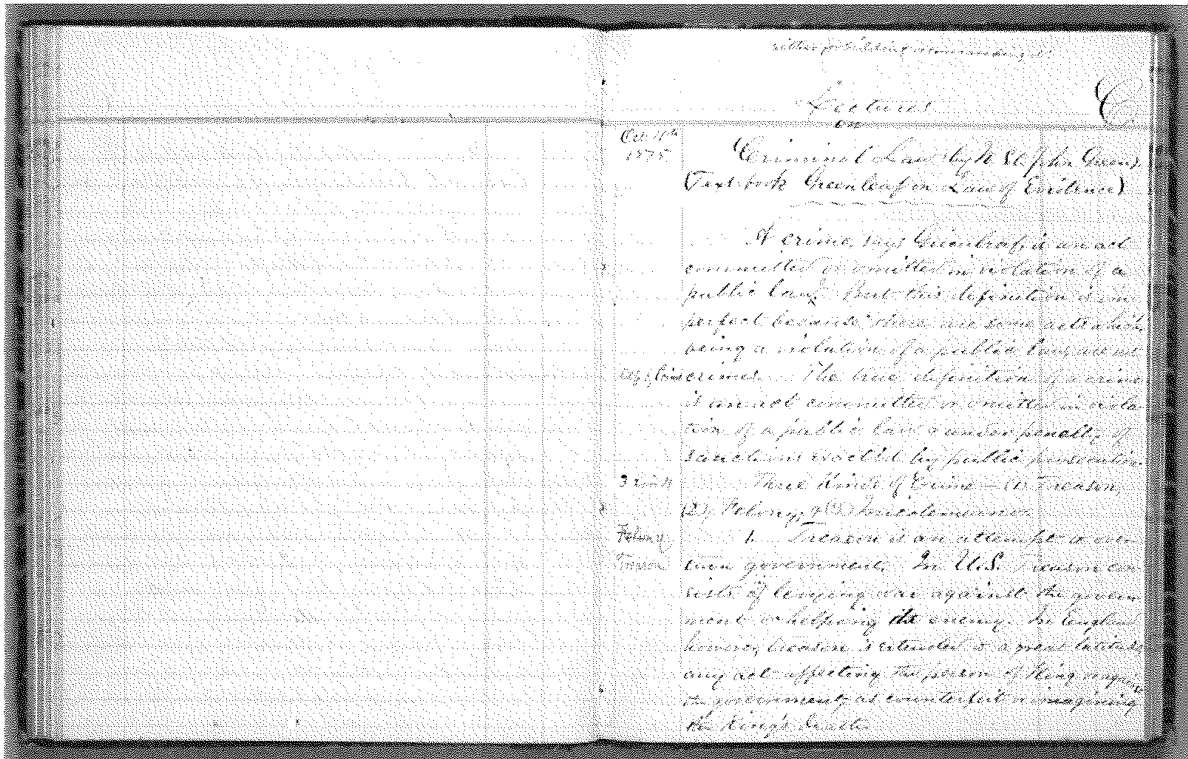
Lectures on Criminal Law



Lectures on

Oct. 11th 1875

(Criminal Law by N. St. John Green.
Text book Greenleaf on Law of Evidence)

A crime, says Greenleaf, is an act committed or omitted in violation of a public law. But this definition is imperfect because there are some acts which, being a violation of a public law, are not crimes. The true definition of a crime is an act committed or omitted in violation of a public law & under penalty of sanctions [illegible] by public prosecution.

Def. of Crime

3 kinds

Three kinds of Crime — (1) Treason, (2) Felony, & (3) Misdemeanor.

Felony & Treason

1. Treason is an attempt to overthrow government. In U.S. Treason consists of levying war against the government or helping the enemy. In England however, treason is extended to a great latitude; any act affecting the person of King or the government, as counterfeit or imagining the King's death.

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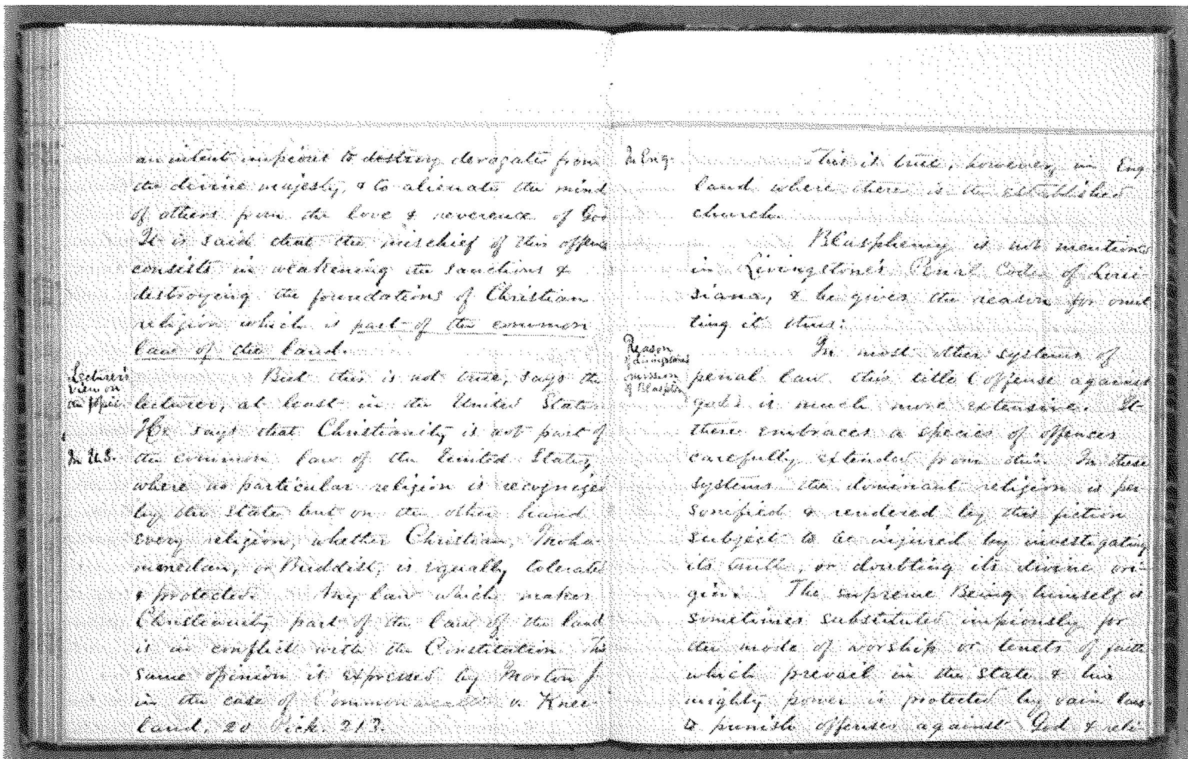

an intent impious to destroy, derogate from the divine majesty, & to alienate the mind of others from the love & reverence of God. It is said that the mischief of this offense consists in weakening the sanctions & destroying the foundations of Christian religion which is part of the common law of the land.

Lecturer's view on the opinion

But this is not true, says the lecturer, at least in the United States. He says that Christianity is not part of the common law of the United States,

In U.S.

where no particular religion is recognized by the state but on the other hand every religion, whether Christian, Mohammedan, or Buddhist, is equally tolerated & protected. Any law which makes Christianity part of the law of the land is in conflict with the Constitution. The same opinion is expressed by Morton J. in the case of Commonwealth v. Kneeland, 20 Pick. 213.

In Eng.

This is true, however, in England where there is the established church.

Blasphemy is not mentioned in Livingstone's Penal Code of Louisiana, & he gives the reason for omitting it thus:

Reason of Livingstone's omission of Blasphemy

In most other systems of penal law this title (offense against God) is much more extensive. It there embraces a species of offences carefully excluded from this. In those systems the dominant religion is personified & rendered by this fiction subject to be injured by investigating its truth, or doubting its divine origin. The supreme Being himself is sometimes substituted impiously for the mode of worship or tenets of faith which prevail in the state & his mighty power is protected by vain laws to punish offenses against God & reli-

 [page 33:]

[flyleaf:]
T. Kikuchi
Japan

[page 1 (81st page after flyleaf):]

Lectures

on

Criminal Law (by Prof[essor] *N*[icholas] *St. John Green).*

(Text-book Greenleaf on Law of Evidence[n1]*)*

[Monday] *Oct*[ober] *11th 1875*

A crime, says Greenleaf, is an act committed or omitted in violation of a public law.[*] *But this definition is imperfect, because there are some acts which, being a violation of a public law, are not crimes. The true definition of a crime is an act committed or omitted in violation of a public law & under penalty of sanctions exacted by public prosecution.*

Def[inition] *of Crime.*

3 Kinds

[There are] *Three Kinds of Crime -- (1) Treason, (2) Felony, & (3) Misdemeanor.*

Felony

Treason

1. Treason is an attempt to overturn [the] *government. In* [the] *U.S. Treason consists of levying war against the government or helping the enemy. In England, however, treason is extended to a great latitude, any act affecting the person of* [the] *King or against the government, and counterfeit*[ing] *or imagining the King's death.*

[n1] Simon Greenleaf, A Treatise on the Law of Evidence (6th ed., Boston 1852-1860). Green's lectures substantially follow the 3rd volume of this treatise in structure and content.

[*] *either prohibiting or commanding it*

[page 2:][*]

Felony — *2. Felony is any crime the conviction of which forfeits the prisoner's property, land & goods. In England it used to be a great source of revenue, though greatly diminished since 1873-4. It is not strictly true that felony is a crime capitally punishable, but on the other hand* [the] *law of Mass*[achusetts] *punishes Fel*[ony] *either capitally or by imprisonment in the state prison. Treason is felony too.*

Misde[meanor] — *3. Misdemeanors included all the other crimes. They are divided into Mala in se & Mala prohibita, but this distinction practically amounts to (almost) nothing because it depends upon education of people.*

Contrast between Eng[land] *& Amer*[ica] — *In* [the] *U.S. no* ~~*criminal*~~ *punishment is inflicted on a person unless he offends against statutes & in this respect it differs from England, where crimes are punished by Common Law besides statutes. The definition of a crime in Comm*[on] *Law, that it is any act done, with criminal intent, to the injury of the public, was borrowed from Civil Law & is imperfect, as*

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[*] *Judges of the Supreme Court are called justices.*
" " inferior courts " " judges. [note at top of page]

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there are some crimes that are no injury to [the]

Attempt
Intent

public. Besides acts *done**, an attempt to com-*
mit a crime or wrong is a crime too, it being,
of course, distinct from *a mere* *intention or thought.**
To make an attempt [to commit] *a crime, acting must*
be such or have gone to such degree that it
cannot be altered by a change of mind,
so as to convert it into ~~*an*~~ *innocence.* ~~*act.*~~

Persons not punishable

Persons incapable of criminal punish-
ment. -- They cannot be punished cri-
minally because they are incapable of
committing wrongs ~~*(e.g. stealing by them)*~~
Criminal Intent is essential to con-
stitute a crime (E.g. Stealing by mistake is not [a crime]*).*

4 Classes

1. Infants ~~*(under 14)*~~*, 2. Non Compos*
Mentis, ~~*3.*~~ *4. Married Women* [Woman] *in the*
presence of her husband, 3. Persons com-
pelled by superior power.

Infancy
(2 sorts)

(a) Infancy -- 1. A child under 7 years
of age cannot commit a crime & cannot
be punished accordingly. 2. A child between
7 & 14 [years] *of age is not liable to punishment (un-*

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* *There is always* *liberty of* ~~*free*~~ *will.*

[page 4:]
less otherwise found by [the] *jury. 3. One above 14 can be punished criminally. Such is the case in English Law, but the distinction differs in different countries & ~~laws~~ crimes.*

Insanity Maxim of Presu[m]*ption.*

II. Insanity -- The maxim that every person is presumed to be innocent until he is proved to be guilty applies to the jury only who try a prisoner and regard him as innocent until they are clearly convinced of his guilt.[n4] *It does not apply, therefore, to the community at large, & a person can not oppose arrest lawfully made setting up this maxim in pleading innocence because he has not been found guilty. There*

Ways of Prosecution

are three ways of prosecution, viz.: (1) The grand jury may give a notice to the court of a crime from their own knowledge & call & examine witnesses to it; (2) Any private person may go before the grand jury & inform them of a certain crime, in which case they sit with [behind a] *close*[d] *door to investigate whether the accused shall be called out to answer. In either of*

[n4] Presumably Green introduced the presumption of innocence here because he wanted to explain that the defendant had the burden of proof of insanity but not the burden of proof of innocence. Green's discussion of insanity resumed on page 5, line 14.

[page 5:]
these cases if they saw the evidence sufficient
to call the accused[,] *arrest is made, but in*
neither case [do] *they determine ~~the~~ his guilt*
or innocence. (3) Policemen may also arrest
a person who[m] *they suspected with sufficient*
reason & then report to the court. (4) [The state] *At-*
torney-general may bring up [a] *prosecution*
without reference to the grand jury.

Difference of Proof in Civ[il] *& Crim*[inal Cases].

In civil cases a mere preponderance of
evidence is sufficient to satisfy the jury,
but in criminal prosecutions the person
proving [the defendant's guilt] *must give the jury such evidence*
as will convince them beyond [a] *reasonable*
doubt. Insanity cannot be pleaded

When Ins[anity] *is found.*

unless it is proved & convinces the jury
beyond all reasonable doubt by this de-
fendant or the insane person upon whom the burden of proof
devolves, for every person is presumed to
be of a sound mind until the contrary is
proved. There are diversities of authority.
Some hold that a mere preponderance of
evidence is enough to prove insanity,

[page 6:]
while others maintain that proof [of insanity] *must be beyond* [a] *reasonable doubt. Some, again, put the burden of proof upon the government, but others upon the party pleading insanity. In these two points the latter opinions are preferable.* [9] *57 Maine 571;*[n6] *45* N.H. *399;*[n6a] *& 50 N.H. 370*[n6b]*).*

Drunkenness.

III. Drunkenness -- Some hold that drunkenness aggravates a criminality, for it is wrong in itself, but it is wrong in morality[,] *& law does not or should not go so far. In fact it should neither aggravate nor palliate a crime, for it is not entitled to mitigation at all. Although thus drunkenness does not aggravate* *nor mitigate* *a crime generally, yet there are certain exceptions to this rule, i.e., where a state of mind is particularly conceived. Thus when a drunkard murders a person, he does not commit murder of* [in the] *first degree, for there is no malice in this case owing to intoxication, or where a person got drunk at a hotel & owing to the confu-*

No Agg[ravation] *nor Palliative*

[n6] State v. Lawrence, 57 Me. 574, 584 (1870)
[n6a] State v. Pike, 49 N.H. 399 (1870)
[n6b] State v. Jones, 50 N.H. 369 (1871)

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	sion of his mind put on another's coat very similar to his, believing [it] *to be his & goes out, there is no intention to steal or take away & therefore no larceny.*
Compulsion of Superior Force.	*IV. Under Duress or Compulsion of Superior Force -- Under this class comes* [a] *married woman acting in the presence of her husband. In this case she is presumed to act under the control of her husband & is not liable except* [in cases of] *murder, treason, & perhaps some other crimes. The word*
Presence	*presence here means not only that he is within her sight, but also he is ~~very~~ as near to her*[,] *even beyond the sight of each other, as to produce* [an] *effect on ~~the~~ her act. (Mr. Green observes that this rule will be inadequate at least often, for many men are nowadays controlled by their wives.)** *In olden times clergy enjoyed an exemption from civil jurisdiction & this immunity was afterward extended to men connected with churches, but*

* A humorous aside.

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not to women for they could not be
priests. But [a] *woman is almost always pro-*
tected from criminal liability, if she
has acted in the presence of her husband.

Threats in [to] *Property.*

Threats on [to] *property may sometimes*
justify, or may be an excuse for the act
of the threatened party, as taking [the] *key of*
a bank depository from a cashier. Though
one who hires or procures another to commit
a crime generally is an accessory, yet if the
perpetrator is an infant under 7 years of age
or anyone who is incapable of criminal
actions, he [who hires or procures] *is no longer accessory but a princ-*
cipal.

Criminal Liability [of] *Corporations*

Responsibility of Corporation in Criminal
Matters -- [The] *Paucity of law relating to this*
topic is owing to [the] *fewness of corporations till*
very recently. They cannot *have* *criminal*
intent like individuals, but responsibili-
ty rests upon officers individually when they
employ. E.g., They cannot be charged with steal-

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ing.

Substantial statement of Offense.

1. It is a cardinal point in criminal law that the accused should be inform-ed of his crime which must be planely [plainly] *substantially, & formally set forth in writing, including all material points therein.*

Indictment become ineffectual in 4 ways.

[An] *Indictment may become ineffec-tual in four ways. (1.) ~~When the jury do not take an oath.~~ When it is quashed owing to its defectiveness. (2.) By demurrer by which is meant that the defendant admits all that is said of* [him] *in the indict-ment but thinks it insufficient in law to ~~convict~~ req convict him. If more than necessary is said in an indictment. it is good, but if less, not. If* [a] *description of* [a] *material point turns out* [to be] *false, the indictment has no effect, so* [also] *when two counts distinctly state two different crimes. (3) By arrest of judgment. 4. By a writ of error.*

Confronting

2. It is another cardinal point in cri-

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with Witnesses against the accused.	*minal law provided by the Constitution of* [the] *U.S. that the accused is entitled to be confronting* [confronted] *with witnesses against him.*
Counsel, Witnesses in favor.	*3. He is entitled to a counsel in his defense & to have witnesses sworn for him.*
The provisions apply to U.S. courts.	*These provisions of* [the] *U.S. Constitution, however, are binding not upon the state courts but upon U.S. courts alone.*
Dying declarations.	*To confronting of witnesses, dying declarations of a witness are exceptons, though they have not much weight generally in criminal cases. The government cannot take depositions without the consent of the accused. In criminal cases unlike civil cases, the prisoner is not obliged to make answer in writing.*
Not Guilty.	*"Not guilty" orally delivered is enough. In case the prisoner pleads not guilty the denial is general negating everything except that he is the person whom an indictment has been found against, & the government is bound to prove everything with the exception just mentioned, beyond* [a] *reasonable doubt.*

[page 11:][*]

Mistake in prisoner's name.

Where an indictment has been directed to a criminal by a different name he plead[s] *"not guilty," thus throwing the burden of proof on the government, that is bound to disclose the nature of* [the] *case beyond all reasonable doubt.*

Mistake as to Time & Place in indict[ment].

This strict rule does not apply, however, to time & place. It will suffice if a crime has been committed any time before the finding of the indictment, provided it does not go beyond six years from the time of conmission which is statutory [the statute of] *limitation*[s] *in capital offenses. Again it is* [*im*]*material that the crime has been committed in a place different from that named in the indictment, provided* [that] *such place is within the jurisdic-tion of the court.*

History of trial confined to the county.

The custom of confining a trial within the county where the wrong has been done is founded upon the old usages of England to summon witnesses from the immediate neighborhood of the place & continued for the reason of relieving poor criminals from the inconvenience of getting

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[*] A longer version of this passage is found on page 12 of Kikuchi's Tort notes, crossed out with an "X." The two passages contain substantially the same information with minor grammatical differences.

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witnesses in their favor.

Time & Place essential.

Time & place, however, must be strictly proven, where they are essential to constitute a crime, as night to burglary or highway to robbery on [the] *highway.*

In case the government gives proof, the jury must not proceed upon [or] *from their own knowledge but must as usual have & hear witnesses sworn for the purpose.*

Criminal intent is essential.

It is another cardinal point in criminal law that the intent of the criminal must be shown to constitute a crime. This doctrine, however, must be taken with a great allowance, inasmuch as negligence sometimes constitutes [an] *offense. But with the exception of Manslaughter, Nuisances, & Libel, the rule* [requiring criminal intent] *is almost universally applicable. As to offenses against statutes English and American laws differ, the former construes in favor of taking intent into consideration if doubt exists, while the latter does not regard intention in constituting crimes, provided no express provisions are found*

3 Exceptions.

[page 13:]

Gov[ernment] *to prove criminal intent.*	*in such statutes. The prevailing opinion or doctrine in America nowadays is, however, that the government is bound to prove the criminal intent of the wrongdoer,* [and un]*till then he is presumed to have no such intent. The doctrine of throwing* [the burden] *upon the criminal to prove his inadvertence is founded upon the English courts' jealousy to save the law from falling into nothingness on account of clergymen's protection given to him* [i.e., benefit of clergy], *or to carry law effectually against clerical*
Case.	*encroachments. 9 Met. 103*[n13] -- *In* [a] *case of murder, the majority of the judges held that in the absence of proof to* [of] *provocation or heat of passion*[,] *the law presumes killing to be homicide with malice, for it was but natural & reasonable to infer malice from deliberate use of deadly weapons the consequence of which everybody ought to know. But Wilde J*[ustice] *said that the burden of proof rests upon the govern-ment & does not shift upon* [to] *the prisoner by the prima facie proof, much less from presumption. All the material points in allegation must be proved by*[*]

[n13] Commonwealth v. York, 50 Mass. (9 Metc.) 93, 103 (1845)

[*] [top of page:] *the government beyond reasonable doubts. (1) When facts & circum-stances accompanying homicide are given in evidence, the question whether* [it is] *murder or manslaughter should be decided upon the evidence & not upon any presumption from the mere act of killing. (2) Such pre-sumption if* [it] *exists is one of fact & if the evidence leads to a reasonable doubt whether the presumption be well founded, that doubt will avail in favor of the prisoner. (3) The burden of proof is always on the govern-*
[top of next page:] *ment to prove all the material allegations in the indictment & if any doubt is entertained by the jury of the prisoner's guilt in the alleged crime on the whole evidence, they ought to acquit.*

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Mode of proof.

To prove intent not only the act itself but [any] *other act or act similar in nature, not only the written words but also all the other circumstances, must be taken into consideration. In burglary, e.g., which is breaking into a house with the intent to commit a felony, the intent proved must not* [merely] *be one to steal or kill, but the particular intent must always be proved.*

Excepting to exact proof of intent.

An exception to the rule that intent must be proved is the case of fraud. It is not necessary, in this case, that intent to defraud a particular individual should be proved to *have* *effected in defrauding him.*

Ignorantia legis.

The maxim that everyone is presumed to know [the] *law* *or* [that] *ignorance of law excuses no one, is not universally applicable, but is adopted only for expediency. 2 Green's Criminal Rep. 208. U.S. v. Anthony,*[n14] *where a woman voted for a congressional member he observes that from the knowledge of her being a woman*

[n14] United States v. Anthony, 24 F. Cas. 829, No. 14,459, 11 Blatch. 200, 2 Green's Crim. L. Rep. 208 (C.C.N.D.N.Y. 1873)

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it does not follow that she knows her dis-

Statutory offenses. *qualification. In offenses against* [a] *statute criminal intent is always essential to constitute an offense unless the words of such statute are very strong to enforce it under any circumstances. Cases of tobacco dealers, of* [a] *dealer* [?] *with bona fide belief of his right, &c. The maxim that* [an] *act without intent does not create an offense is adopted throughout.*

Ignorantia factum. *Ignorance of fact on the other hand entitles everyone to excuse, although it is very hard to draw a line between it & ignorance of law.*

Names of parties essential. *In criminal indictments the names of the persons charged & of all others whose names are essential to the charge legally, & also, of the owner if goods were taken, must be correctly set forth & proved. As a general rule* [the] *burden of proof rests on him who takes* [the] *affirmative, & so if the prisoner pleads that his name is different from that mentioned in the instrument, the govern-*

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ment is bound to prove beyond [a] *reasonable doubt that he is the person. The fact that he has sometimes been called by this name will not suffice, but it must be clearly proved that he is just as well called by both names.*

Spelling.

Errors in spelling, however, do not affect the charge provided its sound is the same.

Admissibility of Character.

Good character at all events.

Admissibility of Character -- The present & better tendency is to allow a man to set forth his good character in every case. The rule that it is admissible only when evidence is doubtful has no sense, since the prisoner is favored in all cases of doubtful evidences, without inserting his good character. The setting forth of his good character avails him benefit if the ~~case~~ evidence is clearly against him.

Bad character disallowed to be set forth.

On the other hand[, evidence of] *his bad character is not allowed to be produced, as many men of bad character may be involved in suspicion, though really innocent of a particular guilt, and thus persons who have once been in state prison would be al-*

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Exception in Rape.

ways dangerous. An exception to this rule is made in case of rape[,] *where the bad character of* [the] *woman* [victim] *may be set forth. But if the act has been done clearly against her will, the wrongdoer will be held liable however lewd or bad her character or conduct may be.*

Remedy & proceeding in civil & criminal cases contrasted.

It is a general rule that the law of remedy & method of proceedings are those of the country [i.e., county?] *where* [the] *trial is held, & this causes often very serious questions in civil actions. But in criminal cases* [the] *laws of England* & [the] *U. S.,* [e]*specially Mass*[achusetts] *restrict the jurisdiction of courts to those offenses which have been committed within their respective dominions, & by this way avoid conflicts of laws.*

Meaning of reasonable doubt.

In criminal cases, as has been observed, [an] *offense must be proved beyond* [a] *reasonable doubt. The jury are regarded as twelve reasonable men*[,] *&*

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whatever doubts they entertain are
reasonable in law, hence if [a] *charge is*
proved beyond their doubt, it is gene-
rally sufficient to constitute an offense.
When, however, they entertain doubt of
law or anything which is not within
their power or position, such verdict is
set aside. ~~*How far they are judges*~~
~~*of law, is fully discussed in 5 Cush. 320*~~
What is reasonable doubt is fully
discussed in 5 Cush. 320[n18] *& 118 Mass. 200.*[n18a]
-- *5 Cush. 320. It is not mere possible doubt,*
for everything relating to human affairs &
depending on moral evidence, is open to some
possible *or imaginary* *doubt. It is that state*
of ~~*mind*~~ *the case* *which, after the entire comparison &*
consideration of all the evidence, leaves the
minds of the jurors in that condition that
they cannot say [that] *they feel an abiding convic-*
*tion, to a moral certainty, of the truth of the charg*e.

[n18] Commonwealth v. Webster, 59 Mass. (5 Cush.) 295, 320 (1850). Green's statement which begins "It is not mere possible doubt" and ends with "the truth of the charge" is a direct quotation from the opinion.
[n18a] Commonwealth v. Costley, 118 Mass. 1, 24 (1845)

[page 19:]

Extent of jury's power in matters of law in criminal cases.

How far the jury are judges of law *in criminal matters* *is discussed in 10 Met. 263*[n19] *&*
5 Gray 185.[n19a] *In* [10] *Met.* [263:] *Although in form,*
the jury seem to consider law & judge of it, in [a]
general verdict, yet they have no such au-
thority. In criminal cases they may decide upon
all questions of facts embraced in the issue &
refer the [questions of] *law to the court, in the form of* [a] *Special*
Verdict. But they are not bound to return a spe-
cial verdict at all, & on the other hand they can
competently render a General Verdict in which
case they necessarily pass upon the whole issue,
compounded of the law & of the fact, & incidentally
pass on questions of law. As the judge must know

[n19] Commonwealth v. Porter, 51 Mass. (10 Metc.) 263, 282-84 (1845)
[n19a] Commonwealth v. Anthes, 71 Mass. (5 Gray) 185, 236 (1855)

[page 20:]
the facts in order to direct them in law in such [a]
manner as the evidence requires & they in turn must
know [the] *law in order to judge whether the facts they*
found coincide *with* *or come short of, law; the defendant or*
his counsel may address them under the superin-
*tendence of the court. The proper course the court takes**

Two points in every charge.

Every charge consists of two pro-
positions[,] *viz.* [the] *act committed & identity*
of the person. A distinction between
corpus delicti & identity is erroneous,
because corpus delicti means the whole
of the offense, of course including identity of [the]
person.

Direct & circumstantial evidence.

A precise line cannot be drawn
between direct & circumstantial evidence.

Reason of strict unanimity.

Strict unanimity of [the] *jury on*
their opinions is required in criminal
cases, [e]*specially capital ones, for an injury*
once inflicted cannot be repaired or
restored[,] *as in hanging & beheading.*

Requisite

In murder no prisoner should
be prosecuted or executed until it is known

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* [this sentence begun on page 20, line 6, was continued on the top of page 19:]
is to direct them hypothetically, to declare what is the law, with its exceptions & limi-
tations, to explain it, & to state reasons & grounds of it; so that they may clearly
understand it & weigh the evidence proved by comparing with etc. law, in order
to determine "guilty" or "not guilty." They are not liable, of course, to wrong decisions ~~of~~ in
matters of law & cannot be punished even for wrong decisions when questions of facts,
unless proof of corruption is established upon evidence. But they must follow the
instructions of the court & cannot decide the law contrary to the direction of
the judge. They & the judge can never go beyond their respective duties established
by law, although a precise [?] *line cannot often be drawn between fact & law abso-*
lutely.

	[page 21:]
in execution for murder & larceny.	*plainly that somebody is killed. So in case of larceny, unless it is proven that property is stolen or taken.*
Recent possession.	*Recent possession alone is not sufficient to convict a prisoner, but something must corrabrate* [corroborate] *this evi-*[d]*ence,* [such] *as refusal to aver the cause or course of gaining possession or* [a] *false account given.*
Recentness.	*What constitutes recent possession must be decided in each case*[,] *for recentness in* [a] *case of* [a] *horse will not be so in* [a] *case of money, & the jury is the proper body who considers the matter.*
Reasonable account.	*If an account given* [by a defendant] *is reasonable the burden of proof rest*[s] *upon the government to show its falsity.*
Exclusive possession in prisoner.	*In order to charge for possession*[,] *property taken or stolen must be in the exclusive possession of the alleged prisoner.*
	A mere failure, however, to

[page 22:]
explain the cause of possession is not suffi-
cient; for the prisoner may have reason or
at least [be] *obliged to remain silent owing to real*
uncertainty.

No man can be tried twice.

The U.S. Constitution provides
that no person should be twice put in jeo-
pardy of life & limb for the same offense,
or which is the same thing should not be
tried & punished again for the same cause.

Former acquittal & conviction.

Former acquittal cannot be generally set
up as a defense, but a former conviction is
sufficient to be pleaded in bar, provided it
is proved in either case that the court had the jurisdiction.

When is a man in jeopardy?

When a man is [When is a man] *put in jeopardy?*
-- A man is put in jeopardy as soon as
the jury are sworn, & any subsequent dis-
charge is an acquittal, except in cases of
absolute necessity. Thus if the judge is
suddenly taken ill or one of the jurors should
suddenly die, the discharge of the jury does
not amount to an acquittal, & a subsequent
trial is not regarded as a new trial. Also,

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if they disagree & are discharged to give place for a new set of jurors. -- 44 Alabama 1.[n23]

Exactly 12 men [jury] *in capital crimes.*

In capital offenses, the criminal cannot waive his right to be tried by [not] *less than 12 men, for here are involved not only his own interest but also that of the community at large.*

Principal & Accessory

In case of felony.

If a crime is felony all that [i.e., who] *are concerned in the perpetration of it are guilty of felony. By the old common law doctrine, accessories cannot be tried & punished before the principal, & if he should die they are generally discharged, for it is said there can be no accessory without* [a] *principal. Though a person is said to be a principal of* [the] *second degree, who aids the perpetrator, there is no good reason of* [to make] *this distinction. Again it is said that all who are present in* [at] *the scene, though do*[ing]

No reason of [for] 2 degrees.

How far is a person simply standing

n23 Grogan v. State, 44 Ala. 9, 14 (1870). This case directly supports Green's claim at the beginning of the paragraph ("A man is put in jeopardy as soon as the jury are sworn, & any subsequent discharge is an acquittal, except in cases of absolute necessity"), but does not deal with "hung juries" or illness as the citation's location implies.

[page 24:]

by liable?

nothing to help or aid him, are principals of [the] *second degree, because they ought to prevent the action from being committed, & it is the breach of their duty to be still & silent. They are not guilty, however, if they simply stand & do nothing to aid the perpetrator. To hold them responsible, they must be in such situation as to be able* *& with the purpose* *to aid or* [a]*bet if necessary the wrongdoer, & it is always a matter falling within the discretion of the jury, to decide whether they were in such position & had such purpose.*

Accessory
2 Kinds.

Accessory -- There are two sorts of accessory viz. accessories before [the] *fact & those after* [the] *fact. Accessories before* [the] *fact are*

Before [the] *fact.*

those who ~~assisted~~ *urge~~s~~* *or give a council* [counsel] *previously to the perpetration* *but without being present on the scene*. *They are not prosecuted just as much* [as] *those after* [the] *fact.*

Accessories
~~2 Kinds~~
after [the] *fact.*

Accessories after [the] *fact are those who, knowing a crime to have been committed, conceal the fact or receive goods knowing them*

[page 25:]
to be feloneous [felonious]. *They are not usually prosecuted ~~severely~~, except in case of stolen goods. Substantial felonies mean ~~those~~ ~~acts~~ those the doing of which the legislature made distinct crimes, & accessories after* [the] *fact are generally punished for a distinct offense. How far* [a] *wife & children are exempt from this rule is doubtful, but they are generally.*

Wife & Child.

What crimes have no accessory?

In all crimes that are or must be committed without premeditation, there is no distinction made between the principal & accessory, but all are treated as principals. So in misdemeanors & manslaughters, all that perpetrate them are principals.

Who cannot be accessory after [the] *fact* [?]

[A] *Wife cannot be an accessory after* [the] *fact as was mentioned; so it is with parent & child, grandparent & grandchild, & brothers & sisters, in short, those near relation*[s] *by consanguinity or affinity, or by blood or marriage. But all those persons*

[page 26:]
can be accessories before [the] *fact.*

Manner of indicting accessory.

In indicting accessories, an indictment is found for the principal & at the end of the instrument are inserted their names stating that they are charged as accessories after [the] *fact or before it to his crime.*

Effect of counsel given necessary.

To indict accessories before [the] *fact the effect* [of] *their counsel given to or ~~stirring~~ inducement of another is indispensable & must be proved, for though e.g. one offered another some money to knock down a third & the latter did it, yet the wrongdoer might have done it out of his own personal animosity or hatred & irrespective of the supposed inducement.*

Different Kinds of Crimes

Arson & its definition.

1. Arson -- It is feloniously, willfully, & maliciously setting fire & burning a certain dwelling house. Arson differs from burglary in this that the former may be committed at any time of day, while the latter can only be committed at night.

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4 Essentials of arson.

To constitute arson there must be four things proved: (1) the offense committed upon a dwelling house; ~~it was~~ (2) it was the house of the person named as the owner; (3) it was burnt; & (4) burning was done with felonious intent. This is common law doctrine.

dwelling house [defined] *by Com*[mon] *Law.*

By Statutes.

(1) Again by common law[, a] *dwelling house included not only one in which people actually live, but also other~~s~~ buildings* [such] *as* [a] *barn, which are said to be within the same curtilage or common fence. But statutes have now restricted it to the mans*[i]*on house in which they really or actually live & those buildings so closely connected as to be nearly joined to it.*

Owner's right to destroy his property.

(2) By common law doctrine the owner of a house or lease holder of it is not liable for arson by burning it, as everybody has [a] *right to preserve or destroy his own property. But if it should be proved that he did it with the intention to de-*

[page 28:]
fraud a fire insurance company. A man
must be strictly identified to be the owner of
the burned house, whether it was burn[t] *by*
another or himself.

What constitutes burning?

(3) As to how much must fire
consume to be called "burning," it is suffi-
cient if any part of the house was burnt,
& the whole need~~e~~ not [have] *been burnt down.*
Mere furnitures [pieces of furniture] *burnt, however, do not amount*
to burning in the sense law requires[,] as chairs.

Intent & its miscarriage.

(4) Felonious intent must always
be proved or it is not arson. Mere miscar-
riage of this intent does not affect crime,
as where one intending to murder A kills
B by mistake, for there ~~is~~ are malicious intent
& act done.

Committing of a totally different crime.

But if he intends to commit one
felony & commits another different in kind
his liability cannot be the same in one case
as [it] *would have been in the other, because in*
such cases generally punishment differs.
If one, for example, shoots poultry with the in-

[page 29:]

tention to steal it & accidentally sets fire in a dwelling house, he cannot certainly be held to have burnt it with felonious intent to that effect, & intending to steal poultry he cannot [be] *punished for arson; though books say that it is sufficient if one has felonious intent whether he commits the crime he intends to or not.*

Assault & Battery.

II. Assault & Battery -- There is not much difference between assault & battery in torts & those in criminal law.

Difference between civil & criminal.

But there is this difference between the two that while in tort there may be assault & battery by negligence for which an action of damage [for damages] *will lie, no indictment can be found against a man in criminal prosecution, unless he commits them with intent to ~~commit~~ injure another.*

Loaded & unloaded guns.

A difference between a loaded & an unloaded gun is that in the former case the jury may infer ~~that~~ the intention of the accused to shoot another.

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Ass[ault] *& batt*[ery] *justifiable.*

Assault & battery are justifiable in self-defense. Although it is said that one is liable for these crimes in spite if [of the fact that it was] *done in self-defense, if he uses violence or force more than necessary; yet his intention must be always proved to indict him.*

Dangerous business.

A general rule is that a man engaged in any dangerous & unlawful business, commits thereby assault or battery, but we must again look ~~to~~ into his intention.

Aggravated & Simple.

By statutes, several distinctions are made in assault, such as "aggravated assault" or one committed with the intention of perpetrating some additional crime; & "simple assault" or one committed without intention to do any other injury.

Barratry & its Definition.

III. Barratry

This is an offense of frequently exciting and stirring up quarrels & suits, either in law or otherwise. All offenses denominated "common" come under this head.

What does "common" mean?

[page 31:]

	In order to maintain ~~the~~ an indictment
3 Instances.	*for this offense, at least three instances*
	of committing the wrong or exciting [inciting] *suits*
	& the like, must be proved. It is not
	sufficient that such acct [act] *has been re-*
	peated twice only.
	It is a mistake to say that
Wrong	*three instances constitute the offense,*
saying.	*because such proof being produced, the*
	case only goes to the jury who need not
	convict upon these instances if they
	choose.
	A person, who is indicted for
Barrator's	*common barratry, has* [a] *right to ask the*
right.	*court to name three particular cases*
	of barratry, to which cases alone the proof
	of the offense must be confined.
	The best case upon this subject
	is 8 Coke's Rep. 36.[n31]
Blasphemy.	*IV. Blasphemy --*
Common	*The common definition of this*
Definition.	*offense is speaking evil of the deity, with*

[n31] The Case of Barretry, 8 Coke 36b, 77 Eng. Rep. 528 (1588)

[page 32:]
an *impious* *intent* *to destroy derogate from the divine majesty, & to alienate the mind*[s] *of others from the love & reverence of God. It is said that the mischief of this offense consists in weakening the sanctions & destroying the foundations of* [the] *Christian religion which is* *<u>part of the common law of the land</u>.*

Lecturer's view on this topic. In U[nited]. *S*[tates].

But this is not true, says the lecturer, at least in the United States. He says that Christianity is not part of the common law of the United States, where no particular religion is recognized by the state, but on the other hand every religion, whether Christian, Mohammedan, or Budd[h]*ist, is equally tolerated & protected. Any law which makes Christianity part of the law of the land is in conflict with the Constitution. The same opinion is expressed by Morton J*[ustice] *in the case of Commonwealth v. Kneeland, 20 Pick. 213.*[n32]

[n32] Commonwealth v. Kneeland, 37 Mass. (20 Pick.) 206, 213 (1838) (holding blasphemy is "speaking evil of the Deity"); *but see* 37 Mass. (20 Pick.) at 244 (Morton, J., dissenting) (asserting people have "a constitutional right to discuss the subject of a God, and to affirm or deny his existence"). Green aligned his lectures with Justice Morton's dissent.

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In Eng[land].

This is true, however, in England where there is the established church.

Blasphemy is not mentioned in Livingstone's Penal Code of Louisiana, & he gives the reason for omitting it thus:

Reason of Livingstone's omission of Blasphemy.

["]*In most other systems of penal law this title (offense against god) is much more extensive. It there embraces a species of offenses carefully extended from this. In these systems the dominant religion is personified & rendered by this fiction subject to be injured by investigating its truth, or doubting its divine origin. The supreme Being himself is sometimes substituted impiously for the mode of worship or tenets of faith which prevail in the state & his mighty power is protected by vain laws to punish offenses against God & reli-*

[page 34:]
gion (4 Bl. 43).[n34] *This code does not*
contain this absurdity. The exercise
of religion is considered as a right --
an inestimable one. It is restrained
by those limits only which must res-
trict all rights, that they do not
incroach on those of another, or in
other words, do not change into wrongs.
All articles of faith, all modes of wor-
ship, are equal in the eyes of the law[,]
all are entitled to equal protection.
The fallibility of human law does not
undertake a task to which unerring
wisdom alone is competent. The
weakness of human laws does not
attempt to revenge [avenge] *the cause of infi-*
nite power; & injuries & insults to the
Deity, are left to the Being who asserts
his rights to the exclusive cognizance
of such offenses. "Vengeance is mine;
I will repay, saith the Lord."[n34a] *The*
code has not ventured to trench on

[n34] William Blackstone, Commentaries on the Laws of England (1769), vol. 4, p. 43. Livingston referenced Blackstone's blasphemy definition to show that English law punished offenses against the Christian religion.
[n34a] Romans 12:19

[page 35:]
this divine prerogative; but the pro-
visions of this title will be found to
repress or punish any wanton, in-
tolerant attempt to disturb or perse-
cute; while every authority necessary
is secured to religious societies, for
the preservation of order among their
numbers. -- (A System of Penal Law
for the State of Louisiana -- p. 174 --
Introductory Rep[ort]to the code of Crimes
& Punishments.)[n35]

Bribery.
2 Kinds
of definitions.

V. Bribery. --

Bribery is generally defined
to be the receiving or offering of any
undue reward by or to any person
whose ordinary profession or business
relates to the administration of pub-
lic justice, in order to influence his
behavior in office & incline him to
act contrary to the rules of honesty &
integrity. But it is taken also in
a larger sense, & may be committed

[n35] Edward Livingston, A System of Penal Law of the State of Louisiana (Philadelphia 1833), p. 174. Green appears to have read this quotation directly from Livingston's report; the only differences are minor grammatical or spelling variations.

[page 36:]
by any person in the situation of public trust.

When complete?

The offense is complete, as soon as it is offered or received, & it is no defense to say that that reward did not have any influence.

Manner of giving.

[A] *Bribe may be given in any way, & it does not make any difference under whatever color it may be given if the substance & intent were to bribe.*

Burglary.

Def[inition].

Essentials six in number.

VI. Burglary --

Burglary is the breaking of & entering into a dwelling house at night with intent to commit felony. Every word of the definition is indispensable to constitute the crime: it must be done at "night"; the house must be a "dwelling-house"; there must be both breaking & entering; & this must be done with "intent" to commit a "felony." Felonies may be those of common law or made so by statute. Unlike English

[page 37:]
law[,] *that of the U.S. has no time defined*
within which burglary may be com-
mitted or how far it is considered as "night,"
& it is better to have a statute sta-
ting the time.

1st Essence.
Breaking.

(1) Breaking & entering must be
done at night but both need not
be in the same night. Breaking,
again, may be either actual or const-
ructive. It is constructive, when done
through threats or by fraud, but must
be done with intent to commit a crime.
Old lawyers doubted whether breaking
should in every case precede entering,
& it is very doubtful if breaking out
is to be considered burglary.

A house must be so shut up
as not to tempt burglars to come in, &
a part of the house itself, breaking a
fixture, even though annexed to its wall,
not being burglary.

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2nd Essence. Entering.

*(2) Entering may also be constuc-
tive. If entering is attempted with
intent to commit a crime, it is enough
to constitute "entering," though no part
of* [the] *person is within the house. Putting
one's hands into a window to enter or
lift himself up is not entering, but
putting even fingers in to pull away
a thing within the house, is indictable.*

3rd Essence. Dwelling-house.

(3) [The] *Building must be an actual
dwelling-house* *actually* *inhabited, but a temporary
absence of the family does not take the
act away from burglary. This building
must be used as part of the house.
In case of an hotel it is* *not* *burglary until
the room of guests or* [of the] *proprietor is broken
& entered.*

Cheating. Com[mon] *Law def*[inition].

VII. Cheating. --

*There are some cheats indic-
table by common law or by statute.
In common law two things are neces-
sary viz: such* [a] *nature as to affect not*

[page 39:]
only a particular individual but the public at large, & the fact that common prudence cannot prevent the act. But this is very doubtful.

True interpretation.

By cheats affecting the public at large is meant those [who cheat] *upon the government, administration of public affairs,* [or] *of justice. All these are indictable. Any cheat*[ing] *between a man & man is not indictable in common law, except in case of weights & measures, because their standard is taken cognizance of by & belongs to the government.* ~~*Thence also*~~ *So also coinage.* ~~*some marks if cheated make a man indictable*~~*. But weights & measures used in shops & stores are tokens visible & real, & so false tokens or signs, if real & visible, may be indictable as cheat*[ing].

private cheating & only exception.

Who is indictable.

Whoever, by false pretences with the intent to defraud others,

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obtains property is guilty of cheating.

When the crime is complete?

What false pretences are indictable? The law that "any pretence which common prudence cannot guard against is cheat[ing]*" has this value & this only, that there is no criminality, unless one parts with his property on account of false pretences.*

It is not necessary that the whole is pretence but it is enough if one of the inducements material in its nature is false pretences, on the truth of which one relies & parts with his property.

The real question?

The only question is whether he was deceived by a false pretence or not. It does not matter whether common prudence can not guard against it or not or it was of such [a] *nature as to affect not only a particular individual but the public generally or not.*

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But it must not be of impossibility.

Analogy with theft.

If a thief tricks [one] *out* [of] *one's property, instead of taking it, there is cheat*[ing] *& this is [the] connection between theft & cheating. -- L. Rep. 1 Crim. Rep. 301.*[n41]

Conspiracy. Peculiar to Eng[lish] law.

VIII. Conspiracy --

This offense is peculiar to English law & is very dangerous because almost any act may be made criminal, if carried into full extent of the definition.

def[inition].

Conspiracy is defined to be a combination of two or more persons to do an illegal or criminal thing or a legal thing by illegal or criminal means.

When crime complete?

If there has been an agreement, the crime is complete, though no act has been done toward the furtherance of the common design.

It is in English law only

[n41] Regina v. Ardley, L.R. 1 Cr. Cas. Res. 301, 40 L.J. Mag. Cas. 85, 12 Cox's C.C. 23 (1871)

[page 42:]
to make an act indictable simply by reason of an agreement of two or more persons, which would be indictable if done by a single individual.

Doctrine of mergure [merger].

Doctrine of mergure [merger] *is never practically applied at least in* [the] *U.S. & has never been understood by this lecturer.*

Strikes.

[An] *Agreement of workingmen to raise their wages, is not now a conspiracy, unless they resort to wrong or unlawful means to effect it or so long as they confine to themselves & not disturb others.*[n42]

Difficulty of trying.

Unlike other offenses trial of conspiracy is very difficult, for one man makes an agreement at one time & another at another, & by words or letters, so that there can seldom be found to be any definite common design or specific purpose, agreement, or act.

[n42] Commonwealth v. Hunt, 45 Mass. (4 Metc.) 111, 129-30 (1842)

[page 43:]

It is almost impossible to keep the rule of evidence that no evidence can be admitted, which has not immediate bearings upon the case, but on the other hand it is very dangerous to break it.

One is agent of another in conspiracy.

In conspiracy one is the agent of another for furtherance of the common object.

Owing to the difficulty above-mentioned an indictment of conspiracy is very seldom issued.

Proof of a common design found against two is proof against all the others.

Criminal Intent.

[Extra --- The Continental nations of Europe have what are called police regulations & the violation of them is not generally punished [not] as a crime, but & without any regard to intent. But in England intent is necessary to constitute a crime by common law. In statutory

[page 44:]
offenses intent is generally disregarded, the only step being to find out the intention of the legislature. It does not follow that because statutes are silent about intent, it should be disregarded altogether, & intent should be looked into even in cases of legislative acts. The only opposition of weight is policy[,] *& justice should not be made subservient to it.]*

Embracery.

IX. Embracery -- All that obstructs or interferes with or corrupts the administration of justice is an indictable act. This is chiefly brought forth ~~to ge~~ in case of a new trial required. -- 13 Mass. 218.[n44]

Progressive gravity of Forgery.

X. Forgery -- The gravity & importance of this crime keeps pace ~~with~~ or increases with the progress of civilization. In rude ages when people did not write much, of course, there could be no or little temptation or occasion for forgery. This appears clear if we trace down ~~up~~ the statutes passed for forgery at different times.

[n44] Knight v. Inhabitants of Freeport, 13 Mass. 218 (1816)

[page 45:]

History of development.

Early statutes provided against forgery of court records alone, & in the 17th century bills of exchange, inland bills, notes of the Bank of England appeared by turned [turns] *& in Queen Anne's time promissory notes came into legal recognition, thus making the crime of forgery graver & graver & consequently increasing the number of statutes on this topic more numerous from period to period throughout all this time. This has continued until the offense becomes a felony, instead of a mere misdemeanor.*

Punishment.

In all the U.S. this offense is punishable by statutes, [the]*penalty being imprisonment in the state prison, &* [the] *statutes contain a long list of punishable cases, or offenses. But if one is guilty of a forgery not enumerated by the statutes, he is guilty of* [a] *misdemeanor common law offense & is punished by an imprisonment in common jail.*

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Originally forgery could be committed only on a sealed instrument & it may be done now of any writing.

Def[inition]. *Forgery is the fraudulent making or alteration of a genuine writing in prejudice of another man's right, with intent to defraud.* *L. Rep. 1 Crim. Rep. 200, 1 Green Rep.* n46

What constitutes a forgery? *To constitute forgery there must be an intent to defraud others. It is not necessary, however, that anyone, much less the particular person intended, has been actually defrauded, nor is it essential that any act has been done beside writing. It is sufficient, if it is made to defraud somebody or anyone generally.*

Previous offenses. *Similar acts formerly done are admissible as evidence of the present crime, but one offense cannot be made the "proof" of another, it serving only as "evidence" of the intention to defraud.*

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n46 Regina v. Ritson, L.R. 1 Cr. Cas. Res. 200, 203-04 (1869)

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Homicide.

XI. Homicide --

Def[inition].

This is [the] *killing of any human being other than himself* [oneself].

Classes.

Homicide is divided into justifiable murder & manslaughter justifiable & excusable, & felonious.

Justifiable.

(1) Justifiable homicide is one which has been committed either by unavoidable necessity, for the advancement of public justice, or for the prevention of any atrocious crime attempted to be committed by force.

Distinction bet[ween] *Excusable & Justifiable.*

The distinction between excusable & justifiable homicide was important in olden times, because if justifiable, the perpetrator was not punished by forfeiture, but he would, if only excusable. The distinction is of no consequence in [the] *U.S. at present because both are not punished.*

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Officer's right to kill.

[An] *Officer's right to kill an alleged wrongdoer in an attempt to bring him to justice must be restricted by some limitations, & still more so with his right to shoot.*

Excusable homicide.

(2) Excusable homicide is that which is committed by misadventure or in self-defense. This happens where one kills another accidentally in exercising [a] *lawful act. This used to be punished by forfeiture.*

Retreat.

It is said that a man should retreat to avoid violence. This applies to a case where the adverse party intends or premeditates to kill him. He must take every means to escape in this case. This is not so where a sudden affray ensued so as to deprive him [of] *any opportunity to avoid the violence.*

45 Vt. 308 (1 Green's Crim. Rep.)[n48]

[n48] State v. Patterson, 45 Vt. 308, 320-21, 1 Green's Crim. L. Rep. 490, 497-98 (1873)

[page 49:]

State v. Patterson -- A man is justified to use extreme means to prevent another unlawfully breaking into his house with [a] *purpose to ~~take~~ injure ~~away~~ his ~~life~~ person, not property, or that of his family.*[*]

Felonious homicide.

(3) Felonious Homicide --

It is of two kinds, viz: Manslaughter & Murder.

Manslaughter is an unlawful killing of another without any malice either express or implied.

History of manslaughter & murder distinguished.

In ancient times criminals escaped justice by force of the benefit of clergymen. To take away this sanctity, it was enacted in the time of Henry VIII that persons killing another with a malice aforethought could not be entitled to the benefit of clergy. Those only guilty of manslaughter remained to enjoy it. This is the beginning of [the] *distinction between*

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[*] *He is not obliged to remove* [retreat] *& can meet the assailant at* [the] *threshold.*

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manslaughter & ~~homicide~~ murder.

Murder.	*Murder is a felonious homicide committed by a person of sound memory & discretion by unlawfully killing any reasonable creature in being & under the peace of the state, with malice aforethought, either express or implied.*
Usage of the term.	*In olden times there was no distinction, as has been seen, between murder & manslaughter, & murder meant a secret killing especially of the Danes & Normans. The term was equally applied to both. But since the time of Hen*[ry] *VIII it has been applied to a special kind of killing as it is at present.*
What [is] *unnecessary in* [an] *indictment for murder?*	*In an indictment for murder, neither degree nor the word deliberate is necessary. Whenever a doubt exists as to murder*

[page 51:]
or manslaughter, it is usual to
indict the prisoner for murder, &
the jury will find out a verdict
of one or another according as there
is a malice or not. The reason
why the variance is overlooked is
that originally there was no dif-
ference made between the two classes
of homicide by common [law]*.*

True meaning of " a year & a day."

There must be some
space of time to solve the doubt
whether poison administered, wound, or
other wrongful act, is the cause of
death, in many cases, & this is
fixed to one year. "A year & a
day" stated in books means a
year['s] *time passed between one sitting*
of court & another, the court meeting
once a year in ~~*those*~~ [*olden*] *times, & it*
may be shorter than a year. [A] *Mo-*
dern statute requires a year only.

In what

The prosecution of manslaugh-

[page 52:]

prosecution for manslaughter consists?

ter consists in criminal culpability, in killing another & negligence of the prisoner. The defense is to plead the act to be justifiable, as in provocation.

Intent only guide.

The only true criterion between murder & manslaughter is intent to kill, its presence in the one & absence in the other. So if persons go to fight or quarrel with the design of killing each other, it is murder[,] *as duel; if not, manslaughter*[,] *as prize fighting.*

Undue advantage & the like.

Undue advantage taken in a fight or quarrel does not of itself constitute a murder. Jealousy of [the] court to take away the benefit of clergy, made it adopt the doctrine of implied malice ~~from~~ in this & other circumstances, as possession of deadly weapons.

Provocation.

Neither does provocation serve as a criterion of murder.

[page 53:]

Warning.

We must always resort to the intent of the party charged, & guard against all mechanical rules "absolutely" laid down in books. Outward circumstances serve only as evidence for the jury but not as the proof of intent & hence not of crime.

Provocation from execution of legal duties.

Provocation arising from execution of legal duties does not reduce killing to manslaughter but [it is] *otherwise, if the process is illegal or authority is defective. If the party resists officers ~~in~~ knowing that they are executing legal duties or authority, & kills them, he is guilty of murder.* [If] *Officers without a warrant are killed, the slayer is guilty of manslaughter, but if he commits a very grave offense & the safety or order of the state requires his arrest, & officers are killed in arresting him,*

[page 54]
he is guilty of murder, whether they had a warrant or not.

Illegal arrest or imprisonment.

Whereas [Where] *an arrest or imprisonment is illegal, killing of the party executing it is only manslaughter.*

Provocation by words or gesture.

Provocation by words or gesture is not sufficient, unless accompanied with peculiar circumstances. But [having a] *deadly weapon is not the turning point as to whether an act is manslaughter or murder, because with it an act may be the former, while without it, killing may be murder, the only question being that of intent.*

The rule as to subsiding of passion.

The rule that a fatal stroke must be inflicted before heat of passion has subsided in order to make an act manslaughter & that whether or not *at the time* *the blow was given* ~~*before*~~ *the* *passion had subsided is a question of law, is not true -- the court cannot give minutes of grace as it does*

[page 55:]
give days of peace in negotiable papers.
But the question is left to the
jury, whether the prisoner gave
the blow with the intent to kill
the other party.

Statute against carrying weapons.

A provision of [a] *statute*
against carrying weapons serves [as]
an argument for the presumption
that a person would not carry
them unless he intends to commit
such offense. If the statute, however,
expressly makes a killing with it
murder, it would be otherwise[,] *of*
course.

Accidental killing.

Unintentional Manslaughter --
If in [the] *exercise of legal*
authority or right, one inadvertently
kills another[,] *he is guilty of man-*
slaughter. A distinction usually
made in books between accidental[ly]
killing [one] *man* ~~*by*~~ *while* *shooting* *another's* *poultry & that done*
with intent to steal them, is now

[page 56:]
groundless. In ancient times stealing poultry was a felony for which a capital punishment always was inflicted, but the act is no longer a felony, & reason ~~being~~ having gone, the law is inapplicable. Intention to steal them neither aggravates nor diminishes the offense if an offense at all.

Criticism on [of] *Def*[inition] *of Murder.*

Criticism on [of the] *Definition of Murder* -- *Murder is an unlawful killing, by a person of sound me-mory & discretion, of a reasonable creature in being under the king's peace, with malice aforethought.*

Any person killing another exposing thereby his own life either to the law or [to the] *hand of the adversary can hardly be said to ~~be~~ act in sound discretion. If reasonable creatures are alone included, what will be the effect of killing idiots, new-born child*[ren], *persons totally unconscious*

[page 57:]

& still more [those] *affected with disease from excessive drinking? In olden times in* [an] *interregnum between the death of a king &* [the] *accession of another, nobody was supposed to be protected by law, & so it was necessary to insert the clause "under* [the] *king's peace," but the reason is gone in* [the] *U.S. & in England too.*

Manner of tryig murder.

The Manner of trying Murder.

death

death by injury

The first process is to prove the death of a person, then that he died in consequence of an injury inflicted upon him. The proof that [a] *dead body has been found is not absolutely essential, but throws a great deal of light on the case. Identification of the dead body is necessary though it need not be proved by direct evidence. There the person must be proved to*

[page 58:]
have died from an unlawful
act of another, but this cannot
be relied on as an absolute
rule. Scient[if]*ic or experts' evidence*
has not yet much weight in [a criminal]
trial. No particular description
of poison is necessary (Crim[inal] *L*[aw] *of*
Eng[land] *by* [James Fitzjames] *Stephen).*[n58]

direct -- not needed to be proved.

It is not necessary, too,
to prove that the prisoner did the
act by his own hands. It is
often very difficult, however, to dis-
criminate whether one died from [a]
wound, or some cause other than
the prisoner's act, [such] *as medicine of* [a]
physician.

Larceny.

XII. Larceny. --
This subject is full of tech-
nicality perhaps more than any other
branch of the law. This can only
be accounted for by the fact that
originally stealing three pence was

[n58] Either James Fitzjames Stephen, A General View of the Criminal Law of England (London 1863), p. 183 or Henry John Stephen, Summary of the Criminal Law (London 1834),p. 266; (Philadelpia 1840), p. 156. Both authors assert in their treatises that a conviction for homicide perpetrated by poison may be sustained if the wrong type of poison was stated in the indictment. Kikuchi's inscription of the title ("Crim L of Eng by Stephen") more naturally identifies James Fitzjames Stephen's work as the source.

[page 59:]
punished capitally & various ways
have been devised to escape the
severity of law.

Def[inition].

Larceny is a wrongfully
& feloniously taking & carrying
away by any person of a mere
personal property of another with
felonious intent to steal. Various
explanations & interpretations are found
in relation to what is meant by
"felonious intent." -- Queen v. Middleton,
L. Rep. 2 Crown Cases Reserve[d] *38, 12 Cox's*
417&*, 1 Green's Criminal L. Rep.*[n59]

Necessity of stating value of each article.

All property has some
value & that which has no value
is not subject of larceny. It is,
therefore, necessary to state the
value of the property taken in
an indictment, not because punish-
ment differs according to [the] *amount of*
value. Furthermore a value should
be alleged as to each distinct article

[n59] Regina v. Middleton, L.R. 2 Cr. Cas. Res. 38, 82 L.J. Mag. Cas. 73, 12 Cox Cr. Rep. 417, 1 Green Cr. L. Rep. 4 (1873). The judges presented differing interpretations of the meaning of "felonious intent."

[page 60:]
for if a total sum alone of the values of three things is stated in an indictment but only two are found as really taken, there will be no value at all & consequently there will be no larceny.

Ownership & description of property.

Ownership of property should be asserted in an indictment. A description of it is also necessary, though it need not be so minute as in forgery. The pleader might describe his property as minutely as he likes but then [the] *trouble is that he must prove it, & so it is always advisable not to make any description more than necessary to be proved.*

Time not necessary.

Time is not essential, unless [the] *statute of limitation*[s] *comes in, but in recent cases it has been held that the government need not prove time*[,] *& limitation must be proved*

[page 61:]
on [the] *defense side.*

Place is material.

Place, however, must be proved. There is a peculiar rule [as] *to larceny, that the wrongdoer can be tried not only in the county within which he committed the crime, but also in any other county where he takes & holds the goods. This follows from an old rule that every transportation of stolen goods is a fresh taking.*

~~How~~ Why was this fiction devised?

This fictitious rule was devised to meet the rule of law that the offense must have been committed where it is tried. The fiction, however, does not hold true in [the] *case of compound larceny, for in this case* [the] *offense in the original county would be different from that in another, as breaking into* [a] *dwelling house*

How in compound larceny?

[page 62:]
& taking away property.
The main points of larceny are, then, capture & asportation with felonious intent of personal property of another.

What is sufficient asportation?

In order to constitute sufficient asportation, it is enough if the property has been removed or taken from the place where it was. The goods severed from their owner *must be in actual custody of the thief to constitute larceny: otherwise not*[,] *as* [a] *key connected by a chain.*

Distinction between Larceny & taking under false pretension [pretenses].

A distinction between larceny & taking under false pretension [pretenses] *is, that in the former the owner does not intend to part with the possession of the property, while in the latter he does,*

[page 63:]
as where he offers a watch
to a man who pretends to
look at it & buy [it], *&*
escapes with it.

Personal property only.

By common law
larceny can not only [i.e., can only] *be com-*
mitted upon personal pro-
perty & therefore wild
animal[s], *& grass growing*
& other reality [realty] *cannot*
be objects of larceny.

As a deed is a
part of [the] *reality* [realty] *it is*
not an object of larceny
in England, but it is in [the]
U.S.

Libel.
Contrast between civil & criminal.

XIII. Libel --

In civil case[s] *libel*
is confined with in a
comparatively narrow limit
i.e., to an individual, because
no action would lie ~~of~~ unless

[page 64:]
a person is injured &
brings a suit. But in [a]
criminal case it covers [a]
broader sphere or class of
cases, i.e., [a] *group of individu-*
als; for an indictment would
be issued when religion,
justice, or piece [peace] *were dis-*
turbed. Libel as a crimi-
nal offense is very rare
in [the] *U.S.*

Truth of statement[,] *how far admitted?*

Truth of [the] *statement*
is not [a] *defense to an*
indictment of libel in
England, but it is in [the]
U.S. provided it is accom-
panied with [a] *reasonable*
motive.

As to criminal in-
formation -- L.R. C.P. 161.[n64]

Maintenance.

XIV. Maintenance --
Out of court it is

[n64] L.R. C.P. 161. This citation cannot be verified; no cases in the English Law Reports containing a page 161 discuss criminal information for libel. Green may have had in mind the criminal information for libel brought by Dr. Giacinto Achilli against John Henry Newman in Queen's Bench in 1853.

[page 65:]

2 Kinds.

Champerty[;] *within it*[, it is] *Maintenance. These are comparatively unimportant, as they rarely occur.*

Nuisance.

XV. Nuisance --

An action is the only remedy in ~~civil~~ private ~~action~~ nuisance, & indictment is [the only remedy], *in common nuisance.*

What constitutes a common nuisance?

Anything which one has no right to do & annoys the public at large is an indictable nuisance.

What amounts to common nuisance?

Generally it is sufficient if a single person is annoyed, provided the annoyance is of such character as would likely subject others to the same inconvenience. -- 113 Mass.[n65]

[n65] Commonwealth v. Oaks, 113 Mass. 8, 9 (1873)

[page 66:]

Perjury.

XVI. Perjury --
It is not simply

What is it?
Kinds of oath.

a false oath. But it
must be an oath law-
fully administered, in a
judicial proceeding ~~& by~~ to
a person willfully sworn
& in regard to [a] *material*
part of the issue.

Def[inition].

Perjury is an offense
committed when a[n] ~~*lawful*~~
~~*justice*~~ *oath is administered,*
in some judicial proceedings
willfully & falsely, in [a] *matter*
material to the issue or
point in question & [the] *person*
instigating perjury to be com-
mitted is guilty of subornation,

Subornation.

but there could be no subor-
nation without perjury.

Indictment.

An indictment for a

[page 67:]

5 Essential elements.

perjury must specify all the material points, viz. "the judicial proceedings," "jurisdiction of the court," "testimony," its "materiality," & "willful falsehood."

It is equally perjury if a false oath is taken in an open court or before [a] *magistrate. It is sufficient if the court has a prima facie jurisdiction. It is immaterial whatever form of oath was taken.*

prima facie jurisdiction.

One of several assignments is enough.

If there are several distinct assignments of perjury upon the same testimony in one indictment, it will be sufficient if any one of them be proved. Nor is it necessary to prove what the prisoner said in the very words he uttered, but proof

[page 68:]
of substance is enough.

What is material evidence?

It is really difficult to determine what evidence is material & what not. Material evidence is one that goes to the inducement or consideration & help of the jury who may infer some[thing] *from such evidence. It is said, therefore, that every question upon cross-examination of a witness is material. -- 12 ~~Cocks~~ Cox's Criminal Cases; 42 Vt. 152;*[n68] *L.R. 1 Crown Cases Reserved 107;*[n68a] *12 ~~Cocks~~ Cox's Criminal C. 166.*[n68b] *It is difficult then to see any difference between these cases.* [What] *Materiality means depends , however, materiality at the time when testimony was given, not injury, & it matters not whether it has*

Material at what time?

[n68] State v. Trask, 42 Vt. 152, 155 (1869)

[n68a] Regina v. Tyson, L.R. 1 Cr. Cas. Res. 107, 109 (1869)

[n68b] Regina v. Holden, 12 Cox Cr. Cas. 166 (1872)

[page 69:]
becomes immaterial since.

Any sufficient legal witness['s] *evidence is enough.*

To convict a man for perjury two witnesses were formerly required, but this rule has been re-laxed & conviction may be had upon any legal evi-dence of a nature & ~~*weight*~~ *amount enough to outweigh that* [testimony] *upon which perjury is assigned.*

Willfulness

It must be proved, then, that false testimony was willfully & intentionally given, but [the] *motive with which the prisoner did it is immaterial. He is guilty of perjury if he swore rashly to a matter which he never saw or knew, though it may turn out not to be true.*

Competency

The party injured

of the injured person.

[page 70:]
was formerly held to be incompetent to be a witness, but this is not law now. ~~*The*~~ *If he has* [a] *direct interest in his impunity, he might be disqualified.*

XVII. Bigamy --

To constitute this offense three things must be proved: the first marriage, the second marriage, & the former husband or wife was alive. A person is guilty of this offense though the second marriage would be void if enforced. *L.R. 2 Crown C. Res. 377* [n70] *If the first* [marriage] *is invalid, there can be no bigamy, of course. Limitation to seven years may not be law now.*

XVII. Rape --

It is an unlawful carnal knowledge of a woman

[n70] Regina v. Allen, L.R. 1 Cr. Cas. Res. 367, 376 (1872)

[page 71:]
without her consent, not [necessarily] *by*
force & against her ~~consent~~ will,
for a man may commit
rape without using any
force at all & at her
will, as where he ~~gave~~ made her
drunk & ~~though she kne~~ not being dead drunk, i.e.
capable of knowing the matter,
she did not care.
Where a man has
connection with a woman [im]*personating her husband,*
he is not guilty of the offense
as he did not use any
force & with consent. -- 105 Mass. 376.[n71]
By force must mean
force ~~cap~~ sufficient to accom-
plish his object against all
opposition, but this is [a] *relic*
of the middle ages.

[n71] Commonwealth v. Burke, 105 Mass. 376, 380-81 (1870). This case supports Green's proposition that the crime of rape occurs when the accused intoxicates the victim to achieve his sexual objective. The citation supports the contention at the close of the previous paragraph, but does not discuss a man impersonating a woman's husband.