery, 11 Lea. 27. a. 17 Ear. 35. 6. 27 Bac. 57. 6. Mod. 57. 57. 1. Man. of B. for manor of A. £1000 for £100. 3 Drat. 169. Cont. Because not made in the name of
Forgery.

another than the true signer—i.e. neither hand nor seal counterfeited.) But it is directly within the definition—seems, if the part is immaterial, red mock. 85.

If one having found a bill of exchange, forges an indorsement, to get it discounted— it is forgery. 17 Bac. 210. 25 at 21 Bac. 25. 85. 146.

One may be guilty of forgery by making a deed himself in his own name. E.g. one having given a deed of blankancy to B. afterward grants the same to C.ante-dates the deed. This is fraudulent, to the prejudice of A. 17 Bac. 343. Mo. 633. 739. 85. 101. 21 Bac. 343. 85. By 284. 285.

But he, who stealthily robs an instrument in another's name, signs & seals it, for the latter (in his presence) by his direction, is not guilty of forgery. It is the act of the latter, vi lam. 17 Bac. 343.

But the making of must be fraudulent. Ergo, if obligee changes the word "pounds" into "pence", not in general, forgery — injury to himself only. (Misdemeanor). 17 Bac. 343. 85. 101. Mo. 633. Cal. 375. 2 Bac. 487. 10 Mo. 637. 94. But the security is avoided by it. 17 Bac. 343. 85. 101. 11 Co. 25. 11 94.

Yet it is said, that even this alteration, if made with a view to gain an advantage to himself, or to prejudice a third person, would
Forgery.

be forgery. 12 T. 357. 12 B. C. 357. Ch. VII. Objection, bound to assign the obligation to another creditor of his own—makes the alteration to defraud the creditor, by rendering the deed void.

Regularly, a mere fancied cannot amount to forgery, the the intent to be represented. E.g. omitting a legacy in a will, for forgery, being positive. But it is said, that if the omission of one bequest materially alters the limitation of another, it may be forgery. E.g. omitting an estate for life to one, whereas the devise of an intended remainder to another, it made to take effect, in present—here the omission operates in favour of the latter, as a positive devise for the life of the former. 17 T. 357. Mo. 760. Nov. 101.

Not necessary that one should be actually prejudiced. Sufficient, that, from the nature of the act, some one's right might be prejudiced. 2 Par. 757. 401-5. 12 S. 744. Barnard. 10: 49, where the obligation is never enforced.

Sufficient to aver a general intent to defraud—without pointing out the particular mode. E.g. With intent to defraud, it is sufficient. Chesh. 15.

Not necessary to forgery, that the writing should be published. 12 T. 1457. 9. 12 B. C. 947. It is sufficient, that the party keeps it in his pocket, the intent being clear.
Forgery.

Forging the name of a fictitious person may be felony. Leach 83: 32: 203.

Subpose an alteration in a part immaterial. If by oblige, requir
ably injurious to himself only. If by stranger, or oblige, of no effect.
11 Ed. 3: 16. Yet if by oblige, it might in some cases prejudice another
er. Another might have the beneficial interest.

Generally, the least variance, between the writing recited, 
offered in evidence, is fatal. Leach 359: Yet, if a mistake in
spelling does not alter the word to another, not fatal. Ex: Ex. Un-
derstood for understand. But it is fatal, if it make the word
insensible. Corp.

In a prosecution for forging, a writing, "purporting, " to be such an
instrument—deed cannot be convicted—if it does not, on its face,
"purport," be the instrument described. Doug 287: 332: 1 East. 83: 2 Leach
299. Cas to the effect of the words "of tenor following" as follling that

In the indictment, the forged instrument must be set out in
words & figures. 1 East. 83: 2: Doug. 287: 332: Leach 299.

Penalties: at C. J. by fine, imprisonment & felony. By a variety Post 1:
of Eng. Tasts, more severely punished—in most cases with death. 47 H. 2 47: 50.
Forgeries.

In Co. &c., if a male, for the first offence, not exceeding 3 years of or to pay double damages to the party, injured & to be incapable of giving verdict or evidence, in any court.

Whether the person, in whose name the forged instrument is, may testify, see Pilk. 37. 50. 105. 117. 137-9, 161-4.

Under our Stat. the making of a writing is not forgery, unless it be to prevent equity & justice. This does not seem to apply the offence, in substance from what it is under the C. & P. definition.

The word "alter," not used in our Stat., but "altering a writing" is "making a false writing." The form here is to charge with making a false deed of when the act was altering.

Uttering & Publishing, as true, a forged instrument, to prevent equity & is punished under our Stat. as forgery is.
Perjury is the crime of speaking falsely, absolutely, falsely, or a material material to the issue, or point, in question—under a lawful oath administered in some judicial proceeding. 4 T. 137. 3 B. & C. 184. 186. 518. 3 B. & C. 184.

It must be a wilful falsehood, i.e. with some degree of deliberation—this ought to appear clearly:—not perjury, if the error be due to mistake, or inadvertence. 17 Ch. 399. 3 B. & C. 82. 3 T. 530. 10 B. 195. 21 T. 573. 3 B. & C. 183. 4 B. 137. 2 D. 1835.

The oath must be taken in some judicial proceeding, i.e. in some court, or before some officer, having authority to administer oaths; in some proceeding, relative to a civil suit, or criminal proceeding. 17 Ch. 399. 4 B. 137. 3 B. & C. 185. 9. Nov. 125. 27 T. 257. 87 C. 132. 5 B. & C. 814.

Immaterial whether the court is of record, or not. D. 3 N. 470. Bur. 1189. Be. & B. 523. Cr. Ch. 47 Eccles. et in Par. 59, or any other lawful court. 17 Ch. 399. 3 B. 185. 69. 90. 7 Mod. 34. 173. 21. 257. 12 C. 157. 3 B. & C. 124. 3 B. & C. 104.

Any voluntary, or extrajudicial, oath, not within the law. 173. 187. 174. 220. 1 Cr. An oath before a magistrate, on making a bargain, that the property is the vendor’s: 173. 37. C. 270. 270. 5 B. & C. 257. 72. 3 B. & C. 161.
But perjury may be assigned on an affidavit, or deposition, tho' the affidavit or deposition in any way relates. 79 T.R. 315. The offense is complete, by taking the oath.

Perjury is confined to such public oaths, as affirm, or deny, some matter of fact, not predicable of from perjury, oath.as oath of office. 170 Am. 320, 27 Rot. 287. 3 Inst. 160. 37 Bac. 814. (? But the violation of the latter may be a misdemeanour.) 170 Am. 320, 2 Com. 147. Ex. Oath of a juror, or judge, or of an executive, or ministerial officer.

But perjury is predicable of any false oath, material to the point in question, in judicial proceeding, tho' not affecting the principal judgment. Ex. Respecting the ability of one offered as bail of parties upon an interlocutory question. 170 Am. 320, 2 Com. 147.

A party, when allowed his own oath, in judicial proceedings, may commit perjury, as well as an indifferent witness. Ex. Left in his answer in Stack v. Bull 239, 3 Me. 1430. — Parties' affidavit, on collateral points, in Courts of Law—book debt, in Cont. — C 176 Am. 322, 1 Rot. 40, 3 Bac. 815, 4 Com. 146-7.

If, left in blank, having given a false statement, explaining it (upon exceptions taken), in his second answer, consistently with the truth of facts; he is not guilty — Mistake presumed. 18 & 19 Vic. 2 Rot. 578, Sm. N. 274.
Perjury.

1. But a juror, who violates his oath, in his finding, is not guilty of perjury — for he is not sworn to testify the truth — but his oath is professedly. 3 S.C.

Said not, necessarily, to be material, whether the matter sworn to be true, or not; in fact, if the witness means that he knows what he does not know, to be true, he is perjured. For he is to swear to these facts only, which are within his knowledge. 1 Sam. 32:3. 3 John. 29:4. 2 Kings. 77: 3 Esdr. 6:1: 3 Neh. 32: 5 Deut. 6:15. 4 Esdr. 14:7. — Suppose he swears absolutely, to what is not true, but believing it true: Guilty of perjury? I think not.

The swearing must, it is said, be absolute, a direct, — Swearing under such qualifications as, "I think," or "I believe," or "according to my recollection," cannot, it is said, be perjury. 1 Sam. 32:3. 3 John. 77:3. 6 Esdr. 6:15. 4 Esdr. 14:7. — If the witness does not think as (Comp. 29:4), for it has the weight of common testimony — May not the law be thus evaded? — It is perjury. Deut. 32:1. 3 John. 77:3. 4 Esdr. 14:7.

The swearing must be to a "material point." In pertinent or idle testimony, cannot be perjury. 1 Sam. 32:3. 3 John. 77:3. 6 Esdr. 6:15. 4 Esdr. 14:7. — Ex. 27:14. Civ. E. S. 50. 176. 141. 6:29: 327: 9. 17: 54: 8. — Ex. 27:14, in daily experience. The question was, whether A. was cnmpos, or not; the witness gives a history of a journey to see A. If it misrepresents none of the incidents of the journey.
But if the false evidence, that circumstantial & not directly, applying to the issue, tends to aggravate, or extenuate, damages, it may be perjury. (Nan. 323-4. 3 Wm. 4 P. 202. 2 12 Co. 101. 2 Elem. 196. 17 R. 732. 8 R. 35.) As goes to the point in question, it is material to that point — viz. the point of land.

So it is said, if the immaterial & false part of the evidence is likely to induce the jury to give a more ready credit to the substantial part. (Nan. 323-4. 3 Wm. 4 P. 202. 2 12 Co. 101. 2 Elem. 196. 17 R. 732. 8 R. 35.) This point, not well settled. (Nan. 323. 1 Edm. Falsely & meaning to certain artificial, or natural marks, about stolen goods: falsely. Professing good will to the party, act when he means.

Falsely meaning that one beat another with a sword, when, in truth, it was with a staff, not sufficiently material, to constitute false juring. (Nan. 323. 2 Elem. 14.) The beating only, material. — Edm. may not the kind of instrument, tend to aggravate &c. &c.

Need not appear, in what degree the false evidence was material; sufficient, if it be circumstantially so — much less, necessary, that the evidence be decisive of the offence. (Nan. 323. 2 Elem. 252. 8 R. 35.) For it may be very material, & yet not sufficient to govern the finding.

Strong incumbent on the prosecutor to prove the evidence material. (Nan. 325. 1 Edm. 273. 178.).
Perjury.

The prosecution of a former issue of good evidence, that a trial may not be introduced evidence of what was done. 2 N.Y. 468. 655.

And the cause, in which perjury was committed, must be set forth. 1 N.Y. 383. 726. 120. How far office copies of an affidavit, in which the perjury is assigned, are evidence, see 2 N.Y. 468. 65.

Not necessary that the false evidence should have been credited by the jurors—nor, of course, that any person should have been actually injured. The crime does not consist in a damage done to an individual, but in abusing public justice. 1 Sum. 326. 2 Leon. 311. 3 N.Y. 233. 373. 375.

The word "wilful," is not necessary in the indictment, at L.S. 1 Bost. 4. (Same under our Stat.) "Falsely, maliciously," sufficient.

To convict of perjury, 2 witnesses, at least, are necessary. Scow, there is oath and oath. 1 Bost. 4. 10 Mod. 195. 178. 179. 178. 179. 20. 23. 37. 28. 57.

How far circumstantial evidence of the fact of the defectiveness of bar evidence is good. Dec. 2 N.Y. 471-4.
Perjury.

Holden, in Eng. that the person injured by the perjury, could not testify against the offender, on public prosecution. 1 Cor. 328. 2. R. 479. 8 Har. 620. Beale 405, 100, 116, 128. 4 T. & J. 479. 3 H. 7, 304. 4 B. & 8b. 28, 939. 7 P. 45. 4 Burn. 226. 3. Deciding contradictory. - Interest in the question of an
Park. 18, 915. 18, 326. 117. 1785. 141. 4. It seems he is now competent.
Park. 18, 915. 18, 326. 937.

Two persons cannot be joined in a prosecution for perjury - the offence not joint. 1 Cor. 328, 915. 4 Burn. 226. 3. Harr. 926. 4 W. 94. 78. 6. 57. 98. - Sec. of the two sides, former. 1 Cor. 915. 18, 326. 937.

Subornation of perjury, is the offence of procuring another to commit perjury - but the perjury must be actually committed.
Sec. on Subornation. 1 Cor. 328. 4 B. & 8b. 226. 4 W. 94. 78. 6. 57. 98. 107. 72. 3. 23. 122. Cor. 915.

Perjury, a subornation of perjury, punishable at P. L. variously - an
sufficient with death, afterwards, punishment, or cutting out the tongue
then forfeiture of goods, now, fine, r imprisonment, r inability to give
evidence. 4 B. & 8b. 915. 23. 107. Other penalties superadded by Acts 915.

2 B. & 8b. 915.

Failing one to commit perjury, it not being actually committed, is
punished at P. L. by fine, an infamous corporal punishment. 1 Cor. 326. 6. 915. It is a misdemeanor.
It is a consequence of a conviction of perjury, at O.S., that the offender can never be a juror. 1 Wheat. 227, e. 376, 368.

A variance in the indictment, by the omission, or addition, of a letter, is not material, unless it makes another word. Ex. "understood" for "understood." Though, if it does — Ex. "air" for " heir." Comp. 392, 7 Cr. 237, Cal. 650. Albam. 239. Doug. 181. N. Y. 7 Cr. 197, 146. — when affixed on an affidavit of P. 30 V. 511-13.

Under our Stat. perjury, or abettation of it, are punished by for a failure of 20£ imprisonment (ann) in state prison, 6 months, if a male, in common workhouse, or jail, if a female. — Dequalifid to take an oath in any court of record. In case of inability to pay the forfeiture, to be set in the pillory one hour, with both ears nailed.

Our Stat. mentions perjury, in a court, of record only: But perjury, in a court, of record, or not, is punishable, vi Contl., at O.S., be fine, imprisonment, or inability to give evidence: (But the imprisonment at O.S. is not in State prison.)

False affirmation, by Quaker, vi Contl., punished as perjury.

By stat. of Cont. 1s one may be put to death; not aof purpose, to take away any man's life, he shall be put to death. See "murder."
Criminal Jurisdiction.

of O. in Cont. — Sup't of all offences punished with death, life, &c. Is there any such punishment here? If there is, what is it? — Also, of adultery — exclusive jurisdiction. Also of divorce (not strictly criminal) — also exclusive jurisdiction of all crimes punishable by confinement in State prison, except that of horse stealing, of which it has concurrent jurisdiction with C. & O. Co.

Of suits, &c., against mit C.O. — It has also jurisdiction of high crimes & misdemeanors, but not exclusive — concurrent with C.O. Co. Exclusive jurisdiction of blasphemy (whipping, pillory, branding to good behaviour). Of crimes inferior to the above (i.e., to those punished with death or State prison) but beyond the jurisdiction of a justice, C.O. Co. have, in gen., exclusive jurisdiction. — 1 D.95, 101.

No appeal from C.O. to Superior, in Crim. cases, nor in equity. 1 D.95, 102. 269.

Justice's have cognizance (originally, exclusive) of all crimes, of which the punishment does not exceed the penalty of $1. — So, of theft, if the value of the goods exceeds $10. — tho' if the value of the goods be $3.14, whipping supercedes but if the value exceeds $10, he has no jurisdiction. 1 D.95, 102.

Of breaches of the peace, justices have cognizance unless aggravated & in which case, the officer is bound over to C.O. to a forfeiture a higher fine, than justices can inflict. In the latter case, he has his jurisdiction, except as a st of inquiry. 1 D.95, 102. of inquiry in all criminal cases, more than their own jurisdiction; & bind over, or commit, for trial. 1 D.106.
An appeal lies from the judgment of a justice of C.C. in all crim. cases, excepting for the offences of drunkenness, profane swearing, Sabbath breaking, selling lottery tickets granted by another state, & some others.

In criminal cases a justice's jurisdiction is not confined to the town, in which he analogy. He may hold plea in other towns in the same County. 21 coats. 357.

Offences are tried here, as in Eng., only in the county, in which they were committed. We have no Stat. on this subject. Hil. 411. 2. Doug. 700. 8 mod. 328. Hely. 79-80. 2 H. & C. 573. 631.

This rule holds, in coats, as to crim. prosecutions, only, not as to actions qui tam. Hil. 431.
Bail in Criminal Cases.

When one is arrested for a crime, & brought before a magistrate (on charge of a crime not cognizable by him), the latter is to inquire into the facts charged, to discover whether he ought to be held to trial, or not. 4 M. 298. 3 Sm. 289-90. Stat. 6 & 7 142, 420.

But he has no right to examine the prisoner, at all, & therefore none here. One having no fact to warrant it. In Eng. it is an authorized by Stat. 2 & 3 W. 4 M. 297. 295. 2 Sm. 396.

If, on enquiry, it appears clearly, that the offence charged has not been committed by the prisoner, the prisoner is discharged. 4 M. 298. 3 Sm. 383. Else, he must be committed to prison, to be kept for trial, or, if the offence is bailable, given bail for his appearance—i.e. furnish security for his appearance. Ind.

Bailing is delivering one to his securities, on their giving security.

1. Regularly, for all offences below felony, (whether by C.S. or Stat.) the offender ought to be bailed, unless it be forbidden by Stat. 4 M. 297-8. 2 Hal. 127.

2. At C.S. (according to 13 El.) all felonies were bailable—even treason & murder. According to others, all offences except homicide. 4 M. 298. 3 Sm. 187. 1 Com. 408. 1 Hal. 97. 1 Bac. 280. So that the
Bail in Criminal Cases.

accused was admitted to bail, in almost every case, at any rate.

3. But the Stat. of Mass. 1. 3 Eliz. I, denies bail in treason, a man, felonies — & further provisions are made on the subject, by Stat. 23. Eliz. T. 21 & 2. Eliz. M. (47th. 29th.) In any case of felony, when the party has confessed, or is notoriously guilty, & in murder, murder, if accused not now bailable, in Eng.

But the Eng. Stat., taking away the power of bailing, in certain cases, do not extend to B.R. v. Eng.? This Court, or any one of the judges of it, in vacation, may now bail, for any crime, even murder, & treason. Hyl. 90. 1781, App. 1781. 17 B.C. 29-33. 1 Dred. 169. Tal. 125. For. 911. 1241. 2 H. 175-6. Conf. 333, 4 Bar. 2179. They extend only to subordinate, or common bailing officers, as Jiffy. & justices.

But the C. of B.R. will not admit to bail, in those cases, in which bail is prohibited by Stat., unless under special circumstances, in the party’s favor, C.E. Where the prosecutor has unreasonably delayed the trial — where the evidence appears very weak — where the prisoner’s life is in danger, from confinement. C.E. Seales. 122. 2 H. 175. 175. 5. 4 R. 75. 10 B. 934. Palm. 339. 9. 72. 176. 176. 485. 485. 48. 105. 105. 10. 10. But in case of illness, it must arise from confinement. 1 B.C. 218. 24. Conf. 333.

In prosecutions for offences, amounting only to misdemeanors, at C.E. deft. may appear by attorney. 1 N.B. 59. 4 N.B. 375.
Bail in Criminal Cases.

After verdict, however, aq. the deft., he is not admitted to bail, unless prosecutor consents. Rast. 39. Sec. 120. X. 9. This rule has often been dispensed with in Cont. ~

In Cont, all crimes are bailable, except capital, & contempts in open court. 2 Sm. 39.

Our Stat. supposed not to take from the Sub. 4. the power of bailing, even for capital crimes—any more than Stat. 1st in Eng. takes it from 73. R. Sup. & it is supposed to have some powers as 73. R. (This, indeed, is expressly allowed by our Stat. in treason) ~ It is a gen. rule, that he, who is judge of the offence, may bail the accused, ex officio, at 3. L. 2 H. 4. c. 20. s. 3. 2 Fam. 11. fol. 148. octavo.

The officer, who arrests the person, Cannot, in Cont., take bail in crim. cases. This is done by the magistrate, who acts as a Ct. of inquiry. After Commitment, for want of bail, the Shiff must take such bail, as the Ct. of inquiry has prescribed (cf. 8cr. 1805, Richmond v. Klingan.) (Taken to the State, County, or Town, according to the jurisdiction—i.e. as triable in Sup. Ct., C.C. or by Justice).

By the C.S., if a magistrate takes insufficient bail, & the prin. def. does not appeal, magistrate is finable. 2 Tulk. 297. 13. B. 227. 2 Fam. 142.
Bail in Criminal Cases.

In Eng. 4, prisoners are generally required, in case of felony, 2 for minor offences. 2 Barr. 140 a. 1 Com. 47. 2 Ta. 93. 10 Co. 101. Not more than 2 are required here, I believe, in any case.

Refusing bail, where it ought to be granted, is a misdemeanor in the justice, 6 Jeff. 29. 3 S. & L. 428, punishable by fine or imprisonment. The party injured has also his action. 1 Com. 47 2 Barr. 145. 17 2 Ta. 105. 10 6 Co. 173.

Granting bail, when not grantable, is punishable at 2 S. 3 Civ. 245. 1 S. & L. 390-1. 1 Com. 47 2 Barr. 175. 17 179.

It has been decided, n. lout., on a prosecution for forgery (the defect being out on bail), that the verdict cannot not be received unless he is present in court (11 Rob. 90). Has not the practice been different? 1 McAv. 37. 2 McAv. 875. 1 Fae. 113. Is his presence ever necessary except on indictment for felony.

If a prisoner prosecuted for a minor offence, is acquitted, but proved, on the trial, to be guilty of another, the court may detain him, to be prosecuted for the latter. 1 S. & L. 393, 353.
Costs in Criminal Cases.

By our Stat., a person charged with, a tried for, any crime, the acquitted, pays the costs— if the prosecution was occasioned by any unlawful, or blamable, conduct of his. Ch. 140. 4.

If not thus occasioned it is dismissed without costs, & then it is paid, according to the old law, out of the treasury, into which the fine would have gone, if he had been found. As in your fines, inflicted by subjects, go into State Treasury. Nov. 4, Stat. 1792. Costs arising on public prosecutions in the common law & paid by the State treasury— if those records go into State treasury. Costs on trials before a single magistrate, still paid out of same treasury.

When costs arise in any criminal proceed, in which there is no acquittal, or conviction (e.g. person cannot be apprehended, or being apprehended, escapes; without the officer’s fault; before he is committed) state pays— if the crime was cognizable by law; £5. *Does the new Stat. apply in this case.*

If the person charged, a tried, is liable to pay costs, but unable, of not having sufficient property; bound out in service to any inhabitant of this state or of U.S. But where it cannot be this obtained payable out of the state treasury, if tried by Act. £5.

When the evidence before the court of inquiry is not sufficient to hold the accused to trial, costs cannot be taxed against him. Act. 43. In Eng? no costs are paid, on either side, when the Crown Prosecutes, except in particular cases, by special provision of legislation.